COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

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DALLAS, TEXAS

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PUBLIC HEARING

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WEDNESDAY,

MARCH 25, 1998

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This transcript was produced from tapes provided by the Administrative Office of the United States Courts.

I N D E X

VICE CHAIR COOPER: This is a public hearing called by the Commission on Structural Alternatives for the Federal Courts of Apppeals. This Commission was created by Congress and charged with the following functions:

Number 1, study the present divisions of the United States and of the several judicial circuits.

Number 2, study the structure and alignment of the Federal Court of Appeals system, with particular reference to the 9th Circuit.

Number 3, report to the President and the Congress its recommendations for such changes in the circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the case load of the Federal Courts of Appeals, consistent always with the fundamental concepts of fairness and due process.

This Commission, thus, has a broad mandate to examine the entire federal appellate system and make recommendations to strengthen and improve it. As was stated in the announcement of public hearings,

the Commission is interested in obtaining views on whether each federal appellate court renders decisions that are reasonably timely, are consistent among the litigants appearing before it, are nationally uniform in their interpretations of federal law, and are reached through a process that affords appeals adequate, deliberative attention of judges.

The Commission has much to do within a relatively short period of time since our final report is due in December. In undertaking this important mission concerning the administration of appellate justice in this country, the Commission welcomes the views of all interested persons and organizations either as witnesses at the hearing or in writing.

We now call our first witness, Judge Patrick Higginbotham, of the United States Court of Appeals for the 5th Circuit. Judge Higginbotham, thank you so much for being with us today.

JUDGE HIGGINBOTHAM: Thank you, Chairman Cooper. Judge Rymer, Professor Meador. It's a pleasure to me to be here this morning and visit with you about this important topic. I congratulate each

one of you on your willingness to serve in this important mission.

I'm going to be brief. My message is pretty straightforward. I see no need for structural change in the present set-up. I think that our court, the 5th Circuit, the court with which I am the most familiar, is working well. I think that bottom line is we simply do not need help by way of change nor do we need help by way of additional judges. I think we are working effectively to deal with a changing a docket.

I should tell you that for some time I have maintained that the formula for the calculation of the numbers of judges needed to do the judicial workload has not persuaded me that it has much value. Under the formula that exists in the AO's office for some time, our court would have like 28 judges. Frankly, that's absurd. We now have 16. We have for much of the time that I have been on this court in earlier times when we had a much heavier workload, functioned with 12 judges. And I think we've functioned very well. I frankly see very little differences on a per judge basis of 12 versus 16, as

far as the perception of workload.

I worried about numbers. One of the things that troubles me about what I see happening is the wide disagreement about the interpretation of numbers. And I think that's important to your mission for the reason that the empirical base of the operation the court will shed a light on many problems. Unless you've worked from some kind of a common consensus about what the numbers are, you are only going to magnify what the inevitable differing interpretations of that data base.

We start from the fact that when discussing workloads, when people talk about, for example, the 5th Circuit, the second largest circuit in the country only to the 9th Circuit in terms of total caseload, they look at this large number of 7,000 or 8,000, such as it is and they see that number "increasing" and they have the perception that somehow or another courts are being overwhelmed. The truth is that when one looks carefully at those numbers, you find that that increase is attributable to -- I don't want to say exclusively -- but almost exclusively to

the increasing number of prisoner suits that have been filed.

If you back out the prisoner cases, what you find in our circuit is that general civil appeals have been on steady decline for the past five years or so. What we are seeing is that in the last 18 months an inability to have enough cases to put together full panels. Now, by full panels, I mean our traditional way of handling cases, which takes a three-judge panel to New Orleans to hear 20 cases set for oral argument. And what we increasingly find is we're having three day sittings, because there simply aren't enough cases coming through the pipeline in a timely way for us to have a full sitting.

I've had only, as I recall, one four day sitting this year. My upcoming sittings are short. I got a call the other day for my May sitting, they want to cut it to two days. Now, that's cutting back from four days. Now, this is a court that's assertedly, I've read, besieged. I just don't know how people read those numbers. What's happening is that the large number of prisoner petitions simply

should not count in any way in the same measure as should other general civil cases.

We have developed procedures which we think are responsive to that burgeoning area of the docket, in particular conference calendar, and we have another little calendar we call an Aegean Panel (phonetic), which takes care of some matters as well. Judge King, my colleague, our future Chief Judge, will discuss those with you, I'm sure in more detail.

But my only general purpose that I want to make with you is that as you move around the country, I would not accept at face value these assertions of numbers. The increasing number of prisoner cases is replicated throughout the United States. The percentages will vary because it has the percentage of the total docket and the general (indiscernible) number will vary somewhat. But I think it's fair to say that all the circuits have experienced a significant upturn in that general category of litigation.

That's important because most of that litigation flows through on a track that reflects the

reality that those individual cases, while deserving of attention, simply do not command the judicial resources, should not command the same level of judicial resources as others. That is they simply to be soundly and properly decided do not require that much time and energy. They are largely moved through magistrate judges.

A second concern that I have, and it does not go to structure, and I don't know that it's within your compass, but it's one that I see as troubling about the developments within the court system itself, and I think it's in part a byproduct of this affection that judges seem to have with the perception of being besieged and beleaguered as large caseloads.

I've seen on the district court and I've seen on the court of appeals. I sat on the district court, in fact in this courtroom, among others, on this floor for nearly seven years some years ago. This is my 23rd year on the bench. In those years we did not use United States magistrates. We had five judges. We had on an individual judge basis, a heavier caseload than they have now. We tried over 30

percent more cases. The only explanation I have for what's happened in the meantime is that we have the explanation given to us that the cases are somehow more complex. And I said "by what measure" and they said "well, because they are longer." The data does not bear that out. They turn out to be shorter. The explanation is, "well, we have more multiple defendant criminal cases." I looked at that and that's true but only by very, very small margin; .01 percent or something.

Are there more cases? There are obviously some areas which are consuming more judicial time. The changes in sentencing procedures and so forth, it takes longer to take a plea. And I mean no criticism of anyone. I am saying to you, though, that there is an increasing bureaucratization that is fueled in part by this perception. It leads to things that are undesirable; increased delegation, increased ministerial tasks of judges, less hands-on work of judges.

In our court we've worked hard to see that the judges, themselves, are engaged in hands-on work

with prisoner cases, for example, in our conference calendar. And I think Judge King will make that point forcefully to you. I have no answer to this tendency to grow as bureaucracy but I see that as a practical and very powerful, insidious force upon the independence of the judiciary.

We're creating magistrate judges to assist as auxiliaries, the theory of them and they, just as we've predicted, they've become an entire level of courts. Some say that's good and they point to the amount of workload that's being done. I caution people in the interpretation of those numbers because of the highways effect. If you put people there and create another level of staff work, you will also generate work that would not have been generated.

I was taken, as the work I've done in the past year, as an editor of more subtle practice Rule 26 area, which took me into FRD, an area that I had not visited with some regularity recently. And I must tell you, if you time the time to look at what's happening to FRD, what you will see are volume after volume of published, written opinions by magistrate

judges about routine discovery matters. I frankly found it disturbing that we're generating a whole body of just case after case of published opinion and most of those are matters that would have been disposed of by district judge directly orally and maybe without even papers and now we have a full panoply of those level of courts generating opinion, which leads me to my final conclusion that the model by which the courts of appeal operate with this long-winded published opinion may not be the complete and the best model for a good operating court system. We need courts, to me, to be devoting the time and energy of the judges to sound decision-making and writing those few opinions that really need to be written and offering briefer explanations to parties in those cases in which the law will not be advanced by publication of opinions. I think we can learn a great deal from British appellate model in that regard.

So I think in sum, the increasing bureaucratization of the courts is troubling. I think the increasing remoteness of judges from the actual hands-on work that is a product of the pressure of

bureaucratization is troubling, and at the bottom of that, I think like this perception of workload.

I conclude with a story that I heard first in this courtroom some years ago at the swearing in of a United States District Court judge and I've come to realize that it has more truth than humor. And one of our judges explained to this lawyer about to become an Article III judge, he says, "You know, a strange thing happened at the swearing in." He said, "It's a phenomenal thing." He said, "A could descends on the courtroom as the oath is administered and when the cloud dissipates, three things happen. The newly anointed formerly lawyer, now Article III federal judge will tell three lies within 24 hours. The first is that he or she is overworked. The second is that they are underpaid and the third is that they were a great trial lawyer when they were appointed to the bench."

I've come to recognize that there is a certain element of truth to that and that's not to cast any doubt on the sincerity of the judges. It is that when you're sitting on the front lines in a rifle

platoon, it takes a little discipline to pause and opine on the causes of war. And that's a little bit of what happens when you ask sitting judges to come in and talk to you about these realities.

I thank each one of you for your patience and appreciate the opportunity to be before you. I'll be pleased to answer any questions you may have.

VICE CHAIR COOPER: Thank you, Judge. Do you have any questions?

I think -- what would be your preference? Would you rather us hear from Judge King and then ask them both questions?

JUDGE HIGGINBOTHAM: I think it would be useful to hear from Judge King and then whatever questions you may have about the docket or whatever --

VICE CHAIR COOPER: All right. That would be fine. Then we could address them to either one of you, if that would be appropriate.

JUDGE HIGGINBOTHAM: That would be appropriate and Judge King would probably give you better answers than I would.

VICE CHAIR COOPER: All right. The next

witness is Honorable Judge Carolyn King of the U.S. Court of Appeals for the 5th Circuit. Judge King, so nice to have you with us.

JUDGE KING: Thank you. I'm pleased to have an opportunity to be here. I don't speak for my court. That's always a hazardous undertaking. I just speak for myself.

I realize that you're looking at structural alternatives and I don't propose to speak to alternatives. Much has been written on that subject in the last 15 years. What I think I would like to do is to talk about how one very large court has addressed what I call volume-driven problems, with only a modest increase in the last 20 years in the number of judges, and the change that I think has resulted in the function of an appellate judge in many, although not all, of the cases that come before us. I think these comments are germane to your inquiry because they point up, they make it possible to evaluate the necessity for structural change.

We have been the second largest circuit for two decades, in terms of the number of appeals

filed, terminated, the number of judges. Appeals increased from 6,382 in 1992 to 7,573 in 1997. But those numbers, gross filings numbers as Judge Higginbotham as suggested, really don't tell the full story because the lion's share of the increase during that five year period has been in direct criminal appeals and in prisoner litigation. And by that, I mean, federal and state habeas cases and prisoner civil rights litigation.

Of the new appeals, this is a startling number, of the new appeals filed in the 5th Circuit during 1997, 64 percent consisted of direct criminal appeals and prisoner litigation. 51 percent of the appeals filed in our court during that year were pro se. And as Judge Higginbotham pointed out, our civil litigation over the last five years has actually declined somewhat.

An active judge participated last year in 591 appeals terminated on the merits and 148 procedural terminations and prepared a total of 189 written opinions. Now, that sounds heavy but during the year 1994, the numbers were substantially higher,

739 cases terminated on the merits and 247 written decisions. And only a portion of this reduction is attributable to the filling of vacancies which has occurred in the meantime. And there were a substantial number of vacancies that have been filled and so now we are operating only one judge short instead of four. And that's significant.

But really, the most significant portion of the reduction in our workload per judge occurred during the last year and is attributable to the AEDPA and the Prison Litigation Reform Act. So the upshot of all this is that for the first time in two decades there has been a meaningful reversal in the upward trend in the judicial workload in this circuit.

Now, whether this is going to continue or whether it's going to be erased with the stroke of a pen by subsequent legislation, you just can't predict. But it does point up the skepticism with which you should view gross filing statistics as an indicator of judicial workload, as well as the hazards of relying on straight line projections in projecting future workload.

And the good news of the Lord is that we are current. We ended last year and we have ended the last three years with no backlog of oral argument cases, nothing ready for argument that is not already been argued. Furthermore, our cases pending under submission have actually declined over the last five years and are at a very low level. So the judges are getting the work out.

Now, beginning in 1960s when Chief Judge Brown was at the helm, literally and figuratively, we developed a whole series of mechanisms to handle what has been a steadily increasing caseload without a concomitant increase in the number of judges. We have been, in the 5th Circuit, I really believe kind of a laboratory for the nation in pioneering new techniques.

Now, there is I think one more statistic that you need to sort of complete this picture. Our court's own statistics reflect that we had 3,114 fully briefed cases screened for decision as to oral argument during the 12 months ended June 30, 1997. Now, of that number only 30 percent were sent to the

oral argument calendar. The balance of the cases screened were disposed of by summary calendar panels, which is 54 percent and the conference panel calendars, which is almost 15 percent of the cases.

We devised the conference calendar in 1992 in response to the escalating caseload and the failure of the Legislative and Judicial Branches -- I mean of the Executive Branch to fill vacancies. We had four years with vacant judgeship statistics ranging from 35 to 42 per year in months. And the net effect of this is what seemed like an avalanche of fully briefed cases being mailed to each judge's chambers for screening and for decision for those cases that were going to be argued. And we also had a huge increase in the number of motions.

So the result was that each judge's workday was devoted to dealing with an increasing number of what we perceived to be fairly routine matters that left very little time in the average workday for the preparation for an oral argument calendar or for research and writing on the cases that were hard. So our theory of the conference calendar

was we're going to leave the easiest cases in New Orleans and thereby hopefully increase the time we had to spend in our chambers on the harder cases.

Each judge serves on one of these panels a year. And the panels, we have -- a conference calendar panel meets every other month for three or four days in New Orleans to dispose of approximately 30 cases a day. The judges who are assigned to that calendar don't work on anything else in those three days. The principal criteria for a conference calendar case is a limited record, are a limited record and a limited issue that has been frequently decided and is well settled. If you have to spend much time in the record, or you have to do more than minimal research or you have to think very much about a case, it shouldn't be on the conference calendar.

The initial decision as to what goes on that calendar is made by the staff attorney's office, but each judge looks at that decision and decides whether or not that's going to stick or it's not. Each day of the conference calendar, each judge that's been assigned to that calendar has 30 cases to review,

ten cases in depth, in the sense that the judge is responsible for reviewing the briefs, the record, a memorandum prepared by the staff attorney's office, and a proposed opinion. And the judge is also responsible for reviewing the 20 other cases that the other two judges had the primary responsibility for. We convene at 3:00 in the afternoon and we decide 30 cases by the end of the day. Each case is discussed orally and all the judges have something to say. At the end of the day, 30 cases are done. I mean, you are exhausted, you are a vegetable, but it is done and you go on for two more days.

But in my experience, these cases get much more hands-on attention from a judge, from all three judges, than they would get if they were simply assigned to the summary calendar panel and channeled through our offices by mail.

We don't have any limitation on the kinds of cases that come to that calendar. We do decide a lot of prisoner cases on it, but in our court we decide a lot of prisoner cases on any calendar, and so I don't think we have necessarily any more on this

one.

Now, our summary calendar technique is much more, I think, commonly understood and I don't want to spend a lot of time on it. At this point in our careers, 54 percent of our fully briefed cases are decided on that calendar, the summary calendar. Those cases come in to a judge's office by mail, fully briefed and with the record and the exhibits, in many cases, accompanied by a memorandum from the staff attorney's office, and a proposed opinion. If all three members of the screening panel subscribe to the opinion, it gets sent to the clerk's office and the case is completed. We do not -- we rarely reverse the case on the conference calendar, to put it mildly. And we do not frequently reverse a case on the summary calendar either.

Personally, I find the summary calendar to be very troubling. The sheer volume of cases that we have to deal with each day makes it all too tempting to rely on the initiating judge's efforts. This means as a practical matter that these cases can easily become one judge cases, with the other members of the

screening panel doing little more than relying on the staff attorney's memo or the writing judge's proposed opinion. And the problem gets worse if the initiating judge is under pressure and relies too heavily on the staff attorney's memo.

So you know, one of the golden rules in this business is that judges rarely talk about the way they decide cases. That's a piece of information that most judges don't put out. So it's hard to evaluate how serious a problem these short cuts are, but my guess would be that that varies a lot from one judge to another and also with the level of hard cases that a judge has under submission.

The other thing I want to mention, because you have here today from my court three very experienced judges talking to you about the way our court works, as they perceive it. But you have to recognize that we from time to time get new judges. And these judges, if they do not come from the federal district bench, frequently have to spend a great deal more time preparing for argument and just simply preparing to decide a case than the experienced

judges. So when Judge Higginbotham and Judge King and Judge Parker say to you that this workload is heavy but manageable, that may not be the candid assessment of a less experienced judge. And the risk of course is that a less experienced judge, with this tremendous volume of getting -- the time required to get up to speed is going to start taking shortcuts and that those shortcuts then become a part of that judge's MO from then on with real risk to the system.

So it seems to me that any judicial, any decision-making mechanism that you evaluate, you've got to look at from the standpoint of how well it is applied in a court that's composed of experienced judges and some inexperienced judges. The inexperienced judges bring something to the system. They bring a fresh look and that's all to be encouraged, but you have to look at how they can handle the workload.

Now, the one thing I want to point out, I mean, the thing that should be loud and clear from this, is that we have been able to do what we do on our court only by adding staff. Today our court,

which consists of 16 active judges and five senior judges, employees 42 staff attorneys in New Orleans and 64 elbow clerks, which results in a total of 106 lawyers working for the court. Ten years ago we had 16 staff attorneys and only three law clerks apiece. Many judges now have four.

Now, fortunately, we've been in a buyers market, as far as hiring staff attorneys is concerned in the last ten years, though that may be getting ready to change. And we have been hiring very able people. And I think there is some comfort to be taken from the fact that these staff attorneys develop expertise in dealing with certain areas of the law like direct criminal appeals, federal and state habeas petitions, pro se litigation, civil rights cases, and there are some federal question cases and some agency litigation, such as Social Security cases and Immigration cases. So they do develop expertise in this area, but it is clear to me that we would not be able to handle the volume of cases that we handle today without 106 lawyers working for us.

Now, all of this means that there has

been, in my view, a change in the way appellate judges in my court function from what was the case a generation ago. The speech that -- I must say -- take great comfort from is Justice Renquist's (phonetic) to the American Bar Association in 1976, which every time I re-read it I find something more in it that he saw down the road that has happened. He was talking about direct criminal appeals and the way they were being handled in 1976 but what he was talking about is true today of a much broader group of cases. He said, "Appellate courts now process criminal appeals rather than decide them. The sheer numbers have thought to require the addition of staff clerks in almost all appellate courts but there is also a subtle change in the function of the appellate judge." He's a tennis buff so you can take this right from the horse's mouth, so to speak. "A change from the role of the linesman at a tennis match to that of an inspector on an automobile assembly line. The tennis linesman doesn't start out with any presumption that the service will be in or out. He simply judges each serve on the merits, but the assembly line inspector

assumes that a part is good unless he sees some defect in it."

And then he goes on to say, "The person who actually decides an appeal is an appellate judge. The person who supervises the processing of such appeals to ultimate decision, though he be called an appellate judge, is really more of an administrator. Instead of personally delving into and casting a vote on, say ten cases, he takes part in supervising law clerks who delve into 20 or 30 cases. He approves what the law clerks have done in half or two-thirds of that number, and personally delves into and decides the remainder."

And here is the part that I take great comfort from. "So long as the clerks and judges are capable as they generally are, there is no denial of justice in this system. But the appellate judge who is one of its supervisors plays a different role, than the appellate judge of a generation ago. The great hallmark of judges, to my mind, has always been the idea that whatever goes out over a judge's signature, while not necessarily composed in its entirety by him

has at least been fully considered and understood by him. Any significant increase in this trend of converting judges into administrators would jeopardize this principle of judging."

Now, that was 22 years ago.

Now, in my view, which I might add is not shared by all the judges on my court, we have gone a long way down the line of converting judges into administrators in the last 20 years. We still personally delve into and decide many cases each year, the number varying from one judge to another. But our efforts in a substantial number of these cases consists of supervising law clerks who delve into the cases and of approving what they have done.

Now, this has all happened, not because we're lazy or because we wanted it to happen because speaking for myself anyway, I would be far more comfortable functioning in the way a judge did a generation ago than I am in terms of the way we function today, because I would be less worried about the accuracy and the quality of our decisions. But we've been compelled to do it, become administrators,

by reason simply of volume and the defensible decision of a majority of the judges in my court to limit the number of judges. And that is a defensible decision.

What I am concerned about is that this core principle of judging that Justice Renquist identified that whatever goes out over your signature, while you don't necessarily have to have composed it yourself, has at least been fully considered and understood is in jeopardy today by reason of the sheer number of matters that go out over our signatures.

Now, one of the judges on my court commented a couple of years ago. He said, "We now have discretionary review." I didn't ask exactly what he meant by that, but I think this problem sort of is at the heart of what he was talking about. The one thing I can say about all this is I think our court will deal with this problem the same way it's dealt with all of these volume-driven problems, and that is by confronting it and by making the kind of changes in our decision-making process that it calls for.

It doesn't exist on our court in the way we handle oral argument cases. It does not exist in

the way we handle conference calendar cases. It exists, I think in the way we handle summary calendar cases and it exists more in the case of some judges than it does of others. I think what we need to do is look at more and more of our summary calendar cases with a view to seeing how many of them we could add into a process that's akin to this conference calendar where we have a collegial conference. Judges who come to a collegial conference and talk about a case are engaged and they do make the decisions that they have to make.

Now, I want to just talk briefly about a couple of other problems that I've seen addressed in the literature, to say the least, at length. One is collegiality. A court is collegial when the work of each of its members is based on knowledge of and respect for the existing law and the views of the other members of the court and respect for the orderly process of change that is central to the rule of law. When the objective of a collegial court is a body of law that is clear and consistent, in my experience it is possible for a collegial court to come close to

meeting that objective, even during a period of substantial change in the law and we've had that in our court in the last ten years. But I think that even during a period of change it is possible to have a clear and consistent body of law.

But in my view, the greatest challenge to collegiality doesn't come from the size of the court. It comes from the occasional judge who comes to the court with a kind of "take no prisoners" attitude and who may not respect either the existing law, the views of other judges, the orderly process of change or all of the foregoing. That kind of a judge creates a potential for chaos. Fortunately, judges with that attitude are very few, and they are by no means unique to large courts. But the presence of one of those judges on the court places a particular premium on careful review by each judge of the opinion output -- well, first of the opinions submitted for concurrence. You've got to pay attention to what comes in front of you, and on careful monitoring of the court's output. But in my view, that review and monitoring in combination with the en banc process resolves most of

the problems created by collegiality challenged judges, which I think is probably the best way to describe it.

The other topic that I saw on the list of topics that you're going to be considering is the difficulty of monitoring opinions. The objective of monitoring opinions is the same as the objective of a collegial court, and that is to maintain a clear and consistent body of law. It may have the incidental effect of pointing up cases that are wrongly decided, but that's in the sense of an individual case that's wrongly decided. That's not the point of it.

In our court the percentage of appeals terminated on the merits that have resulted in published opinions has declined steadily from 1981 to 1997. In 1982, which was the first year -- well, it was actually the year of the split. We published 832 opinions and we put out 646 unpublished opinions. So the percentage of opinions published was 56 percent. In the most recent 12 months, the court issued 585 published opinions and 2,607 unpublished opinions, so the publication rate was 18 percent. So we have gone

from 56 percent to 18 percent.

The number of published opinions remains fairly steady during most of this period between 800 and 900. But in 1994 is when we began to have this very substantial decline. Now, I don't know exactly the reasons why this is so but I think that it's obvious that one reason is that a steady percentage of the appeals in the view of the judges consists of courts that don't make any -- I'm sorry -- of cases that don't make any new law. And therefore, don't require publication.

And this points up again the importance of paying attention to the statistics and being discriminating about the use of them. Much of our case law explosion has consisted of direct criminal appeals and prisoner litigation which frequently involve the application of settled law to a particular set of facts and don't require publication. So you have to pay attention to the fact, I mean it seems to me, that a large court and a large docket don't automatically translate into more precedent setting opinions.

If you think about it, Congress made the decision in 1981 that 14 judges, active judges, could monitor 832 opinions. That's the judgment that was made when the circuit was split. So I think it goes without saying that 16 or 17 active judges can monitor 585 of them, and we can.

Of course we have the ability to look at first petitions for rehearing en banc, which point up inconsistencies, also. I don't think our court is plagued by a high level of inconsistency in panel decisions. I encounter that in the course of the year, maybe a couple of times, and I think when I look at it that they are frequently inadvertent. And some of this has been alleviated simply by the technological advances that make it possible very easily to pull up all the cases on point including very recent cases. So we don't have that many, and the ones that we do have we can resolve through the en banc process.

Now, I want to talk just about two more things. One is the en banc court itself, because we have done it differently than the 9th Circuit. We

have not elected to utilize the option of an en banc court consisting of less than all the active judges. The consensus on our court has been that such a procedure may result in en banc decisions that do not reflect the views of a majority of the active judges. An en banc court that consists of 17 judges is cumbersome but it's not so cumbersome that we have been unwilling to make ample use of it. During the 12 months ended September 30, 1997 we decided 15 cases en banc, second only to the 9th Circuit, which decided 16 and far ahead of the other courts in the country.

Now, I have to say there is nothing quite like the prospect of an en banc court of 17 judges to keep inner circuit conflicts to a minimum. But more important than its (indiscernible) effect, the en banc court serves an important educational function of providing regular lessons, very good lessons, in the values and the techniques of a collegial court. So long as the burden of convening 17 judges doesn't cause us to shy away from en banc consideration, as far as I'm concerned, getting the whole group together is a very worthwhile enterprise.

The only other thing that I would have to say that troubles me is that beginning in about 1995 when the staff attorneys started submitting proposed opinions along with memoranda, we have gone to the procedure of not giving reasons for the decision in a large number of cases. Basically these opinions will list the issues on appeal. They do list the issues, and they conclude where appropriate with a statement affirming "for essentially the reasons given by the district court." Now, not all the judges utilize these opinions, but I would have to say that many of the judges do.

There are good arguments for those opinions. In a frivolous appeal, all it does is possibly suggest if you write a full scale opinion in a frivolous case, all that does is add fuel to the fodder of having more frivolous appeals from the same person. And there is many cases -- I noticed that the district courts are giving reasons more and more frequently and where a district judge has given a good statement of reasons, they really don't add anything by putting more on it or repeating them.

But I think there are many cases in which the litigants would be more likely persuaded that we have at least paid some attention to their case if we gave succinct particularized reasons for the decision. And you can't rely on the petition for rehearing to identify error by the panel if you don't give any reasons, because then all the petition for rehearing does in my experience is just regurgitate the brief. And you cant look t it to tell you what mistake you made.

And finally, I think that giving reasons, however brief, provides a basis for accountability for the court and for the whole judicial system so I think that a short statement of reasons, not a law clerk special, but a short statement of reasons is important, and I would encourage that on my own court.

I came to the conclusion a long time ago that a federal appellate court has very little control over the number of authorized judges, over the rate at which vacancies are filled, or its caseload. When you think about it, I mean, we have very little control over how much person-power we can devote to deciding

cases and we have almost no control over our caseload. Those are political decisions that we can hope and try to inform but we in any event have to honor and work with. So I think it's our responsibility. It's the responsibility of each of these courts that you're looking at to devise decisional processes that will allow us to dispose of whatever our caseload is at the moment, in a manner that preserves the historical role of appellate judges to the best extent that we can and that also insures the justice position of appeals.

We, in this court, have demonstrated both the ability and the resolve to do that. Our mechanisms are what have to be viewed as sort of works in progress but I'm confident that on the 5th Circuit we will continue to evolve in ways that enhance the quality of justice that we dispense.

Thank you.

VICE CHAIR COOPER: Judge King, thank you so much.

JUDGE KING: You're welcome.

VICE CHAIR COOPER: We want to hear from Judge Parker, hear from all three of them and then we

can kick it around, don't you think?

Our next witness -- we'll save questions for all the 5th Circuit judges until all have had a chance to make a statement and we're pleased to call the next witness, Judge Robert Parker of the United States Court of Appeals for the 5th Circuit.

JUDGE PARKER: Thank you very much. I appreciate the invitation to be here and I noted that now that I'm in my sixth decade, I've started thinking about what I'm going to do when I get to the middle of that decade and it's been 19 years since I was privileged to stand in the pit. I kind of like the feeling. It may be pushing me in that direction.

VICE CHAIR COOPER: Judge, it's kind of fun sitting up here as a trial lawyer too. I'll tell you that.

JUDGE PARKER: Well, we might just swap for awhile. I'm in pretty much agreement with most of what was said by both Judge Higginbotham and Judge King. I want to take a little different tack with you and I'll push you in the direction of examining our court and our system a few years down the road.

I agree that we're functioning well today. One of the things I did to prepare for coming up here over the weekend, I went back and read what members of this court have said about our process over the past 25 years, starting with Griffin-Bell (phonetic), and to a person they call complained about the quality of the cases are decreasing and the numbers are going up. We're still saying the same thing today. Our perception is the cases we deal with are not as important as they were earlier. Exactly the same song being sung. Griffin-Bell was lamenting the trivialization of the federal courts by the Congress.

As you make your decisions about your recommendation and whether any structural change needs to be made and what might happen down the road, there are four things that I think are vitally important that's part of that equation.

Number one, case filings will increase. There are a lot of factors that will contribute to that but that is a given. I mention my view of those factors in the paper.

Number two, Congress will not change.

There is not going to be a reduction, a jurisdictional reduction. There will continue to be federalization of traditional state court crimes. There will continue to be an increase, sporadic maybe, in civil causes of action. The rate may fluctuate but that leopard will not change its spots.

Three, in my view, fewer circuits are better than more circuits. We have this curious system where federal law, national law, law that applies to the entire country is different in different parts of the country. Now, if you just sit back and look at that, it's a rather curious phenomenon. There is a good case to be made for the percolative effect of how the law works its way through the circuits and for ultimate resolution by the Supreme Court. But there should be an outer limit to the number of circuits, as that relates to the order of the system. My personal view is that ten are plenty. At some point we overburden the Supreme Court's ability to resolve splits in all the circuits.

This last term 26 out of 75 cases was granted on the basis of split among the circuits.

That was 35 percent. I don't have access to the numbers of how many petitions were based on claimed split between the circuits.

And the fourth foundation, in my view, is that there is an inverse correlation between the size of a court of appeal and its ability to speak with one voice. And the ability to have a consistent, coherent body of circuit law is indispensable. And the more judges you have, the more difficult that becomes. My personal view is that when you get over 12 you greatly complicate that task.

I'm not going to cover the material Judge King covered. Let me just barely touch on that. In profile of our circuit last year, approximately 7,500 filings for 16 judges, 69 percent of the cases were on the summary calendar, decided in chambers without conference. Now, Judge King has a concern about that process versus the summary calendar. It was interesting, I thought my view was just the reverse. I personally think cases probably get a little better attention on the summary calendar than they do on the conference calendar. But I don't lodge a complaint

about either one. Published opinions, 21 percent and the oral argument, 27, but that's misleading.

And this relates to one of the things Judge Higginbotham said. He talked about recent experience of three day panels. I've had that occur to me on two occasions. And next month I'm sitting at Baylor Law School and we have 20 case docket, typical 20 case docket, but we've taken six of those cases off the oral argument calendar since the briefs were sent out. And that's becoming a common occurrence. There are a number of reasons for it. Matter of fact, that's one thing that we're starting to hear complaints from lawyers about and I think it's a legitimate complaint. Judge Higginbotham and I have discussed it.

We get this list of 20 cases, we look at them. One of the three of us will say oral argument's really not going to help here. Why don't we just decide this NOA? So we start taking them off the docket. We're down to 14 for next month now out of the 20 so we're looking at three days instead of four. That's a reason for this recent phenomena. And

another reason is the steep incline of cases that are being decided on screening calendar, summary calendar versus oral argument. But we started out on 20 years ago it was about half the percentage that it is today and it continues to go up and it will continue to increase.

Going back and looking at what some of these other judges have said, I ran across an article by Tom Gee (phonetic) who mentioned -- I for some reason have never looked at these numbers. He mentioned the fact that when the circuit was split, there were 25 active judges, plus one vacancy. There were 11 senior judges on the 5th Circuit at that time and we had 4,280 filings. Today we've got 16 with -- we have five senior judges but we have two active senior judges, and we're 7,500 filings. I agree the mix has changed but the truth of the matter is that an opinion today that we devote six pages to, 15 years ago would have had 26 pages. It has to do with the way we go about doing our business. We have short -- we have instituted shortcuts pretty much across the board. And the reason the numbers are what they are

today is because of these case management techniques that we've instituted.

Now, what I really wanted to do today was to get you to focus on the 5th Circuit with 10,000 filings. According to the circuit exec's officer, who I gave a blood oath to I would not attribute it to them, so I don't. They say it might take ten years for us to get to the 10,000 level. But it doesn't matter how accurate that prediction is. If it takes eight years or twelve, it makes no difference. We will get there.

Now, what will happen to this court when we get to 10,000 filings? If we proceed to handle our business exactly the way we're handling it today, we've got serious problems. We will have intra-circuit conflicts that will be a real problem. We'll see lawyers appealing cases for the roll of the dice to see what kind of panel they get. I think it will impact on morale. I think an en banc process will be very problematic. Monitoring will become very difficult. And we may have two or three more judges over that ten year period. I mean, that would

typically be what we might expect.

But what's more likely to happen when we get to 10,000 filings, whether that's in eight years or ten years, is that we won't conduct our business the way we do today. What we will do is -- I'll characterize as an incremental corruption of case management techniques. We'll handle a lot more cases on the conference calendar with a whole lot less conference or maybe no conference but we might still call it a conference calendar.

The bottom line is we will be exercising discretionary review, but not be honest about it and we'll be calling it something else. Now, there is a legitimate complaint that we're doing some of that today. We have this jurisdictional defect calendar that we affectionately call our Aegean Calendar. Tom Waverly (phonetic) penned that name on it when we started out sweeping out the judicial stables. And staff counsel identifies these cases that have a jurisdictional defect. It's a small step to get to the point where, well, this case has a little merit defect so we'll just do it on this summary of summary

calendars and we'll dispose of 30 of those in one day.

I think it is imperative that this process have integrity. I think it's imperative that we actually do what we say we're doing. If we institute discretionary review by some other name, it will not go undetected. And the bar will know it, our colleagues will know it, the academicians will know it. It will result in a loss of confidence in the system. So what do we do? We're looking at this court with 10,000 filing.

When you look at the options. There are a number of options and I think it's fair to say that pure discretionary review, which I happen to favor because it's the most honest approach and it serves more of the objectives laid out for the courts. But it may well be an idea whose time is not yet ripe. We will get there. That's the way the courts of appeals will handle their business in the future. It's just a question of when and admittedly, we may not be there now.

There are incremental steps that can be taken short of pure discretionary review, but if you

look at the other options, one of the options that the proposed long range plan looked at was restructuring all the various circuits to equalize the sizes of the circuits and to produce administrative efficiency. There is some benefit to that and there may well be more downside than benefit. I think it would create much resistance in the bar. It would create an administrative nightmare for X amount of time and at best, it would be a short term fix and not a long term solution.

We're going to move to the outer layer, between the district court and the court of appeals, or do you build in an appellate division of the district court? Well, if we assign a high level of importance to each case getting plenary review, that's an obvious solution because you can do that by adding a layer, either in between the two or as part of the district court. You can provide -- both circuits under control. But this too is problematic. It would not be greeted with enthusiasm by the district judges. The fact is that they would be getting cases with less romance. They would be involved with error correction

in cases considered "less important" and there would be serious resentment from the district judges in my view in participating in such process. The Congress is not going to be enamored with creating however many new district judges it make take to implement such a program. But depending on, again, depending on the level of importance you attach to the objective of providing a full appeal for each case, that is a viable option.

Now, commissioners or magistrates at the court of appeals level has been bandied about now for several years. It has the obvious disadvantage -- I mean, I've got a lot of cases in my office right now I'd love to give one like I used to give to the magistrates when I was on the district court. But it's got the obvious disadvantage of, I'm assuming there will be Article I judges. I see no political support to create this whole new category of Article III judges, but I'm assuming therefore, they will be Article I judges and for Article I judges to be grading the papers of Article III district judges is really problematic.

So the only way this appellate magistrate -- appellate commissioner process, I think could be successful is if they are Article III judges and there's huge resistance to creating a whole new cadre of judges.

We have a long history of using pilot courts for experimentation. We've done in any number of areas. And the long range planning committee suggested that if we decide to really get into some structural change, it probably should be on the pilot court basis. It would seem to me that if we get to that point, the 5th, the 11th and the 9th have the statistical fit that would justify their selection as a pilot. The 11th, numbers are almost the same as ours, but they manage to keep it at a 12 judge level, I believe, or is it 13 now? One or the other, but they've got nine senior judges and they have a very high level of visiting judge in the mix with district judges that they bring in to hear cases.

I remain persuaded that of all the objectives that we should focus on, the most important is the maintenance of a predictable uniform body of

law. The entire business community depends on it, social planning depends on it. Our whole system is tied to the predictability of knowing what the law is, knowing it's not going to rapidly change with shifting winds. And to maintain a predictable, consistent, coherent body of law the number of circuits have to remain under control and they have to be produced by courts that are small enough to do it within their own court. And I sincerely believe that that's best served by no more than ten circuits and courts with no more than 12 judges.

And one last thing. We will have discretionary review. It's a question of what we're going to call it, whether we're going to be honest about it. And that's going to effect the integrity of this system. I think we need to be up front. I think if we're going to have it, let's call it what it is. Our Rule 47.6 that permits us to dispose of cases with one word, "affirmed," it doesn't take a genius to figure out that that's a wonderful tool for the implementation of discretionary review. But if we do that, and we will when the numbers get to the point

where we have to, and judges are problem solvers. Judges are going to handle the business of their court. We will do that. And at the same time we will be holding ourself out to the country and to the bar as providing plenary review when in fact, it will not be the case.

I suggest that the best thing to do is give that a hard look. We may ease it in with certain kinds of cases but I remain persuaded that it's the best way to proceed.

I appreciate very much your attention.

VICE CHAIR COOPER: All right. Judge, thank you. I'll ask a question of you to sort of start this off, if that's all right.

You say you want ten circuits and 12 judges. Would you just redraw the lines nationwide?

JUDGE PARKER: Well, if you have to go to ten, you have to reduce somewhere. I'm certainly no expert on where the lines should be driven.

VICE CHAIR COOPER: I don't know if the math works. I haven't looked at the number of judges. We have 11 circuits and we have more than that now.

JUDGE PARKER: I can't stand up here and tell you that there's a huge difference between ten and 11 but there's got to be some limit on it. You can't -- a comment Tom Gee made one time, said, "The rate we're going we're going to have a court of appeals for metropolitan Ulster." And you know, we're getting continually pushed toward having our system mirror the state court systems. We're handling their cases and you keep splitting the circuits and you know, we're going to have them for each state. The federal nature of it -- you're dividing up national law and permitting areas where it controls within a geographical region, the number of those regions should be small. But I can't tell you there is a magic number.

VICE CHAIR COOPER: All right. Thank you, Judge. We appreciate you taking the time to be with us today.

Judge Rymer, you want to sort of -- you can address questions to any of the three judges or throw it out for any of them to respond?

JUDGE RYMER: Well, I came in with a lot

more questions than I ended up with because the comments were extraordinarily thoughtful and incite-full and I, for one, really appreciate the time and trouble that went into them. Obviously, discretionary jurisdiction is something that is rather harder to talk about as a possibility. But there is also a very strong sentiment in favor of oral argument. If not as a (indiscernible), sort of as a (indiscernible) and I would like to hear particularly from Judge Higginbotham about the scenario that you see, if in fact these filings do continue to go up. And if any of these filings were of a more or somewhat more difficult than you both believe, and I guess I would share the belief, exist now.

JUDGE HIGGINBOTHAM: Well, on the question of discretionary review, which is one of my colleagues pets -- I see a significant difference between a summary affirmance which says no more than affirmed and a denial of review. The difference is more than simply -- I think it's a large step when you move from an appeal of right to discretionary system. At bottom, what you have changed is that, what you have

done is to acknowledge that the court of appeals' primary role is not error correcting, but rather is lawmaking.

Now, we may -- maybe some judges do -- I don't think Bob does -- perceive our role in a way that would accent more heavily its lawmaking function and less its error correcting function. I think once we say that there's discretionary review, then I think we have changed in a significant way what I think is the simple mission of the court of appeals, which is error correcting and not lawmaking. By way of accent, I would accent the error correcting function of it.

I don't see discretionary review as an inevitable event. That type of prediction really rests a lot on the underlying premise of straight line projection, which is flawed just as Griffin-Bell's oft quoted comment about the number of prisoners in the growing prison population. He said we follow your straight line projection, everybody in Georgia is going to be in prison, to which someone said that's the way you started off.

But I think that the docket --

VICE CHAIR COOPER: I assume that was meant to imitate Judge Bell's accent, Judge Higginbotham.

JUDGE HIGGINBOTHAM: That was close. I can't mumble in quite the same way. I just don't see it as inevitable. I think it's a very basic, very basic change. I am not bothered by the fact that at some point in the future there may be 10,000 filings. I'll worry about that when it comes. The problem is that we've -- in trying to deal with that hypothetical now is that we don't know in what form they'll come. What we've been saying today is that the very mix of the cases informs or should inform the response to them. And equally so, whatever will be the number of cases we have in the future, it's the mix of cases, the types of cases that will inform the appropriate response.

And finally, I really think that the bottom line is we're functioning well and we ought to be left alone, at least insofar as any kind of a structural change that is involved. I -- we've not talked about it. I personally disagree with Professor

Meador, for whom I have great warmth and respect, with regard to the question of specialized courts and I hope that we do not move in that direction. The longer I'm in the business, the more I'm persuaded of the value of the generalist judge. I see great merit in that. I see a lot of difficulties with courts of specialization.

I hope that responds in part to your question.

PARTICIPANT: Is it appropriate for me to remind Judge Higginbotham that the reason he rose was to answer your question about oral argument.

VICE CHAIR COOPER: I was going to do that, judge, but that was good. Would you like to answer that? We certainly can't make you answer the question.

JUDGE HIGGINBOTHAM: How quickly I get back in the role when I move down here, of needing to be prompted and directed.

The question you want me to address precisely is what, with regard to the oral arguments? I think if you look at the numbers again of our

docket, I don't see an appreciable difference in what realistically has happened. You have to start with this number, let's say of 7,000 cases. Remember that over 1/3 of that total number of cases are disposed of almost by dispatch. A number that approaches nearly 16 percent never leaves the clerk's office. They never see a judge. I mean, and so we look at these, we're being besieged? These are -- what happens to them? Well, they're cases that are not pursued. They are cases that are appeal -- notice of appeal is filed three years after the judgment's final, etcetera. Those cases are not going anywhere. They are administratively processed.

And then you add in the conference calendar and then you add in -- we've disposed of a whole range of these cases and there's no real question with regard -- I don't see any question with regard to the substantive accuracy of these kinds of summary dispositions. The fact of the matter is that these cases are chosen for this type of disposition because realistically they really don't permit but one answer. And you give the answer and go on.

I think that when you eliminate that group of cases and then you look at the universe of cases for which oral argument might be helpful, you will then see that very few cases in my view for which the parties want oral argument and have any really arguable basis are really decided without oral argument. It's easier today, I think, to get oral argument than it was when I was practicing before this court some years ago.

VICE CHAIR COOPER: Do you see oral argument changed -- the going in result, on occasion?

JUDGE HIGGINBOTHAM: I think the oral argument process is quite significant. I think the oral argument process means that the judges are engaged in a level that they will not be engaged in the summary calendar and I think in that sense, Judge King I think is right on -- I think. But if the system is working properly, it will be a type of case that -- for which that kind of engagement is -- there is enough there to warrant that much effort. But you put three judges and their focus in oral argument and in preparation in three separate chambers, that case

has gotten a lot of attention.

I'm not bothered with the fact that those cases may not produce a written opinion. The length of opinions, I would disagree with Judge Parker. I think the length of opinions sort of went up considerably as we added these law clerks. There is a tendency to add law clerks. Some of my colleagues have four and I don't criticize their choice to that. I don't know -- I happen to think that is not a good thing in the court as an institution.

I think if you want to look at the length of opinions, they're directly reflective of the amount of staff function and not earlier. If you look back just pick out -- go back to Fed 1st and look at some of the opinions written by this court before when at best you had one law clerk. And what you will see is a much shorter opinion. I think that -- and that's true, I think of courts in general. I think that a model of what's an appropriate opinion sort of has changed and I don't think for the good. We don't need to shoot every dog in town. I mean, that's -- in every opinion that's what it comes down to.

VICE CHAIR COOPER: Let me ask a question to any one of the three of you. How big a circuit in number of judges is too big? Do we have any thoughts about that? If anybody has any thoughts with respect to -- I think Judge Parker already stated his view on that but we've exceeded your view, I think, Judge Parker, with all due respect. But does anybody else have any views to pose and you know we're specifically charged by Congress to take a look at the 9th Circuit and you all are familiar with the size of that. Does anybody have any views not directed to the 9th Circuit but just what would trouble you? If you got to 20 judges, or 30 judges or 25 judges?

Judge King?

JUDGE KING: That varies dramatically with each judge. Each judge has a different view of that, in my experience. And it's very difficult, if you start asking, well, exactly why do you think that, it's very hard to get all the reasons why a judge thinks that. And it's difficult to make sense out of some of it. I would not accord 25 judges for three years. It wasn't 25 the whole time. It was, I think

like 19 to 25.

I personally did not find that to be a problem. It was a very collegial court. The old 5th Circuit was a very collegial court, and the judges had enormous respect for one another and for the process.

PARTICIPANT: And all of the Alabama cases.

JUDGE KING: Yes, well, I mean we may have suffered from when we (indiscernible). So in terms of consistency of respect for the law and so on, and for one another, the old 5th with 25 judges was a very, very collegial court and its decisions were on the whole consistent.

The problem is, the thing that finally was the coup de grace of the old 5th was a couple of en bancs that I participated in where we had 25 judges and people were just sort of dismayed by that, and thought that that was a very unwieldy group.

Let me say that the process of dealing with an en banc court of 17 judges takes some getting used to. I remember that when we had this court of 25 and I was very nearly the junior judge in this crowd,

and the rule was that you went around and everyone had to speak. My God, 25 people each feeling compelled to speak is awesome and it came to me, I was the 25th and I said, "I really don't think I have anything to add." And there was just a stunned silence and then a great round of applause.

Let me say that that was the breakthrough and then I noticed that several of the cases that we handled, you know, some of the judges would speak and some of them would say, "I don't have anything to add. Judge so and so has pretty well said what I think." And so we went from 25 judges having to all run their mouths and got it down to the people who had something to say. And it began to look like it was going to work, but the general sense was that it was something that people just didn't want to try.

But it does take experience and it takes practice and it takes some sense of self restraint to make a court of that size function in en banc form but it can be done. So I don't personally -- it doesn't concern me but I know a lot of judges on our court who would say, "Oh, my God. We can't have that." Well,

the answer is you can have what God gives you. You just have to make do with what you have and you'd be amazed at the techniques that you can devise to make do with a court of that size, and make it work.

VICE CHAIR COOPER: Is there any thoughts anybody has about geographical diversity, for example? I'm not saying this is on the table, but someone felt that we ought to split Texas up.

PARTICIPANT: In other words, what do you do with Mississippi?

VICE CHAIR COOPER: Right. Well, we know what happened to Mississippi. They wanted to go east but they went west. Judge Gottenbaugh (phonetic) told us that in Atlanta, about how that came about.

No, with reference to any thoughts, all sorts of configurations have been given to the 9th Circuit and we don't endorse any of them but do you split California? You can relate to a Texas situation, because Texas dominates the 5th.

JUDGE KING: I think it would be very ill advised to split a state, because you know, you have a great many cases in which you're essentially

pronouncing what state law is. And that's enough of a problem as it is, without having two federal appellate courts pronouncing as to the state law. So my own sense would be that that's problematic but let me say I haven't lived with the problem the way the 9th Circuit has. So I couldn't -- I certainly could be persuaded otherwise.

VICE CHAIR COOPER: Judge?

PARTICIPANT: Well, do you see any problems -- (indiscernible) sort of automatically says state law problems and now that you have state law certification that would all be (indiscernible) but it has occurred to me that an equally interesting difficulty would be with respect to habeas and capital case decisions. Would you have any view based upon your experience dealing with those cases in the 5th Circuit?

JUDGE KING: Insofar as splitting a state law like Texas, would that adversely effect us in federal --

PARTICIPANT: Even though I don't have anything to say, I think it would be a serious mistake

to do that. I think that having the circuit as it now is (indiscernible) is about as small circuit geographically as -- that I would like to have.

PARTICIPANT: You talking about the 5th?

PARTICIPANT: I'm talking about the 5th. We're talking about the 5th because we're taking Texas as a surrogate issue to the 9th Circuit thing in California. And now we're talking about Texas. I think that you would run immediately into a lot of problems in the state law area, not just diversity cases. I think the habeas (indiscernible) would be -- would cause a great deal of difficulty. You'd have two different bodies dealing with a court trying to administer capital punishment laws for the State of Texas which is one of the more active states in the Union in that area.

There seem to be a lot of -- I think there's real value in the geographical mix as well as the -- in the court.

Judge Parker was talking about the leaning toward -- pushing toward a more national sized court. To me on the one hand you want a court that is large

enough that it is viewed as more federal than parochial but at the same time you want them viewed as a court that is not so large that it is all federal and not parochial. You want to balance, as (indiscernible) with a local view. And that to me argues for a multi-state circuit. I think that a state has a certain kind of identities. There are distinct differences in identities among these circuits and I think the court can reflect in their appointments and in the nature of the cases that are brought to the court.

If you look at our court, we have some evident maritime practice. We have new policies coming off the Mississippi River and coming off the Gulf coast, etcetera. There is more identity, frankly between the 5th and the 11th and it follows to reason that if they were a circuit for a number of reasons, not all -- of course it was political but the politics drawing those lines of what was the underlying causal identities that I think are very, very important.

So when we talk about the political lines that in drawing a circuit, it's not some abstract,

arbitrary figure that a politician ought not to trouble judges with, quite the contrary. It reflects a judgment of identity that -- I'm not bothered with the fact that political lines in circuits have historically been drawn by Congress. They might as well (indiscernible) full powers. (Indiscernible) I like the balance. I like the way it is and though I would never -- I don't want to say never but to me, it (indiscernible) with any state and certainly Texas.

JUDGE KING: Also, let me point out one thing. The certification process that we now have in Texas we didn't have for a long time but we now have it, is a little -- has to be treated very carefully because the Texas court and the Louisiana court, for example, they don't want to take all the cases that we would like for them to tell us the answer to. So we have to think very carefully before we certify a case. We've only got -- like dissents. You've only got so many dissents you can write in a year and you lose your credibility. Well, it's also true that you've only got so many cases you can certify in a year before the court is just going to say, well, you know,

enough is enough. We're not just here to take your cases.

So we are very careful about what cases we certify and any process that puts more cases into the certification process seems to me to be run the risk of having the state court say, no, we don't want to take all these cases.

I wanted to make one point in response to your questions on oral argument. We have more and more cases nowadays in which both parties waive oral argument, mainly because it's an expensive proposition and the sense is that they don't need it. So I think that's something to focus on. And also, when you have 51 percent of your docket is pro se, we don't allow people for the most part, we don't allow people who are pro se to argue. Now, I understand that the 2nd Circuit does that regularly. We don't. But usefulness of oral argument when your customer is pro se, is sort of problematic.

VICE CHAIR COOPER: Professor Meador.

PROFESSOR MEADOR: May I ask you a question about the internal processes recorded -- as

you know, there are people out there who assert that the quality of the appellate process has been graded over the years. There's a perception, rightly or wrongly, a perception by many people that a lot of cases are not getting the kind of attention they deserve and if we put together the totality of what's happened, you say you went from I believe 16 staff attorneys to 42?

JUDGE KING: Right.

PROFESSOR MEADOR: And your law clerks have multiplied. All of that, when you couple that with the diminution in the number of cases getting oral argument, and so on sort of look at the totality of it, what is your view about the overall quality of the appellate process inside of the court today, as compared to say 25 years ago.

JUDGE KING: Let me ask you a question, if I may. And that is, how is you -- quality in what terms? If you mean in accuracy of the outcome, I would say that the accuracy of the outcome in the individual cases is high. And the only way I can tell about that is by measuring it terms of petitions for

rehearing. But I would say it's high.

If you mean does each case get the attention from each judge that it would have gotten 20 years ago, I think the answer to that is no. Due to hard cases in the sense of cases that truly demand careful attention by an Article III judge to get that attention, I would say the answer to that is yes.

PROFESSOR MEADOR: I'm not quite sure I understand the difference between the sort of case that goes to the conference calendar and this other case that goes through the summary calendar. What are the criteria that routes a case to one or the other?

JUDGE KING: Mainly a conference calendar case has to be a case that you don't have to spend any time at all on the record, that the amount of effort that has to be made in looking at the record is very small.

PROFESSOR MEADOR: The easier case in a summary calendar?

JUDGE KING: Much easier, yes.

PROFESSOR MEADOR: I see. Let me ask you, do you still have the oil and gas calendar?

JUDGE KING: No. Let me say, I think there are still some cases in it. There are still some cases on the oil and gas calendar, yes. I've never been on it so I don't --

PARTICIPANT: They exist on a separate panel only because of the liberation of the (indiscernible). What happened in that field is that people may (indiscernible) a Chevron card or an Exxon card says you're recused and so these cases are not fun cases and I must say they're certainly first cases. They complicate records and (indiscernible) judges in this area are likely to be recused. The stock owners gather the fact that they may own some very small fraction of interest in some old gas-producing property.

PROFESSOR MEADOR: How many judges serve on the oil and gas panel?

PARTICIPANT: At the moment we're down to three or four.

JUDGE KING: Yes. There's not much volume.

PARTICIPANT: The cases don't lie and

there are very, very few cases.

PROFESSOR MEADOR: Let me ask Judge Higginbotham a question. Are you comfortable or uncomfortable with the existence and work of the Federal Circuit?

JUDGE HIGGINBOTHAM: I don't like courts of specialization in taxes, for example. I think that is a mistake. I understand the components for it. My judgment is it's pre-Byzantine law and I've read conflicting reports back in practitioner. What I really don't have countenance to stress an opinion of it. As to the (indiscernible) I try (indiscernible) on district court. I had some (indiscernible) practice, not much. I thought that requiring the (indiscernible) of appellate judge (indiscernible) was very useful. And I thought kind of correspondingly putting that before the case, but it didn't. It works out that the concentration of effort can be counterproductive. I really am not comfortable giving you an honest, informed judgment about the work of that because when I been out of it, and I really don't see the work enough to make that judgment.

My fear was that it would produce increasingly hyper-technical kinds of distinction but it failed clearly here in the law which is a peril that by a course of specialization might be (indiscernible). I don't know. I've heard comments but it's purely (indiscernible).

PROFESSOR MEADOR: I have one more question.

VICE CHAIR COOPER: Go ahead.

PROFESSOR MEADOR: Judge Parker has given us his view of future lines of development and his suggested way to meet it. I'm not quite sure that I've heard that from Judge Higginbotham and Judge King. Assuming the dockets intended to grow at whatever rate you want to project, 10,000, 12,000 or whatever, what would you do? There are several things that can be done.

What would you suggest that the Commission consider? We're supposed to look to the future, not just today or six months from now. The Commission is supposed to think about an appellate system to serve the country effectively over the years ahead. And

there are only predictions or projections about how we assume an increase in filings, of substantial sort. What would you propose doing?

JUDGE KING: I agree with the comment Judge Higginbotham made and that is I really think it's difficult to say what you would do for the reason that you don't know what those cases are going to look like.

PROFESSOR MEADOR: Is that what the Commission should say? Just say, "We can't say what to do. Too bad --"

JUDGE KING: I'm not sure what the Commission should say. All I'm saying is that if you had said to me back when our caseload was substantially smaller than it is now, "All right. In the year 1998 your caseload is going to be 7,500 cases, what are you going to do about it? What do you think we should do?" I might have made an answer that in view of the case mix we have today, would have been the wrong answer, because the case mix we have today is a huge percentage of cases, prisoner cases that simply don't require the same amount of attention, my

attention as a judge. They don't require as much work as the rest of the cases on our docket because they are very, very, very repetitive.

So I think that's the problem. You can't say what those cases are going to look like ten years from now and it makes a big difference what they look like in terms of what kind of judge-power we need to handle them.

JUDGE HIGGINBOTHAM: I would not make the assumption that we're going to necessarily have a large increases in any particular kinds of categories for reasons that (indiscernible) too many other things that are not going on now in terms of the profession and litigation in general that are in place. How the Wall Street Journal Monday, July 21st of '97, 100 big company joined the disputes, litigated disputes agreeing to take cases out. I wonder why it is that we have a steady -- it's not just one year or two years. It's well over five years of steady decline in this category of general civil appeals. It used to be a very large stable of the court's work. Why is that happening? Is it mediation? Is it arbitration?

Maybe it's in part because economy is good -- at least most recently it's been good and some believe in good times litigation tends to decline, you know, we aren't trying to pass on losses to other people as much.

But whatever the reason, we don't know why but if we know that it's steadily declining and while we've seen a rapid upsurge in prisoner cases, we can attribute -- we know what the underlying cause of that is. We have so many -- such a huge increase in prison population. But at the same time, you say, given that increase in prison population, assume that's not going to change. They're going to keep coming. Well, then we get the Prison Litigation Reform Act. And we don't know just what that's going to do to that mix. Seems to be cutting back substantially upon that area.

So there have been -- we're spending a lot of time on capital cases. There was a new (indiscernible) and frankly, that count of cases and habeas in general certainly have been reduced substantially in terms of the work demands it places upon this court. So in a period of 18 months or so we've seen Congress take actions which can make

substantial differences in this burgeoning caseload we have from the prison side and we see a steady decline yet on the civil side. We have a slight uptake on the (indiscernible) criminal side.

I think -- I can't demonstrate this but most of that is -- most of those cases are being brought -- a high percentage of those cases, I should say, are coming to us because of sentencing guidelines. We just see an awful lot of appeals on pleas of guilty. And we knew that was coming, the sentencing guidelines but that's a source of a lot of that. Will that change? I don't know.

But I can see a situation in which the prisoner litigation goes down, for reasons we talked about, changes in guidelines -- with new standards for guidelines, such as getting back to what the original standards were in the sense of true discretion and the wide -- long range of discretion for trial judges and that would substantially reduce the numbers of appeals coming forward and would reduce the waivers of appeal and plea bargains.

All those things could cause enough of a

reduction in the caseload that the general population growth, which is what you would expect over the years of projection, would be all set. So the underlying premise of growth is one that I would put a big footnote by. I just don't know. And that's (indiscernible). I think it's a mistake to try to propose structural changes for what might happen. It's tough enough to do to make changes and respond to what's happened. If you add to that the layer of what might happen, I think it would be just too much of a (indiscernible).

That doesn't mean that your engagement and your thoughtful consideration and exploration is not important. Quite the contrary. I think it is something that has to go on in the study that, for example, Professor Meadors has conducted for so many years, are awfully important, part of the literature (indiscernible). And so I think yes, we talk about it, yes we speculate about it but when push comes to shove, right now, (indiscernible) and comes up (indiscernible).

VICE CHAIR COOPER: Judge Rymer?

JUDGE RYMER: Does this district have a mediation program?

JUDGE KING: Yes. We started it about two years ago and it's sort of in its infancy but it's doing very well.

PARTICIPANT: The (indiscernible) numbers are in my prepared statement.

JUDGE KING: Okay. Thanks.

VICE CHAIR COOPER: All right. Well, thank all three of you for being here. Anybody that says we can't convene a three judge panel just wasn't here today and so we appreciate you being in here. And we have our next witness, Sharon Freytag. And Ms. Freytag, it's so nice to have you with us today. And we appreciate you taking the time to be with us.

MS. FREYTAG: Thank you. I do appreciate the opportunity to share my comments with you but before I begin with the comments, I'd like to give you a brief background of my experience so you'll be able to understand the perspective from which I give those comments.

After I graduated from law school in 1981

I was Judge Higginbotham's judicial clerk for a year and a half, first in the Northern District of Texas and then when he was appointed to the 5th Circuit, I continued my clerkship with him there. And then after that extended clerkship, I joined Haines and Boone (phonetic), a law firm now of 300 attorneys.

Our litigators and our appellate attorneys have appeared before all of the circuit courts and the United States Supreme Court several times. And we do have a separate appellate section. There are 16 members in our appellate section and six of us are partners and I'm the one to whom questions about federal appeals are directed often so I think that's why I'm the firm's representative here today and I am pleased to be here.

While I have the opportunity to talk to you today, I am going to focus primarily on the second question that you posed to each one of your witnesses. The question is what measures should be adopted by Congress or the courts to ameliorate or overcome perceived problems in the Federal System or any of its circuits. And as my brief description indicates, I

will address the issues from the point of view of a practicing appellate attorney. I do that 100 percent of my time.

I would like to address three issues. The first is the proliferation of local rules among the eleven circuits. The second is what's available on the web sites for each one of the circuits. And the last is a possible suggestion for equalizing the workload among the judges in the eleven circuits.

The first problem that I identified is the proliferation of local rules among the eleven circuits, to the extent that it makes appellate practice from the practicing attorney's point of view, extraordinarily expensive and extraordinarily complicated. In fact, I would propose that the Commission consider recommending that we recognize that the Federal Rules of Appellate Procedure are the national guidelines for appellate practice in the United States, and that the various circuits should be very careful about promulgating rules that make appellate practice much more onerous.

In 1994 I was privileged to chair an ABA

subcommittee of the section of litigation that studied the local rules among the eleven circuits. Our report then became the adopted report of the section of litigation that was provided to the Judicial Conference when they were considering amending the Federal Rules of Appellate Procedure. And what our report concluded after a year-long study of all of the circuits was that the proliferation of local rules affects the ease of federal practice. It dangers the uniformity of federal practice and it complicates appellate practice unnecessarily.

After our report was submitted to the Judicial Conference Federal Rule of Appellate Procedure 47 was amended, the rule that applies to the promulgation of local rules. But it didn't go far enough, because we are still in a situation at practicing attorneys where there are -- I pulled out the local rules. There are -- it's like over 2,000 pages of different local rules among the eleven circuits. We're still in that situation where we have to very carefully, in order to represent our clients, review in great detail and at great expense to the

client, each one of the -- some people say idiosyncratic rules of the eleven circuits.

I'm not here to say that these local rules are bad, because in many instances, they are very, very good. What I'm saying is that if they're good enough to be mandated, then they should be good enough to be proposed to the Judicial Conference and the Appellate Committee on Rules so that they do become part of the Federal Rules of Civil Procedure.

One of the main areas of disparity among the rules is the area related to appellate briefing, which is what we spend a lot of our time as appellate attorneys doing. In addition to the requirement that are pretty detailed in FRAP 28, each of the eleven circuits has increasingly more detailed requirements. For example, the 8th Circuit requires that the statement of issues also include the top for apposite cases for that issue and the apposite constitutional and statutory authorities. And that's a good idea. As I said, it's not that they're not good ideas, but when you go to the D.C. and the 11th Circuit, you are required to place asterisks in the Table of Authority

beside those authorities that you're primarily relying upon. And then when you move to the 9th Circuit, you have to remember that if you want to get attorney's fees for appellate fees, that you have to state specifically in the brief what entitles you to the fees and the underlying authority.

And although FRAP 32 is very particular about the format of the briefing, when you go to the 2nd Circuit, you have to recognize that they prohibit the use of proportional computer fonts, unless it's identical to a typographic facing. And in the 10th Circuit, they say they strongly prefer typewritten briefs, and we've come a long way since typewritten briefs.

The circuits also differ, not just on matters of form and briefing, but on the propriety of citation to unpublished opinions. And the reason I think this difference is primarily important is because it goes beyond what is a procedural variation, because whether or not counsel can cite to certain unpublished opinions or not, and the value of that citation goes to the substance of the decision-making

process.

The 3rd, the 8th, the 10th and the 11th Circuits declare that their unpublished opinions are not binding precedent but can be cited as persuasive authority. The 4th and the 6th allow citation as precedential value when counsel believes that the unpublished opinion goes to a material issue in the case and that no published opinion would serve as well for the argument. And in the 5th Circuit, the local rules provide that unpublished opinions issued before January 1, 1996 are precedent, while opinions issued after that date are not precedent, although they are persuasive.

As I said, the variations among the rules in this particular area, I think are particularly worrisome. Why? From the appellate practitioner's point of view, each hour spent in having to locate, digest, understand and apply the local rules is expensive to my client. And because of the variety of rules making them more complex, more detailed, counsel necessarily, even counsel that spends 100 percent of their time doing appellate practice, makes more

mistakes. And as a result, it requires the staff in the clerk's office to spend more time identifying those errors and asking that they be corrected.

I was intrigued that Judge Choplatt (phonetic) on Monday made the statement to this particular Commission in his comments, when he said, "The pressure placed on the courts of appeals by their increasing caseload might be lessened by a number of measures." And one of the possible measures he said, from the point of view of a judge is that local rules and operating procedures and the Federal Rules of Appellate Procedure should also be revisited with an eye toward expediting and streamlining appeals. It encouraged me to believe that it's not just from the practicing attorney's point of view that the local rules need to be revisited.

And the problem is exacerbated by the difficulty in obtaining updated local rules, because at any point in time if you go to the advance sheets in the Federal Reporter, you will see that a number of circuits are considering amending rules at that point in time. So staying up with the most recent rules is

a very challenging endeavor.

There are matters of uniquely local concern that require local rules. But when you talk about matters of local concern, it's my opinion that those matters should be unique circumstances that go to the physical size of the circuit, that go to the geographical location, or that go to the caseload of the circuit. And not to effecting the litigant and the parties' responsibilities and rights, as is possible by some of the variety among the local rules as it now exists.

Whenever the Federal Rules speak to an aspect of procedure it seems to me to make sense that they should be recognized as the exclusive provision by which counsel should abide, and that supplementation should only be allowed in those areas where the Federal Rules are silent on a general subject or where the Federal Rules specifically contemplate the promulgation of a local rule. And that's now in 22 instances, in 22 rules. It contemplates that a local rule be passed. For example, 21D of the Federal Rules of Appellate Procedure allows

local rules to set the number of copies for a petition of mandamus.

On the other hand, it would seem to me not wise not to allow the circuits to streamline the procedures available in the Federal Rules of Appellate Procedure. I am quite grateful that the 5th Circuit allows us to file the record excerpts as a shortened form of what's required in the Federal Rules of Appellate Procedure. Streamlining saves my client money.

In sum, what I'm saying is that Federal Rule of Appellate Procedure 47 should be understood to establish uniform Federal Rules of Procedure as the national standard that all of the circuits abide by. And that promulgation of more onerous standards should be discouraged. In fact, I would propose at this Judicial Conference once again, amend Rule 47 to make it absolutely clear in no uncertain terms that promulgation is discouraged. And as the Judicial Conference has the authority in 28 U.S.C. 2071 to abrogate local rules, I would encourage the Commission to consider recommending that the Judicial Conference

study the local rules and abrogate those that seem unnecessarily burdensome.

Finally, it would seem to me that it might even be possible that the Rules Enabling Act should be amended to transform the Judicial Conference's negative veto power over local rules into an affirmative power of approval so that they would have in essence pre-clearance power over the local rules.

The second issue I would like to address is I'd like for the Commission to consider recommending the implementation of web sites for each of the eleven circuits that require the same information. Each of the eleven circuits has a web site. And most give access to their opinions back through at least 1994. And they give the capacity to search those opinions by key word and by party. But the 5th Circuit gives us a lot more.

In fact, they have just updated their web site and as an exhibit to my statement, Exhibit A, I've provided for your review, copies, hard copies, of the pages of the web site that are available on the 5th Circuit and if you'll look at that, you'll notice

that what the 5th Circuit gives to practicing attorneys are new opinions released twice a day, an archive of published opinions that goes back through 1991, a full text index that I can get on and use key words to search through all of those opinions back through 1991, the ability to view docket sheets on a daily basis and to monitor cases without having to call the clerk's office. It's an, it would seem to me, an amazing amount of time saved from the clerk's staff point of view because of the fact that we don't have to call them to ask what's happening. We can just simply get on line and see what's happening through the docket sheet.

PROFESSOR MEADOR: -- used to getting interrupted so I'm just going to go ahead and ask a question.

MS. FREYTAG: Absolutely.

PROFESSOR MEADOR: All right. Does the 5th Circuit maintain on line unpublished as well as published dispositions?

MS. FREYTAG: No. In fact, I tried yesterday to get an unpublished opinion and I couldn't

find it on line.

PROFESSOR MEADOR: So there is no practical way that unpublished dispositions are widely available?

MS. FREYTAG: I can find it on Lexus or West Law but not on the 5th Circuit web site.

PROFESSOR MEADOR: Okay. But you can get it off of Lexus or West Law?

MS. FREYTAG: Yes.

PROFESSOR MEADOR: All right. It's kind of bandied about but there is a lot of inconsistency in the law, at least some circuits, that is buried in unpublished dispositions. Do you find that to be a practical problem in the circuits in which you practice?

MS. FREYTAG: More than an inconsistency among the unpublished and published opinions, I'm finding in my practice that there are unpublished opinions in the 5th Circuit that do speak to an issue that none of the published opinions do speak to. And in order to do the creative advocacy that I need to do, it's helpful to have that as analysis, even though

I might not be able to cite it as precedent. But that's why I was suggesting some uniformity on whether or not I could cite it as precedent would be helpful, because I do find that there are issues addressed and decided in unpublished opinions that are not decided in published opinions. I haven't seen as much conflict.

I'm excited about the 5th Circuit web page, as you can tell, because although I'm a novice computer user, it is exciting to me to be able to have this easy access and if you'll notice, the 5th Circuit web site has the local rules. So while I was suggesting that they're hard to get hold of in a lot of circuits, I can get them in the 5th Circuit by having access to the web page. And as long as we're going to have that disparity in local rules, it would seem to me to make a lot of sense to recommend to the circuits that they make this kind of thing available to practicing attorneys. As I said, it not only saves me time but I would think it would save the clerk's office time as well.

The final suggestion that I would like to

make is that the Commission should consider, if only in the interim, recommending the transfer of circuit judges among the circuits to equalize the workload. The statutory authority exists in 28 U.S. C. 291 and 331 for temporary assignment of circuit judges to the circuits where the need most exists. And if there is genuinely a problem about which I'm sure others know a lot more than I, but if there is genuinely a problem in the inequality of the workload among the circuits, it would seem to me that this transfer of authority already statutorily allowed would help to equalize that workload. And it also seems to me that Congress contemplated that kind of annual review, annual consideration, and annual reassignment of judges.

PROFESSOR MEADOR: Do you not think that the use of out of circuit visiting judges has an effect on the stability or predictability or coherence of the law at circuit? That's a problem?

MS. FREYTAG: I think that if you have a visiting judge from the 9th Circuit, for example, sit in the 5th Circuit or vice-versa -- I think that it would require the examination necessary to say do we

do this just in federal question cases, because then you would not be impacting the state -- the interpretation of state law. And I do not pretend to have the nuances for the way it was contemplated to be done, but it seems to me that it's possible to have a workable plan, to at least temporarily try assigning judges, as you assign district judges as visiting judges on the appellate court -- sometimes from out of the jurisdiction.

PROFESSOR MEADOR: Well, may I -- the question then is there is a lot of that already going on. I'm not quite sure what it is you're suggesting that isn't now happening. The very high percentage of uses of visiting judges in many circuits now.

MS. FREYTAG: Of circuit judge being reassigned to other circuits?

PROFESSOR MEADOR: You mean reassigned permanently?

MS. FREYTAG: No, temporarily.

PROFESSOR MEADOR: Just a visiting judge.

MS. FREYTAG: As a visiting judge.

PROFESSOR MEADOR: There is a great deal

of that going on. That's why I'm --

MS. FREYTAG: -- explain that the idea came to me through a -- I won't own the responsibility for the idea nor take credit for it because the idea of using the statutory authority to transfer judges is an idea that came in a conversation with former Chief Judge Clark (phonetic) who was the Chief Judge of the 5th Circuit for a number of years and still believes that while there may be some assignments and reassignments being done, that there is not enough in order to equalize the workload.

Although this isn't really in the parameters of what I had thought I would say today, when Chairman Cooper today said that you had a large mandate to assess the appellate practice, I thought I'd just add one thing that makes appellate practice more complicated for appellate attorneys. When I am contacted the day a judgment is signed to become appellate counsel for a client, it is very challenging and sometimes nearly impossible to file within ten days a motion for a new trial and a motion for judgment as a matter of law because in that ten days

time to digest the record, to study it, to identify the issues, even with the assistance of able trial counsel, is very challenging. So if you have any ability to make a recommendation that the time be stretched from ten to 30 days, it would help immensely.

And I'd like to address finally, very briefly, the question that you ask what is working well in the Federal System, because I would like to give accolades to the 5th Circuit and the 5th Circuit's clerk's office. We do primarily business litigation and appellate practice in our firm and the consensus among all of the partners that I spoke to from whom I collected the collective wisdom, is that we are very encouraged by the fact that our 5th Circuit judges are very willing to get into a complicated record, to study it, and to evaluate it so that we feel we've gotten serious appellate review. And we're also very impressed by the fact that they take the issue of attorney/client privilege very seriously. So when that privilege is challenged, they look at the issue very seriously.

And I am personally very impressed with the clerk's office. They are responsive. The staff is well informed, intelligent and that makes my life on a day-to-day basis a lot easier.

Thank you very much for the opportunity to share my thoughts with you.

VICE CHAIR COOPER: Any more questions?

PROFESSOR MEADOR: You say -- did I understand you to say that the lawyers in your office have appeared in all the Federal Circuits?

MS. FREYTAG: That's correct.

PROFESSOR MEADOR: But you, yourself, how many have you yourself appeared in?

MS. FREYTAG: I have not appeared. I've only appeared in three separate circuits.

PROFESSOR MEADOR: Do you have any observations about the differences among those circuits, any impressions of how they function, are there some problems in some and not in others, some of them?

MS. FREYTAG: Only to say that perhaps because of my familiarity with my home circuit, I find

it easier to work with the clerk's office here than I do in the other two, the 9th and the 10th, where I was but I only had one case in the 9th Circuit so I can't really speak with a great lot of experience there.

VICE CHAIR COOPER: Thank you so much. We appreciate you taking the time and giving some thoughtful incite.

That will adjourn the hearing for the morning and I appreciate everyone being here in attendance. The hearing is adjourned.

(Whereupon, the hearing was adjourned.)

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