COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

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PUBLIC HEARING

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JUDGE MERRITT: ...and we're holding six public hearings around the country and this is the third one of those public hearings.

The job of the Commission is to look at the structure of the Federal Courts of Appeal and to make recommendations to the Congress (indiscernible) a statute that Congress adopted a few months ago. The statute provides that we will make a recommendation specifically with regard to the 9th Circuit and (indiscernible) recommendations (indiscernible).

I don't know whether Judge Rymer or (indiscernible) have any comments that they would like to make preliminarily.

COMMISSIONER: I might just state that these hearings are (indiscernible) be made available to the other commissions who have not passed statutes (indiscernible) two members of the commission. (indiscernible)

JUDGE MERRITT: Our first witness is distinguished former chief judge of the 9th Circuit and a long time friend of mine, Judge Wallace.

(indiscernible)

JUDGE WALLACE: Well, I hope that you won't let that interfere with your asking questions, and I am sure you won't. I'm very happy to be here and I appreciate the opportunity because I will not be in the country when the Commission (indiscernible) my own circuit.

What I want to talk about briefly is the high points of the written testimony that I've already provided. It seems to me the Commission is in the place of having a great opportunity to change the process we followed in the past of when circuits should be divided. The fallacy is that we divide when a court is quote "too big" close quote. When is a court too big? That's like asking the question how long is a string?

The answer is too big when our own individual experience tells us it's too big. And what does that tell us? Anything bigger than what we're used to is too big. This ad hoc approach it seems to me is problematic because it isn't based upon principles. It's based upon subjective thoughts.

Let me if I could explain why I think we're in the problem we're in today with a simple diagram. This triangle is what we refer to as the judicial administration triangle, at least when I teach judicial administration. At the lowest end of the triangle are the District Courts. At the upper end is the Supreme Court and in the middle is the Court of Appeals. When you need additional District Court judges because there are more cases, it's easy to get them. All you so is have a formula, which we have, and when that (indiscernible) meet the formula, you increase the District Court.

So the bottom of the triangle has a tendency to expand, increasing the size of the triangle. That does not create a problem at the District Court level because they're dealing with a certain number of filings. So each District Court judge is not impacted. The Supreme Court is not impacted because the Supreme Court has the hand on the spigot and will only take a certain number of cases.

The problem is with mandatory jurisdiction to the intermediate court. And as the triangle

continues to expand to more District Courts, the problem always occurs -- and this is true not only in the United States but in foreign countries -- the problem always occurs in the intermediate court where you have mandatory jurisdiction. And that's what we're suffering from now. It's finally caught up to us. In fact, it did years ago, but it's finally caught up to us that that problem in the intermediate court is a serious problem that our country has to face now.

There has to be, it seems to me, an alternative to the ad hoc approach. If the problem is as serious as I think it is, it's time to relook at how we approach the intermediate court problem. Now, what is the alternative to the ad hoc approach? It seems to me it's to find basic principles.

JUDGE MERRITT: What would those principles be?

JUDGE WALLACE: All right. The first, of course, would be to recognize that no system is going to be perfect. There will always be objections to it. Professions, you can't expect profession in the

principle nor can you rely upon what judges would like to do. That's where I find the fallacy in the Federal Judicial Center 1993 report which did surveys of judges. Judges like (indiscernible) They like to stay the way they are. They don't want to change how they've done things. We're the most conservative people in the world. Lawyers are second most conservative.

So we can't just go on what we'd like to do, what our creature comforts are. Then it seems to me the principle is to recognize a long-term need for the court system, to find out what the long-term need is, not to focus so much on the present problem, division of (indiscernible) but to decide what the long-term principles are, then apply that principle to the (indiscernible)

JUDGE MERRITT: (indiscernible)

JUDGE WALLACE: It is. Then that starts off with the first issue is what do we want the courts to look like 20, 30, 40, 50 years? That comes back to determining what the mission of the federal courts is. Seems to me that you have to first establish what the

long-term needs are and that invariably gets you in a position that you have to decide what's the mission of the federal court going to be?

Obviously, the federal court is a very unique court. We have less than 10 percent of the filings --

JUDGE MERRITT: Let me ask you this. The case loads of the federal (indiscernible) are relatively (indiscernible) in that you can take a growth curve and you can come up 30 years, 40 years from now, if you use the same pattern of the last 40 years with a case load of about 15 times the numbers that we have now (indiscernible)

JUDGE WALLACE: That's right.

JUDGE MERRITT: But it's been slowing down. So the problem, it seems to me, with a global solution or to find the answer to a searching question of what are the principles is that we don't really have a good fix on what the case load is going to be or the kinds of cases that may have to be decided 30 years from now. For example, biology is exploding and we've not had very many cases (indiscernible) genetic

areas. We may have 30 years from now a lot of cases. Our case loads could be high for reasons that are not immediately apparent.

So it seems to me that to say that we've got to set up minimum principles that apply is a problem because we don't know what the future holds.

JUDGE WALLACE: That's true. The answer is in three areas, it seems to me. #1 is that you can't predict accurately. We can make estimates and those estimates are ones that probably will not be accurate. The Federal Court Study Committee made some predictions which I don't think are going to occur and haven't so far.

But on the other hand, if you do nothing, if you do nothing, then you're just leading blindly down the process and when you pick up one end of the stick by dividing the circuit or not dividing the circuit, automatically you're picking up the other end of the stick. You're making long-term decisions but what you're saying is I will not consider the future because we don't know enough about it.

There is an alternative and that

alternative is to become more effective in our development of the future and then have the flexibility to make the changes. Now what do I mean by that? I am an advocate of large circuits. I think if we had five or six circuits in the United States we'd be about right. Why?

Well, there's a lot of reasons in economy but one of them as far as the future is concerned is that you have the flexibility to meet changes. Let me give you an example. In the 9th Circuit we weight cases. The weighting system is one, three, five, seven, 10. An average case is a five. Now, there are some other circuits that have begun doing this, but we've been doing it for a long time. Shirley Hostetler (phonetic sp.) came up with this idea. So we now have trained staff that are reasonably competent. It's not perfect. They make mistakes. But it gives us enough to work with and we use it for a variety of things like setting cases.

What I did when I became Chief Judge is began to test us on where this is going. We were having an increase at that time of seven percent per

year. It's now about three to five percent. So it's gone down. We're having a seven percent increase. What I found out was the fives, sevens and 10s remained relatively stable. This was about 25 percent of our work load. Where was the increase? The ones and threes. The ones were the single issue easy cases, the threes were half way between that and an average case.

If you have a large enough circuit to be able to run these kinds of statistics, you also have a large enough staff, resources, to modify your process to take care of change. So with a large staff with the ability to do it, we could then concentrate upon this process.

I found, for example, that over one-third of our cases are pro se which means that a system that was set up for the adversary system was missing the boat in over one-third of the cases. We were set up for a system that didn't fit. With enough resources then, I was able to set up a pro se department which took each one of these cases and we're being able to massage that one-third of the cases to handle them

differently than the rest of the cases.

PROFESSOR MEADOR: I ask a question?

JUDGE WALLACE: Sure.

PROFESSOR MEADOR: Because you said you used (indiscernible) Do you mean that a large Court of Appeals or a large Circuit? Seems to me there's a difference between the Circuit and the Court.

JUDGE WALLACE: I'm glad you brought that point up, Dan. I had not made that distinction and I think it's a very important distinction that I'm talking now about the Court of Appeals rather than the Circuit as a whole. But invariably the process is similar. It's just not as extreme as it with all of the District Courts which have now, I understand, somewhere around 40 percent pro ses are funneled into the Court of Appeals.

COMMISSIONER: Let me follow up on his question. If you change the structure of the Courts of Appeals, the law and administration and such, you have to change the circuits as well, or the administration of the circuits would have to be changed. You couldn't just have a few large Courts of

Appeals without changing the administrative structure of counsel.

JUDGE WALLACE: You mean if you followed through on my suggestion of having five or six circuits? Yes, there would be changes. There would be modifications. There would be different modifications than providing the Circuit. There's always change, whether you divide or increase. It's just a question of what will work best in 20 or 30 years and bite the bullet now. At least if it's right, it means don't do any more dividing and let Circuits growth. Excuse me, Dan.

PROFESSOR MEADOR: Excuse me. I think you're willing to go along with the basic geographical structure of (indiscernible) We had that (indiscernible), as you know, and you're not advocating taking away from the territorial structure. You're just saying (indiscernible)

JUDGE WALLACE: That's correct.

PROFESSOR MEADOR: Somebody has to design and say (indiscernible) If a body is looking at circuit boundaries, given the territorial concept we

have, is it possible to identify some sort of factors, objective factors, that one would take into account in fixing Circuit values. What are the elements you look at to decide whether the values are here or there or large or small or what?

JUDGE WALLACE: I think that would necessarily be an arbitrary decision. If you're going to get down to five to six Circuits, what you're trying to do is develop a certain amount of equality and there wouldn't be equality of geography or maybe not even necessarily equality of population. I suppose it would be equality of federal impact. That is, to try and divide the federal impact into five or six units. It would not be exact obviously and there would be some gives and takes.

But I think the principle as I would see it would be to try and divide up the federal work load or the federal impact and I would think it would come out unequal. But it would be more equal, say, that the division now between the 1st and the 9th. It would be somewhat more difficult. And it may not be enough gaining five to six Circuits. It might be

four, it might be seven, but the idea would be to have fewer larger circuits.

If that principle is right, then it should be done. If it can't be done, then at least the principle indicates that we ought to continue to let Circuits continue to grow. My theory is that if the 9th Circuit has a reasonable method of disposing of cases that is not perfect, we can't go back to the days of (indiscernible) when everything was nice and warm and fuzzy. But if it carries out a reasonable method, then it seems to me that there's at least a viable alternative that large Circuits can work.

And I suggest to you that the 9th Circuit has worked and, if that's true, then at least the alternative of five or six circuits should be on the stove. Something that should be dealt with with the Commission and that looking long-term --

COMMISSIONER: Are you saying that more Circuits should like my Circuits rather than splitting my Circuit to make the 9th Circuit look more like the other Circuits?

JUDGE WALLACE: Yes. The 9th Circuit

becomes the model and, if that's right, then look at the alternatives that it overcomes. If we continue with ad hoc approach alternatively by picking up one end of that stick, the other end is balkanization (phonetic sp.) of a national law. You continue to divide for 20, 30 years, you end up with balkanization of national law or a fourth tier, which I rejected and many others have.

COMMISSIONER: -- provided once over the last number of years and that's the 5th and that was at the unanimous suggestion of the 5th Circuit judge.

JUDGE WALLACE: With one exception. (indiscernible)

COMMISSIONER: Yes. (indiscernible)

COMMISSIONER: Let me get your reaction to this point. Instead of there being some kind of crisis in the Courts of Appeals, it seems to me that in the last 40 years since 1960 Courts of Appeals have accommodated themselves through minor evolutionary change to a (indiscernible) large case load. Taking my circuit, the 6th Circuit, in 1962 (indiscernible) were 365 cases and now there 4,500 cases. There were

five judges in 1962 and they're now authorized 16 and we never have more than 15. (indiscernible) And we maintain (indiscernible) all cases (indiscernible) and we don't have any summary orders that were (indiscernible) We do decide some cases from the bench but there's no talk that 6th Circuit is in crisis and, in looking at case loads around the country, (indiscernible) we've foreseen that they'll accommodate the increase in (indiscernible) and that's been done through mainly (indiscernible) and other mechanisms. Sometimes short cuts that judges would prefer not to have. But I don't know that (indiscernible) It's a great deal less than it was 40 years ago.

Now, what's your thought about this.

JUDGE WALLACE: When I came on the Court of Appeals in 1972, we weren't working as hard as we are now. I think I had more time for cases then. This is subjective.

COMMISSIONER: (indiscernible) quality has --

JUDGE WALLACE: I don't. I don't think my

quality of my opinions has gone down. It's a hard working job. I don't see a problem with that. I was a hard working lawyer and I expect to be a hard working judge. I think what we have done, as you say, over some resistance of judges who don't like to change, what we have done is found new methods that can be used which can accommodate work load. For example, the idea of screening and more effective screening. The biggest group of your cases coming through are simple cases.

COMMISSIONER: (indiscernible) cases.

JUDGE WALLACE: Yes. Yes.

COMMISSIONER: That's been the largest increase in (indiscernible)

JUDGE WALLACE: Thirty seven percent of our increase are in prisoner cases and we have this large pro se. That's the increasing group. What we have to do is figure out new ways of handling that. We didn't have settlements at the Appellate level. We thought they wouldn't work. And now the 6th Circuit and the 9th Circuit, the 10th Circuit, the 2nd Circuit, all have effective programs. In the 9th

Circuit we have six well-trained mediators. They settle about 100 cases each a year. We weren't doing that when I came on. We didn't have any need for that kind of thing.

Now, 600 cases a year, solid cases, are going on. Not the spinning (phonetic sp.) type cases. Solid type of cases. We developed this oral screening which at first light most judges said, You can't do that. And yet every judge who has done it has said, This is a better way than serial screening. The importance of our oral screening program is that we can expand it. What serial screening depends upon is ended by the number of judges you have. Our oral screening program is you just take judges off the oral (indiscernible) and put more in oral screening. You have the flexibility to move. I think we've found out over the years there's different ways of accomplishing our job.

COMMISSIONER: Let me ask a few other questions. (indiscernible) I have not had any personal knowledge about (indiscernible) talking to you over the years.

JUDGE WALLACE: You beat me at tennis, I might add.

COMMISSIONER: And so I asked a number of the visiting judges from other Circuits, friends of mine and others who have been out there to give me their reaction to the splitting problem. The but/for clause in this connection is a 9th Circuit situation and so we've got to address that one way or another.

There is a general perception among judges who come out to the 9th Circuit and sit as well apparently as Justice Kennedy and (indiscernible) that the 9th Circuit ought to be split and when you ask the question why, the kind of responses that you get are, Well, it's just too big and then, Well, what do you need? What are the consequences of being just too big? And they say, Well, there's no collegiality and the benefits that arise from collegiality (indiscernible) are undermined and secondly, there is a perceived set of conflicts, intra-circuit conflicts, that why was there (indiscernible)

You have Justice Kennedy who makes the statement publicly that the Circuit ought to be split

and maybe he has some other reasons. I don't really know. And then these judges who come out and sit for the 9th Circuit tend to say (indiscernible) Why do you think that is? I mean this is a perception that judges have about it. Why do you think that is?

JUDGE WALLACE: Well, judges when they come to make a subjective determination are based upon their own past experience and they come out for one term and they just say, Of course, 28 is too large. But if they came and lived in the Circuit, if we had a way of bringing them out there for six months or a year so that they could watch the process work, it's quote, "too big."

Now, there's a lot of problems, of course, with keeping any circuit their law consistent. The strange part about it is our law is as consistent as any other circuit. We're not too big. The only empirical data shows that we're as consistent as any other. Now, what is that? We've learned over the time period since I've been a judge that all cases don't have to be published. When I became a judge in '72, we published every case. Then we realized that

we have two responsibilities. One is error correction and one is setting precedent. And precedent, you only need to publish when there's precedent.

Now, as we've become more effective at looking at whether we really need a precedential pace, we publish fewer and fewer cases. And now in the 9th Circuit it's less than 17 percent. So when you talk--

COMMISSIONER: By published, you mean in the west (phonetic sp.) system? What about in the electronic retrieval?

JUDGE WALLACE: I mean published, when I say a precedential case, in the 9th Circuit you can not cite to us unpublished decisions.

COMMISSIONER: But they are on the --

JUDGE WALLACE: (indiscernible) They have. But they can't be cited to us. We don't pay attention to them because we know how we do those and what we have in mind.

COMMISSIONER: Could you address the question of collegiality. What do you think it means and do you have it and bow?

JUDGE WALLACE: Well, collegiality has two

forms. #1, it's (indiscernible) and to me that is an issue of attitude rather than numbers. There are smaller courts that are far less collegial in that respect than the 9th Circuit. And we go to great lengths to make ourselves collegial in that way. We are able to disagree without being totally disagreeable and we remain friends. Some of the judges who are "I disagree with most" have a tendency to be most interested in me and my personal welfare.

The other part of collegiality is the ability to come together with the law. That is, to understand the law and the direction of the Circuit. And that's a process that's more difficult and it requires people to work together on the process. Because there's a larger number, you have to do things differently. Not wrong, but do them differently.

For example, we have to pay attention to about one out of five cases. That's the precedent and we must keep our eye on it. But it's wrong to think that we're alone. I disagree with people who have said that there is this sort of monitoring duty that evolves solely upon the judges. Through the process

of using modern computerized techniques, we can decrease that problem. The problem is is not knowing what's going on in the rest of the court. Through issue identification and case clustering, we stop that problem at the beginning. Then as we decide cases, we have staff to look at the cases and to watch us. We look at the cases and, most importantly, we have lawyers who know how to file suggestions for rehearing (indiscernible)

If you look at the total process, if you look at the total process and not just judges alone working on it, then it's doable. Is it as collegial in that respect as it was in the days of (indiscernible) Obviously not. And if you have a three judge circuit, you're going to be completely collegial. The question is is it collegial enough to provide a fair way of solving disputes? I suggest it is and, therefore, large circuits can work.

COMMISSIONER: Well, most people -- of course, collegiality is a matter of friendly feelings and open expression but that doesn't necessarily mean anything about the judicial process. It's thought to

mean that views get accommodated. Where there's disagreement or different views, they tend to get accommodated more easily.

JUDGE WALLACE: And to follow precedent.

COMMISSIONER: With less of a chip on the shoulder, I'm going to maintain my position in the face of some different views from others.

JUDGE WALLACE: Yes.

COMMISSIONER: I don't know in the 9th Circuit whether there's a difference there or not but there seems to be a perceived difference. Whether that's truth, I don't know.

JUDGE WALLACE: I think that's right. The reason it's perceived that way is no one can see if you're sitting on a court of five or six judges how you could possibly be congenial with 28. That's because it's quote "too big" close quote. The same is true (indiscernible) decision. People say how can you have 11 judges decide for 28? Well, they aren't. It's a process. It's a process that accommodates the saving of assets that's sufficient for finality. If you don't believe every judge has to have their hand

in the --

COMMISSIONER: That system didn't work for years. That didn't have anything to do with the particular structure. It changed (indiscernible) objective of the 9th Circuit changed (indiscernible)

JUDGE WALLACE: Any time it's by local rule.

COMMISSIONER: Let me ask you this. I know this is a different question but it runs contrary to what you were saying. I assume that (indiscernible) is going to have to consider this problem that if Congress should decide that it will reject the views of Judge Wallace and split the 9th Circuit, how should it be split?

JUDGE WALLACE: Well, I've thought about that. I mean I've got to be honest about it. I'm somewhat concerned about setting up a northwest circuit. That's an easy thing to do because the line is easy to draw and the political votes are there if you want to count them (indiscernible) and it obviates the problem of inviting California in where the (indiscernible) votes aren't there in the House.

But if you go back to principles and not political decisions, what a Circuit should be is large enough so it's not parochial, so that it has a federal feel about it. I think that's too small a circuit. I think the first circuit is too small. I just don't think those are the kinds of circuits that give us enough breadth to get at nationalism --

COMMISSIONER: Would you split California? if it pushed (indiscernible) and that's what they're going to do, Congress will (indiscernible) whatever the various reasons are. Would you keep California intact? (indiscernible) recommended that it be split.

JUDGE WALLACE: I know and one of these days you'll find the story behind that recommendation is truly rewarding but I wasn't sitting there when it happened. You ought to ask that question of one of my colleagues on the court who was in Congress at the time on the (indiscernible) Commission and I think you'll get an interesting answer.

I don't think dividing California is in the long-term interest and best interest of the federal judiciary for California. There's too much

interaction between cities and the state to have to worry about two circuits. The state is not two states. It's one state and it functions commercially as one state. And it would seem to me that there's no logical reason for dividing California. If the Commission wants to recommend and if Congress wants to adopt some division, it should be one that's agreeable with the future of the community. I say dividing California isn't. I say a northwest Circuit isn't.

I suppose the least worst solution would be the so-called string bean Circuit. Arizona and Nevada aren't going to be too happy about that. But at least it would get away from the provincialism in too small of a Circuit, which I think the northwest Circuit is. Arizona is growing. It now has the sixth largest city in the United States. It would provide more of a balance than it would --

COMMISSIONER: Just that the illegal (indiscernible) with California, I think.

JUDGE WALLACE: If it was to or should go as a horse shoe. We've never had a single state Circuit before, but we're talking about what's best

for 20 or 30 years from now. Maybe a single state -- maybe 50 Circuits is okay.

COMMISSIONER: I assume the projected growth is more for the string bean than it is for California, although who really knows? I assume the growth in the Pacific northwest and Arizona and Alaska is likely to be at a larger percentage than --

JUDGE WALLACE: The growth is larger outside of California than in California, although California is growing. It was two-thirds and it's less than two-thirds now. Over a period of time, there will be more growth outside of California.

COMMISSIONER: By your line of reason, were you saying, for example, the 11th Circuit is fully designed?

JUDGE WALLACE: Is what?

COMMISSIONER: Fully designed. You have three states in the southeastern part of the country. Is that different from a northwestern state?

JUDGE WALLACE: Well, maybe. Although the problem there is that there's a lot more federal impact in those three states than there are in five

states in the northwest and it may be that making the 11th Circuit larger would have more of a generalized approach to the Circuit. I frankly hadn't thought about that. My focus has been more when I've been asked a question about the northwest.

COMMISSIONER: We had a witness in one of the prior hearings talking about this problem, how to design the (indiscernible) One of the elements involved, the fact that it was cultural opinion wi]thin the region. Given the fact that we don't have regions (indiscernible) then how do you find a region for that Circuit? One suggestion was that cultural affinity is one way of identifying a region (indiscernible) Do you have any observations about that?

JUDGE WALLACE: Yes. I disagree with it. When you say cultural affinity, what you're saying is there's a certain culture that can develop federal law for that culture which is different from another culture and the whole idea of nine Circuit law is to be national and once we have the idea that there should be different national law for different

cultures, seems to me we're going the wrong direction. I would have to reject the principle.

COMMISSIONER: If you take on morning (phonetic sp.) I see Judge (indiscernible) here and voters. Maybe we'd better wrap up --

JUDGE RYMER: Do you suppose I could have a chance?

COMMISSIONER: Sure. You ask any questions you like, Browning.

JUDGE RYMER: Thank you. Since I see the charge of the Commission as being a good deal broader than just whether the 9th Circuit should or should not be split, I'd like to take advantage of the thoughts you've given to the administration of justice in the country and world-wide to ask a few somewhat broader questions, one of them being do you have, based on your experience internationally, any suggestions that might shed light on how our Court of Appeals ought more effectively to be organized?

JUDGE WALLACE: We have had a fixation on the number nine in the United States because there's nine members of the Supreme Court and you'll see again

(indiscernible) no Court of Appeals should be more than nine. Why? Because the Supreme Court is nine. That fixation is not true overseas where large courts are accommodated all the time. There's 138 members of the Intermediate Court in the Philippines. They work differently in some countries than others. In the civil jurisdictions, because they don't adhere to precedent, they can use larger courts so in Turkey you have 240 members of the Supreme Court. So there's a different way of approaching the law.

But that set aside, they don't fear largeness. They work with it. If large works best, they work with large. We have not done that in the United States. I just traced it back to a small Supreme Court and a view that we have to look small instead of looking large. My view on it is that we ought to look and see which accommodates the future best and if we look to that, we'll see there are certain efficiencies in a large Circuit which will be far more flexible in meeting future needs than smaller Circuits.

JUDGE RYMER: You started off by talking

about the need to identify 10, 15, 20 years ahead or project a mission (indiscernible) in changing times. What are your thoughts on how that ought to be defined?

JUDGE WALLACE: All right. It's an issue that deals with our subject matter jurisdiction and it seems to me that any view of how we're going to function different has to come to grips with federal jurisdiction. What is this small unique resource that folks could do? We're always going to be less than two percent of the total litigation. It's wrong-headed just to continue to pump cases into Federal Court because it's easy to do. Someone has to look at that issue to determine what our mission is and, based upon that, then to make as good a prediction of the future as we can and then, having done that, then apply the type of a solution to those needs that'll be flexible enough to meet that or any change in the future.

JUDGE RYMER: That sounds fine but in terms of specifics, the political reality is that Congress will probably continue to create business for

the federal system. If that's so and if that does continue to be the case, then what efficiencies do you suggest might impact the (indiscernible) of this Commission?

JUDGE WALLACE: Okay. I'm willing to grant the difficulty of getting Congress to reverse itself and that the Commission, after determining a mission of the court, may well consider the best way to look at the future is moderate growth. That's what the Long Range Plan Committee did and that's what the Judicial Conference adopted, and I can't fault that. I'm just suggesting we should not give up on the effort.

If, in fact, there's going to be a moderate growth, then we can project what that growth might be and then try to see what is the best way of meeting that, having in mind growth may be different. For example, we find out now at least in the 9th Circuit, the growth is in a different type of cases. But what is the best way to accommodate that growth looking at what will happen in 20 or 30 years.

Now, I think that most people would not

like to have 40 Circuits in the United States. IF that's true, then now a decision needs to be made as to how many Circuits. Now, maybe people won't agree with me there should be five or six, but at least we can let Circuits grow to see if they can accommodate. The larger the Circuit, the greater the flexibility to accommodate change. I think the 9th Circuit has demonstrated that. There's efficiencies that have been developed to scale of size and if any -- I shouldn't say any -- most people who would come out and live in the 9th Circuit for a year would see those efficiencies because they rid themselves of prior prejudices based upon their own experience.

So it seems to me that if you look, even though it's an inexact guesstimate of the future, it has to be made and the Commission is the best place to make it or have it made. Having done that, then the question is what's the best way to meet that in the future? What structure?

JUDGE RYMER: (indiscernible) your pyramid. One of the suggestions that's been made for structural change is in some way to give some

Appellate function to the District Court. The analogy here, the 9th Circuit's bad experience, it occurs to me is already analogy for how it might function. Do you have any thoughts on that?

JUDGE WALLACE: There is an obvious candidate and that's the Social Security cases. Why the Court of Appeals should be involved with another level of appeal is mystifying to me although I grant you that there should be a uniformity of law. But it seems to me clear that the District Court can function as an Appellate Court in certain areas. That would be a typical example.

The District Court would be the final termination on Appellate body for issues of fact and the Court of Appeals would only take issues of law, whether that's automatic by law or whether it's by sersurary (phonetic sp.) doesn't matter. You're using, you're functioning within the District Court.

There's another area that we need to look at also and that's the Administrative Tribunals. We always allowed the ALJs to be within the organization and, as a result, the Court of Appeals takes much more

lip than they should. But 20 years ago, Bob Door (phonetic sp.) came up with the idea of generalized ALJs and no one had moved in that direction at all. It could cut off a certain amount of work if there was an administrative structure which was separate from the agencies. So there are avenues of separate Appellate functions now available to us, and I think it's something we need to look into.

JUDGE RYMER: One final question and that is following up on Professor Meador's question. There are those who say that when a Circuit gets large, whatever that means, but gets large, that it just becomes impossible to expect that a judge who lives in Chicago to understand in a meaningful way the conthet in which litigation coming from, say, Alaska, Hawaii, arises. In other words, there should be some more consideration to the smaller regional culture. Do you have an observation on that or the geographic organization of the Circuit?

JUDGE WALLACE: Well, I have a strong feeling that they shouldn't be too close to the culture. It's not only an issue of diversity on the

Court, you get a finer blend of an opinion, but it's to make sure we don't become provincial or parochial as to certain cultures for federal law. The federal law is supposed to be as even as it can be whether you're in Hawaii or Maine. The larger Circuit has a tendency to do that. A smaller Circuit that only has parochial views will have a tendency to have interpret federal law to match that parochial view. I think it's the wrong way to go.

PROFESSOR MEADOR: Following up on Judge Rymer's question about (phonetic sp.) situation and you find out quite correctly that in many other countries of the world you have huge courts, particularly one I'm more familiar with than others in civil law countries of Europe, the intermediate level will have courts with over 100 judges. My observation of that (indiscernible) is the only way (indiscernible) and the way they operate is by what I call subject matter (phonetic sp.) matter issues. You don't have 150 judges sitting randomly in Canada raking over the entire (indiscernible) You have maybe 10 positions on the court and each position has a set

of cases.

Now, what would you comment on that? If we're going to (indiscernible) the large Circuits or we will grow into them and you have 30 or 40 different judges in a large Circuit, sitting in subject matter positions would be one of the concerns and that is that (indiscernible) of the law and so on. You like to be known by your decision makers (indiscernible) is a major factor (indiscernible) Do you have any observations about getting into that kind of system in our courts?

JUDGE WALLACE: Well, yes. I thought about that and I read some materials on that and articles which I think are very helpful. In most of those court systems, especially the ones in Europe, are civil law jurisdictions which don't have precedential issues. That is they don't care what the town next to them did. And so the subject matter jurisdiction is more for ease of the Court in deciding cases rather than precedential (indiscernible) If you're dealing with one issue all the time, you know the law better.

The down side as I see it and this has to do with the particular way we handle things in the United States is we go on precedent. Truly maybe one in five cases are precedential but they are precedential. And as I see the evolution of the law in the United States, it has great difficulty staying within its cubby hole. For example, you take a patent case (phonetic sp.) and automatically there's a cross claim for an antitrust violation. And the interaction, because of the dynamic large economy, has overflow from one particular cubbyhole into another and, because we're not a civil law jurisdiction, it seems to me that the generalist approach has more benefit to the United States at the national level, that is where we're supposed to be a small court handling a small number of cases.

So my view so far has been that we probably shouldn't go to subject matter jurisdiction. I understand that we did so in the Federal Court of Appeals. I was against that from the beginning. I still am. I think it was wrong, headed by some people that didn't like to do patent law and I think we've

got to overcome that. But I thought about that, Dan, especially because you've written about it but so far I've concluded I don't think it's in the best interest of the United States.

COMMISSIONER: Thank you so much for sharing (indiscernible)

JUDGE WALLACE: You're welcome.

COMMISSIONER: Thanks very much.

COMMISSIONER: Judge Wood.

JUDGE WOOD: Good morning. I'm Harlington Wood from the 7th Circuit. As you know, this Circuit is comprised of three states, Indiana, (indiscernible) Wisconsin. We have 11 active judges here assisted by a number of senior judges, as I am. There's nothing in particular that this Circuit has to complain about. We're satisfied with the number of judges we have. We're satisfied with our service boundaries. As far as we can tell, there may be others in the audience you'll hear from today who have complaints about the subject and suggestions would be welcome, but as far as we can tell, we think we're operating pretty well.

I'm really appearing here to talk a little

about the 9th. You're already heard the very informed comments about the 9th but I was asked to appear by Chief Judge Hoke (phonetic sp.), former Chief Judge, to give just personal perspectives from a judge who has worked and served on the 9th. I've been out there six times since 1993 for about a week at a time. Worked in Seattle, San Francisco and with Judge Rymer down her way. So my brief comments are not a scholarly analysis of the thing or a statistical analysis. They're just personal perception from having been a part of it.

So that's given me a chance to get to know the judges, many of them, not all of them, very well. I'd say that I haven't met a judge on the 9th Circuit yet that I did not like or did not respect in spite of the differences that we had on some of the cases. In that time, I helped dispose of about 184 cases. During this time, I've worked not only on my own Circuit but on seven other Circuits including 6th. I enjoyed that experience, too.

The judges I've found on the 9th are very well prepared for oral argument which make oral

argument a worthwhile exercise and then the conference that follows the oral arguments that are informed and very helpful in reaching a decision in the case. Then when it comes time to distribute a draft, a memo disposition or an opinion, I've found the working relationship very good. You can exchange ideas then, suggestions for improvement, any corrections, things of that sort, back and forth by phone or by fax. I haven't been a part of yet any cases that has not been thoroughly considered.

The residing judge of the panel has always been most helpful to me and with the Circuit's procedure. I can't tell Judge Rymer anything about the 9th Circuit because she's been one who has taught me a great deal about it herself.

I'm of course aware of the controversy about the size of the Circuit but, as a visiting judge out there, I've seen no indication that the size is a handicap. To the contrary, I sense among the judges a certain amount of pride in being on the 9th Circuit and a strong determination to make it work better and better in the future.

The Circuit has had outstanding Circuit Judge leadership, Chief Judge leadership.

COMMISSIONER: You haven't seen that there is any more (indiscernible) Circuit conflict in the 9th than there is in the 7th?

JUDGE WOOD: I really don't. We have plenty of disagreements on this court about cases, but I found that --

COMMISSIONER: I mean by that that a panel sitting will go one way with this panel and then, rather than following the precedent of the prior case, you have a conflict.

JUDGE WOOD: No. I really haven't experienced that, Judge, because I think one of the reasons is they're very careful about it and they keep looking at it right up to the last minute and with our computers and all that modern technology, there's very little chance I think to get into the conflict inside and miss something inside the Circuit. Maybe something comes up the day before but if there isn't, my experience has been you find out about it right away and take another look at the thing.

PROFESSOR MEADOR: Let me ask you this question. I don't know whether you can answer this or not (indiscernible) Do you have any sense in the cases you've sat on (indiscernible) because they're the only two judges on the panel who are not circuit judges, the extent to which in the case before you having a judge sitting who comes from the state in which the case comes from. Do you have a sense of how that happens (indiscernible) say, a case coming out of Montana and you're sitting with two other judges. What's the likelihood that one of these judges would be from Montana?

JUDGE WOOD: I don't suppose it's very high, but there is that chance. I'm not sure right now how many judges are from Montana. But I think there's a feeling among the judges that regardless of where you're from, you're all seeking the same thing. I think the judges regard themselves as American judges, not like clinical precinct committee men.

PROFESSOR MEADOR: I take it it was never a point that occurred to you as you sat there in a lot of cases, there's no judge sitting here from the state

that the case comes from. That's not a point that occurred to you as a matter of observation?

JUDGE WOOD: I think so, but that happens here, too. Sometimes all the judges on our court are from Chicago, Illinois. But I think we try get above the local problem.

COMMISSIONER: One of the political problems (indiscernible) to it is that the perception that as California judges you might have about two-thirds on the bench dominate the Circuit (indiscernible) and that the law is California law whether the state is Montana or Washington or whatever. I have never sat there and I just don't have any personal view about it. That is something that is said, it is a perception that the California judges dominate the Circuit. But you don't necessarily see any downside of that or even maybe that it's a fact?

JUDGE WOOD: I've heard that, too, except you know the California judges on the Court of Appeals, they're all different opinions, persuasions and backgrounds just the same as we are here.

COMMISSIONER: No different than Montana.

JUDGE WOOD: I think there are more similarities than differences and I think by the time you get to the level of the Court of Appeals you're looking above and beyond, like a state does. You're looking at the national scene. I think they (indiscernible) they're on the national scene. They want to do something look at the whole country, not just for one particular state.

PROFESSOR MEADOR: The 7th Circuit is a relatively compact Circuit. There are three states only and definitely a definable region and that is unlike the 9th Circuit. Do you see any differences between the way these two courts function? You've sat on both and they're contrasting Circuit configurations. Do you see any differences at all coming out of that?

JUDGE WOOD: There are differences, but I don't think they're really significant. During World War II I found out how far (indiscernible) was (indiscernible) Alaska, Hawaii a number of times. That difference now is practically nonexistent. Our

modern means of communication, our jets and all that. And here it's about the same thing. The timing is no different in our communicating with ourselves here than in the 7th than it is out there, as far as I can tell. I never experienced those things. Of course, mine was very limited, six times, but I haven't seen it.

COMMISSIONER: In our Circuits there seems to be -- we have (indiscernible) and there is some advantage, we think or I think, to having judges who understand the local procedures. That is, the procedures, civil procedure, criminal procedure, is different in Tennessee from in Michigan and there are quite different institutional (indiscernible) in the state (indiscernible) and the perception, our perception is that there's something valuable in knowing those local conditions. You're suggesting -- and, of course, that would be true in most (indiscernible) here in the 7th Circuit. You want to find out what the real (indiscernible) procedure is and (indiscernible) easily find that out. (indiscernible) That is not something that you saw as

a (indiscernible)

JUDGE WOOD: Well, I think what you say, there's a lot of truth to that but I think that when you're on the Circuit level it doesn't take you long to get familiar with the processes in the other states. You have to, particularly in diversity cases and things of that sort, and we all have at our disposal the laws of the states which California has more than that. I wouldn't see it as any -- I see it as some benefit but I wouldn't see it any reason to split a Circuit in order to cut down. The judges in the bigger Circuit have to strive more to get that bigger picture, but they do.

The 5th Circuit went to (indiscernible) and handled it very nicely but down there, my understanding was that most of the judges favored it and (indiscernible) I was invited to sit with the new Circuit very early on. They looked like they were doing very well with it and they have since. But I don't see the need yet at least to subject the 9th Circuit to some misty operation because of changes in relationships and all the things we've been learning

and working on will be split apart somehow.

You even have a problem with possibly creating two Circuits getting more Circuit conflicts which have to be resolved in Supreme Court where if you had one Circuit, you might be able to work out those things in the Circuit.

JUDGE RYMER: One of the obvious ways in which the 9th Circuit functions quite differently from any other is in the limited inbank (phonetic sp.) process. I know that you have been involved in some cases which have gone through an inbank process without actually serving the court, of course. Do you have any views about how you think the 9th Circuit resolves either its intra-Circuit differences by comparison with the other Circuits in which you've sat?

JUDGE WOOD: Well, I know that...

[END TAPE 1, SIDE A; BEGIN SIDE B]

JUDGE WOOD: ...but I don't see that as any reason for a major overhaul. You know, a District Judge has already looked at the thing. You've got three panel judges on the panel who have looked at it

and then you have a large segment, representative segment, of the rest of the judges who've looked at it. Compared with the rest of the world, that's a lot of judicial review.

COMMISSIONER: This (indiscernible) of course is something that the 9th Circuit could change if it found that it (indiscernible) a less stable system (indiscernible) The 9th Circuit judges, it's not like they use the same panel of judges to (indiscernible)

JUDGE WOOD: That's different than ours. It might vary more than ours. I don't know. But it looks to me like the judges with the proper view of their position striving to get above this (indiscernible) concerns come out about the same way.

COMMISSIONER: May I go back and pick up a point that (indiscernible) about the old 4th Circuit problem that was (indiscernible) You indicated that seems to be working all right. What is the distinction in your mind or the (indiscernible) distinction between the old 5th Circuit problem and the current 9th Circuit problem? That is to say, you

have a large (indiscernible) You say it seems to be working well. You've now got a large 9th Circuit. What is the problem (indiscernible)

JUDGE WOOD: Well, I think one of the reasons, as I understand it -- I haven't made any study of it -- was that the judges down there all favored it. I understand that would help --

COMMISSIONER: (indiscernible) The question is why did it work well then and not work well in the 9th Circuit? (indiscernible)

JUDGE WOOD: It might work in the 9th Circuit. I don't know. I just don't see the need for it and I think there was general support for it. The circumstances were different. At the 9th you do have different population. Southern California is different. And different pursuits and different ideas and all that. But that's really a part of the change in America and I think a mixture of those things is good for everybody.

COMMISSIONER: We don't know how the 5th Circuit would have worked.

JUDGE WOOD: If it had been left intact?

Yes. I don't have any idea. I've been down there and it seems to both parts are working well. But it also seems the 9th is working well. They treat me when I go out there just like I was a member of the court and I've found no trouble in communicating from Illinois with them any different than if I'd been in San Francisco. And there have been, I've found, very collegial working relationships among the judges.

COMMISSIONER: In reading the legislative history and press accounts of why this Commission exists, the main reason is the 9th Circuit problem and the desire of the House to defer a decision on that question and to create (indiscernible) If the Commission, although it may recommend not splitting the 9th Circuit, if we have to address the question of even if that is not accepted and (indiscernible) what kind of split should occur? That means that the question really is (indiscernible) like to split a state (indiscernible)

JUDGE WOOD: I'm sorry I couldn't hear all that.

COMMISSIONER: If we're going to split,

that's the next question, if the 9th Circuit was going to be split, would you split California?

JUDGE WOOD: Well, I'm fairly well acquainted with California. I was stationed there for a little while during the war as Deputy Chief of Staff with the (indiscernible) getting ready for station in Japan. It just seems like one fine unit to me, even though there are differences. I think it's very difficult, as I heard Chief Judge Wallace say, former Chief Judge, about the relationship between part of California. I don't know really how you would split it unless you're going to just separate north and south. I heard somebody say split it down the middle. I don't see how that would solve anything. I'm not solving. The Commission has to make these decisions. But I just wanted to give you the feelings of a judge who --

COMMISSIONER: You're been very helpful.

JUDGE WOOD: Well, I don't know if I've been helpful but it may be a different perspective. Judge Rymer said she was going to cross examine me.

JUDGE RYMER: Thanks very much.

JUDGE WOOD: Let me say that Thomas Fitzpatrick is here, our Circuit Executive who's on the agenda later this afternoon who knows more about this Circuit than anybody and he can answer questions.

COMMISSIONER: (indiscernible) his views.

JUDGE WOOD: Beg your pardon?

COMMISSIONER: We'll get the benefit of his views.

JUDGE WOOD: We think he's one of the best Circuit Executives in the country. Thank you all very much.

COMMISSIONER: Thank you so much, Judge Wood.

The next person is Thomas R. Meites on behalf of the Chicago Council of Lawyers.

MR. MEITES: We appreciate the chance to appear before you. As practicing lawyers, we have a different agenda and a different perspective than the judges do. We have no views on the 9th Circuit. We're here and we like it here and we're staying here. But I think we have something to contribute because as we read the Chief Justice's charge to this Commission,

we understood it also to ask for comments on what is working in the Court of Appeals and maybe what's not working as well. That's the side of the ledger we're on.

The Council is a public interest bar association established in 1969 here in Chicago with 1,200 members and over the years we've devoted a lot of our efforts towards evaluating courts, both state and federal. We evaluated the District Court, Northern District of Illinois on three occasions and in 1994 we published an evaluation of 7th Circuit.

In our work we try to look at courts from the point of view of our point of view which is active litigators and we try to treat the courts as another arm of government, even though lawyers have trouble doing that.

JUDGE RYMER: Unfortunately, I haven't had a chance to read your evaluation. Can you just in a -- not the results, that's not interesting to me at the moment, but what were the criteria that you used?

MR. MEITES: There are two parts to the report. One part was to look at the individual judges

and in a way it's kind of like the students grading the professor after a course. There's a lot of comments that came in to lawyers that we looked at and some was people didn't like the --

JUDGE RYMER: Again, apart from individuals, some of whom can be wonderful and some of whom can not be, but the system.

MR. MEITES: Okay.

JUDGE RYMER: What criteria did you use to evaluate the system of the Court of Appeals as a whole?

MR. MEITES: That's the more interesting part of it for this morning. We looked at the procedures of the Court. We looked at oral argument. We looked at assignment of panel opinions. We looked at page limitations. We looked at conduct of oral argument. We looked at nuts and bolts issues that we know about. We don't know anything about how cases are conferenced. We don't know anything about how decisions are written. But we do know the public face of the court. And like every court, the 7th Circuit had procedures that we didn't like and we brought them

to the Court's attention.

For example, we felt the court was too hard on page limitations. That matters to lawyers, matters to courts. The public doesn't understand it. We're the only ones who --

JUDGE RYMER: It matters to the judges who have to read it, too.

MR. MEITES: But we're the only people who can raise that. The problem we had -- not problem -- is that there's no feedback. We know that. The Court is not going to ever tell us, and they probably shouldn't, that we thought your survey was great, that we were too hard on Smith, not hard enough on Jones. We have to assume that it was worth the effort and that's kind of an act of faith.

Our first recommendation is, based on our experience, no other bar association does this and it's a tremendous amount of work for us. In the four years since we did our appraisal of the 7th Circuit, there's been no evaluations done of any other Circuit and there was never one before ours. So our first recommendation is that this evaluation function be

institutionalized. The Courts have a wonderful resource in the Federal Judicial Center. They are very, very talented people. We know that from the surveys are public.

JUDGE RYMER: The key thing, of course, is to that what you do is you do it. To some degree, that's exactly what the Commission is about which is evaluating whether the present structure can be improved or changed to meet changing circumstances. What would you, as somebody who's done a lot of this, suggest that we look at?

MR. MEITES: There are two parts. There's the numbers part. How long do courts take to reach decisions? How many cases never reach a decision on the merits? What kind of delays between oral argument and final decision? What kind of cases are denied for this full disposition? Is there some bias in the Circuit against Social Security appeals or employment cases or whatever. It's not biased since the court goes out of its way to avoid areas of cases on the merits, but that's what's happening.

One thing we believe is true about courts

is they have no capacity to do self-analysis. It's not their job. They don't have the resources, they don't have the people. What we would recommend is that for each Circuit there be a periodic self-evaluation with input from the local bar because the court can only see itself. It can't see how others see it. I'm not so --

COMMISSIONER: Could I (indiscernible) that Congress did set up a system specifically for that purpose and maybe it doesn't work. It doesn't work in some Circuits and works in others. That is the system of judicial conferences. Most of the Circuits now have judicial conferences once a year or once every two years and invite lawyers generally, not just selective ones. And the purpose of those conferences is to evaluate the conditions of justice in the courts within the Circuit. So that exists. You're saying in the 7th Circuit it does not work that way.

MR. MEITES: Oh, no. No. I think the 7th Circuit's judicial conference is typical of the judicial conferences. I'm looking for a more

systematic review, not three days twice a year, but some kind of both a quantitative analysis and also some kind of a formal questioning process. There are all kinds of excellent survey techniques that are commonly used to evaluate the performance of all kinds of organizations including governmental organizations and it hasn't occurred to us why the courts should use these tools when other both corporate and government agencies do use them.

I'm not talking about telephone surveys. I'm talking about something that the Federal Judicial Center designs with care for the court's use. But I think that there's no real basis to believe that informal kind of talks are going to make the difference. We found in our work where we interviewed hundreds of lawyers that unless you get a broad cross section of the bar a lot of people don't come to judicial conferences. A lot of practicing lawyers, you know, lawyers self select themselves for that. Unless you reach out to those people, you're not going to get even the whole picture but even two-thirds of the picture.

COMMISSIONER: Could you give me an example other than personal of the evaluation of judges personally which I don't think is part of our charge here, the kind -- particular criticism that you think you have with 7th Circuit since that's the one you have looked at that is subject to change if the judges fully considered your recommendation.

MR. MEITES: Let me give you a very practical one. Several occasions judges on the 7th Circuit in the last X years have asked lawyers their views on cases that are not cited in either side's brief. Presumably the judge preparing comes across with a case in the judge's mind. That puts the lawyer in a terrible position. Put aside being embarrassed. That's what lawyers get paid for. But really it is not going to help the court at all and may in fact lead to lawyers making an unfortunate concession. One thing we suggested in our survey is if the court finds this kind of case that a simple phone call the day before the oral argument from the clerk's office to at least let the lawyers read that.

That's a very simple concrete issue that

can be solved if the court were aware that it's a problem. The court is not trying to embarrass anyone. It just doesn't occur to them. And you're not going to get that kind of feedback unless there's some --

COMMISSIONER: It does occur with some frequency in Courts of Appeal that if a judge finds a case uncited or recently decided (indiscernible) may control the outcome of the case, that you are asked to come to court prepared to discuss that. That's what you're saying.

MR. MEITES: The court should do that if it's going to ask the lawyers questions about it. That's the kind of nuts and bolts issue that courts aren't going to know about unless they reach out to find out how it really works on the other side.

PROFESSOR MEADOR: (indiscernible) that's a fairly particularized (indiscernible) Out of your evaluations though can you tell me out of that any suggestions to this Commission as to ideas or proposals it might consider for the system as a whole? Did you run across some malfunctions or some problems that you think the Commission ought to look at in

terms of the federal system as a whole?

MR. MEITES: I think that from our point of view the largest problem that we have as lawyers is we take too many appeals and the largest problem that the Courts of Appeals has is too many appeals are taken. And the systematic or the endemic question is is there any way to solve that problem? And our other recommendations go to that. Lawyers don't want to take appeals they're going to lose. I guarantee that absolutely true. How can lawyers get a better idea of which appeals have a chance of winning? And the rest of our recommendations go to just that.

I brought with me a publication of the Administrative Office of the Court, their annual statistical tables.

PROFESSOR MEADOR: Well, does that have anything to do with the constitution of the panel. If you know who the panel is or if it is a relatively small court and there is a clear law about that in the Circuit, then you would be assisting in making the decision about whether to appeal or not. In other words, if the law of the Circuit is somewhat instable

(phonetic sp.) for whatever reasons, you're more likely to appeal than if the law of the Circuit is fairly stable and well known. Right?

MR. MEITES: That is right in, I suppose, a theoretical sense but lawyers are optimists by nature and they believe that they can distinguish their case. Not always. But maybe too often. What we don't know is there's no quantification of what the success rate in a particular kind of case is. The figures published by the Administrative Office simply list outcome by case type all civil appeals, all government appeals. That doesn't help us at all in making predictions about how this Circuit feels about insurance companies appealing in diversity cases.

COMMISSIONER: Judge (indiscernible) I guess the most comprehensive book recently about the Court of Appeals. He makes the point that appeals have arisen because of the instability of Circuit law rising from more judges, intra-Circuit conflicts and different nuances in cases that tends to be the result of too much law and that this produces appeals that wouldn't otherwise occur.

MR. MEITES: Well, that's a view of what motivates lawyers and clients which I just don't think is right. From the other side of the trenches, I think it's quite different (indiscernible) than that. We don't know the judge we're going to get obviously when we file an appeal and there's no Circuit that's so small that you have any realistic method of guessing your panel.

COMMISSIONER: Would it be helpful if you did?

MR. MEITES: No. I think that's a terrible idea because we all believe that there's a wide diversity of judges on the Courts of Appeals. You've got some judges you know you're going to lose. You've got some you know you're going to win. But part of the process I think is keeping it random until you arrive or shortly before argument.

What would help us though is knowing what is this Circuit's experience in this class of cases. I'll tell you, in the 7th Circuit insurance companies that are Appellants in diversity cases lose. They just do. Maybe they should, maybe they shouldn't.

But I don't think they know that because there is no published statistics by the Administrative Office by category of case and identity of Appellant, Plaintiff or Defendant.

If you want to cut down the number of appeals that have small chances, it seems to me, assuming Chief Judge Posner's rational universe of lawyers, then you've give them more information. But the courts don't provide that information. They just don't tell us that. Now I think I know why they --

COMMISSIONER: -- statistical studies about (indiscernible)

MR. MEITES: Right. The only thing we get is how many reversals are there all civil cases. That doesn't tell us anything. What I would want to know if I were an insurance company in a diversity, I lost the trial. Should I appeal? It's going to cost me X dollars. What's the success rate for insurance companies, Defendants and Appellants, in insurance cases? If I knew that, I could make a rational decision about what my chances were in this case. There's no published numbers on that. The

Administrative Office has all of those figures. They don't publish them. Seems to me if you all want to--

COMMISSIONER: I don't know if they do have that particular figures. They have a lot of figures that they publish each year about cases, but I don't think that outcomes for particular classifications (indiscernible)

MR. MEITES: No, they don't publish that. And I'm not talking about that particular figure. What I'm suggesting to you, if the volume of appeals is to be controlled or alleviated at all, then more information is a device that may lead to that.

PROFESSOR MEADOR: Do you think it makes any difference whether the Circuit is a relatively small Circuit like the 7th or the 1st and has a relatively small number of states within it or is a large Circuit that is designated particular unity within and among the states in the Circuit.

MR. MEITES: I think it matters in one sense. If there's a number of states, you're likely to get more diverse backgrounds among the judges. That's a fact. That's a political decision --

COMMISSIONER: Is that good or bad or neither?

MR. MEITES: We take the judges we're dealt. It's hard to ask a lawyer if they'd like different judges because we don't -- I don't have views. But there's another advantage to that kind of diversity, is that from a lawyer's point of view you would expect that a diverse group would have more opinions to discuss rather than coming from a similar background.

Another problem we complained about in our survey in the 7th Circuit specifically is we felt that the Court in assigning opinions to a particular judge (indiscernible) panel was assigned on the basis of perceived expertise. If one judge knew a lot about securities law, he or she would get the securities opinion. We criticized that because we didn't think there should be a judge deciding all the securities cases in a Circuit. To the extent there's a larger Circuit, you avoid that problem. So that is an advantage of a larger Circuit.

PROFESSOR MEADOR: Why do you say that

having a (indiscernible) of decision makers, that is a lawyer who knows that in this particular case if I take an appeal, I'm going to get Judges A, B, and C, as distinguished from not knowing what judges you'll get. Why do you say that would not affect the lawyer's decision as to whether to take an appeal?

MS. HARRIS: It would if I knew it would be A, B, and C but there's no Circuit so small that I can meaningfully make that prediction.

PROFESSOR MEADOR: No, but I mean suppose they are arranged that way. I know it doesn't exist now. But suppose you had a known body of judges who were going to decide your case. Would that make a difference?

MR. MEITES: Our state court system -- I can answer that from experience. Our state appellate system in Cook County, which is where we are, has I think six districts or divisions and there's four judges or sometimes five in each division. You're assigned a division the day you file your notice of appeal. So it is your system. You actually know the panel that you're going to get. There's no indication

that that either increases or decreases the number of appeals.

PROFESSOR MEADOR: I understood that is only after you take the appeal. Is that correct?

MR. MEITES: It's the day after you take the appeal. You've invested nothing in the appeal.

PROFESSOR MEADOR: (indiscernible)

MR. MEITES: For free.

PROFESSOR MEADOR: But you don't think on knowing who the judges are going to be affects whether the appeal is dropped.

MR. MEITES: Not using the state court example. It may be discouraging to proceed but you go ahead.

PROFESSOR MEADOR: You as a lawyer, why does that not make any difference knowing who the judges are?

MR. MEITES: I think there are a couple of reasons. One is that (indiscernible) litigators added to -- you play the hand you're dealt. No matter who the judge is, you have to go in the courtroom believing that if you present your case adequately,

you'll at least get a fair hearing.

PROFESSOR MEADOR: You have a hope.

MR. MEITES: That's right.

PROFESSOR MEADOR: You're going to make a (indiscernible)

MR. MEITES: That's right. That's our job. So if you're going to believe that because you got a judge who's adverse to your position you should stay home, you shouldn't be doing this job because at least half the time that's what's going to happen, particularly in a district court where we practice extensively. You know from day one the judge you got and some judges are just not going to like your kind of case. Well, you don't go home.

PROFESSOR MEADOR: But isn't it part of a lawyer's job in the sense they take an appeal whether than cause the client to invest a lot more money, isn't part of that the sense, the likelihood or unlikelihood of success and if you know the decision, doesn't that help you make that appraisal?

MR. MEITES: Yes, it would. I think that in the practical manner there are ways that are

effective which I'm arguing for. In any appellate court that's large enough to have numerous decision makers, published numbers of outcomes, and you can get a pretty good idea overall what your chances are.

COMMISSIONER: But that large investment of money is with you. Then that is a counter (indiscernible) I mean by that on one hand you may think not much chance of -- it's an uphill battle here. But it's worth (indiscernible) and that is influenced by the fee system which provides the lawyer with an incentive for taking a shot.

MR. MEITES: Well, yes. You have to divide the fee issue in, too. There's contingent cases where the lawyer is investing his or her own capital.

COMMISSIONER: I'm asking that question, should there be some thought given to changing the incentive system of fees?

MR. MEITES: Well, the Council has a clear and consistent position on that. The answer is no. Any systems which taxes the right to appeal with a (indiscernible) is inevitably going to discourage

large classes of litigants and large classes of cases from getting an appellate review. We all have the English system where there's fee shifting at the trial courts which has stifled, what we understand, large areas of law. We do not have any kind of appellant fee shifting in the United States and we shouldn't.

COMMISSIONER: Do you handle criminal cases?

MR. MEITES: No, I do not.

COMMISSIONER: Do people in your group?

MR. MEITES: Yes.

COMMISSIONER: You know, we've had tremendous increase in the number of criminal cases since '86 with passage of the Simpson law about three- or four-fold. (indiscernible) I really don't know exactly what the change (indiscernible) That's become a serious problem (indiscernible) because (indiscernible) person goes to jail (indiscernible) Do you have any thoughts about how that system might be changed (indiscernible)

MR. MEITES: Well, I think the Council has

taken and does take the position that the present sentencing system is perverse. It mis-allocates responsibilities and deprives District Court judges of flexibility they need and forces placing a tremendous burden on the Appellate Courts. You've nothing to lose to take a criminal case. It's an absolute given. And on almost every case your appeal will be paid for by someone else, usually the United States, and you'll lose. Something like nine out of 10 criminal appeals are unsuccessful in this Circuit and elsewhere.

That's a crazy system where you're putting all this material through the system knowing that it's going to make very little difference.

COMMISSIONER: How can we change that?

MR. MEITES: Well, I think you have to go back to sentencing. That is what's driving the train.

PROFESSOR MEADOR: This was true before the (indiscernible) came in though, wasn't it? It didn't add any appeals. Not only sentence but I mean the fact that the criminal appeal has nothing to lose. (indiscernible) mid-'60s.

MR. MEITES: If you ratchet back, the

reason that people appeal is because they don't plead guilty. The reason they don't plead guilty is because of a number of factors. 1) they're over-charged because the U.S. attorney controls the charging decision. 2) the sentences are mandatory so that there's no real discretion as the District Court can't impose a sentence that the person would accept.

So you get extremely high sentences that the District Court can't alleviate leaving no choice but to appeal. It's a Congressional choice whether to keep the system going and one of the unfortunate effects is it burdens the Courts of Appeal. Presumably Congress thinks it's worth the cost. By creating this Commission, perhaps there's a chance for you all to tell Congress that there is a real cost --

COMMISSIONER: Congress has the view that absence (indiscernible) There is a diversity of views on the District Court. One judge will give a person probation, another will give him 10 years, and absent a process of enforcing sentencing guidelines through appeal, you're going to get this very diverse sentencing. That's the reason.

MR. MEITES: Well, this district, the Northern District of Illinois, has a Sentencing Council. Now, not everyone belonged and it wasn't mandatory. But as I understand it, many judges would get together and informally discuss sentencing, sentencing practices. That didn't mean that the outliers didn't exist. But if you focus on the outliers -- I'm afraid Congress too often does focus on the unfortunate exception -- then you're going to create a whole system for one out of 10 or one out of 100, and that's what I think we have in the sentencing problem.

We had a couple of judges who were lenient, a couple who were severe. The other eight or 10 or 12 were kind of ordinary. Now they're all severe because that's what the system says you have to be. I don't know how you've gone from having two judges who were too lenient to 12 or 20 judges that now have to be very severe. It doesn't seem to be proportionate to the problem. And if you could reel that back and give discretion back to the District Courts so that they could impose reasonable sentences,

people would plead guilty for reasonable sentences, there would be less criminal appeals. But you've got to put the Genie back in the bottle.

PROFESSOR MEADOR: Let me ask a question on that point. Is your group concerned in any way or concerned about the internal decisional precesses on the Court of Appeals, that is to say the number of cases that don't get oral argument but go through some sort of fast track. Have you looked at that and do you have a position on that?

MR. MEITES: We did. Our fourth recommendation actually addresses that problem. The 7th Circuit does much less of that than some other Circuits. In our testimony we commend the Court for doing that.

COMMISSIONER: More oral argument.

MR. MEITES: More oral argument. We get oral argument in virtually all our cases. It's kind of a mystery to us. If the judges here could do it, they're no more more moral or less moral than the judges in the rest country. Why can't it be done elsewhere? We'll leave that to you because there are

vast disparities in oral argument practices among the Circuits and I can't imagine why that's necessary because if you look at appeals per judge, they are not explained by the disparity of oral argument. There is disparity but the 7th Circuit has an average to above average case load, yet we handle oral argument.

What I'm concerned about is the other side. What cases don't get full consideration? I don't know but I know no one else knows either. There is no systematic tracing of what kinds of cases and who are the appellants in the cases that are summarily disposed of. Just isn't. No one knows. It's not reported in any of the statistics and I'm concerned and the Council is concerned that in some Circuits in some category of cases unconsciously --

COMMISSIONER: I don't really understand that. Maybe we'd better be (indiscernible) In our Circuit the judges of the Court of Appeals are invited frequently to bar associations, to CLE programs, etcetera, and ask questions about how the process works and very specific questions about how the process works and most (indiscernible) judges give

very polite answers to that and the lawyers who are interested can find out precisely how in cases any particular system works. I don't understand why you can't do that.

MR. MEITES: Yes, we do understand the mechanics. Both in this Circuit and I'm sure elsewhere there's candor on how the cases are selected for summary distribution. I think we understand that. I'm making a different point. The point I'm making is I don't know in any kind of systematic way what kind of cases are selected out of the system. In the 7th Circuit are 80 percent of the employment cases taken? I don't know.

COMMISSIONER: What do you mean are selected?

MR. MEITES: Well, cases that don't receive oral argument. Cases that are decided per (indiscernible) like are all Social Security appeals disposed over 90 percent that way?

COMMISSIONER: Why don't you ask the judges?

MR. MEITES: I don't think they know.

Unless there's some record keeping mechanism. In the 6th Circuit does someone count whether --

COMMISSIONER: I can tell you precisely how it works in the 6th Circuit.

MR. MEITES: It's the other question. Does the 6th Circuit know of all the cases that are summarily disposed?

COMMISSIONER: Summarily disposed (indiscernible)

MR. MEITES: Correct. Is there any kind of record keeping so you know that 90 percent are one kind of cases or 80 percent are cases where --

COMMISSIONER: Yes. But in the 6th Circuit we have oral argument in every case. We have one lawyer (indiscernible) both sides submit the case on briefs. Occasionally we say well, we want the case argued anyway but not usually.

MR. MEITES: Our concern is perhaps the other Circuits where less than half the cases appear to have oral argument.

Well, thank you very much for a chance to address the Commission.

COMMISSIONER: All right. Thank you so much.

The next witness here is Peter Jon Simpson on behalf of the Christian Legal Education Association & Research.

MR. SIMPSON: Good morning. Welcome to Chicago. I am Peter Jon Simpson, an American with firsthand knowledge of the federal judiciary today.

Restructuring the Appellate Courts in the United States involves three questions. #1, what does a non-lawyer litigant in America have to do to get his case read by a judge who understands laws and a Constitutional question placed before him? 2, what does a non-lawyer litigant in America have to do to get his appeal placed before a panel of judges who will: A) read it and B) understand the law and the Constitutional question or questions placed before them? Lastly, what do Americans have to do to experience good old-fashioned legal performance.

History notes in 1066 William the Conqueror landed in England, burned his ships behind him and lost half of his army in the first battle. He

conquered England anyway. Why? Because as the retreating English king sent for the people to come to the defense of the king and the father land, the people refused his call. Why? They ignored the invasion of their own country because corrupt federal judges of their day had reduced them to slaves on the land.

There were two sets of rules, one for the king's cronies, another for the people. The people, facing a legal system that worked solely for the benefit of the privileged elite, stood by as the invaders marched. Do you know why many today would not lift a finger if an enemy came to these shores and threatened you members of this panel, your cronies, and the silk stocking lawyers and judges that sit behind me in this room? Do you know why many would pray for the success of the invaders? Do you know why many disenfranchised Americans would actually help the invaders hoping for a better deal from our enemy than the deal they've received from the corrupt and reprehensible reprobates who parade as federal judges today?

COMMISSIONER: How long is your statement?

MR. SIMPSON: I'll be not much longer, sir.

COMMISSIONER: Could you suggest what might be done about the situation?

MR. SIMPSON: As you will shortly see, sir. In the legislative history of Judicial Improvements Act of 1990, Senator Joseph Beyden (phonetic sp.) remarked, quote, "The courthouse door is closed to the American people." Believe me, it is now permanently welded shut. I am the living embodiment of that. Can any of you explain why today non-lawyers like me who study and raise Constitutional questions in federal courts are laughed at, ignored or worse?

Gilgor (phonetic sp.) wrote in Judicial Tyranny, quote, "Tyranny can not come to America until judges become intellectually dishonest." End quote. In 1991 my daughter was removed from my home at gunpoint without any court process whatsoever as required by state law. She was then assaulted and

sexually molested by government bureaucrats and their agents. Ignoring the direct warning of the United States Supreme Court, I entered the judicial meat grinder in America and foolishly appealed to justice by filing a federal civil rights lawsuit. This action was summarily dismissed after 58 docket entries in 60 days. I have waited over seven years for my Constitutionally guaranteed day in court. I am still waiting.

Can any of you explain to me how I get my $120 filing fee back? I paid for trial by impartial jury, not summary dismissal. I drew Federal Judge Scott Allright (phonetic sp.) known in Missouri as Scott Allwrong, the District's Chief Judge. He has risen to his level of incompetence. Scott Allwrong is as intellectually dishonest as the worst of despots. Can any of you learned judges explain to me why Judge Wrong has done absolutely everything in his power to prevent me from bringing those who molested my daughter to trial? Absolutely everything.

Can any of you learned judges explain to me why the federal prosecutors laugh in my face when

I ask for a grand jury investigation of the crimes visited on my then innocent three year old daughter? And please save your suggestions about hiring a lawyer. For someone who knows less than I do about our caste system, legal system. Can any of your learned judges explain to me why no lawyer, not one, would lift a finger to help me? They all told my father as he waved his checkbook in their face, We wouldn't touch this case with a 10' pole.

Judge Rymer, can you explain to me how I get my daughter's innocence back? Can you tell me, please, how I can stop the nightmares from waking her? Can you tell me how I can make her not flinch whenever she sees a cop?

My first go at the 8th Circuit Court of Appeals won a summary reversal. Since then, the 8th Circuit's judges have gone out of their way to deny me relief unless and until I surrender my daughter to the very bureaucrats who assaulted and molested her in 1991. Can any of you learned judges explain this to me? This panel has already learned first hand in lie (phonetic sp.) that in the 11th Circuit's Court of

Appeals no pro se petition ever reaches a judge's desk. The opinions are decided and written by clerks or staff lawyers.

From my experience, the same is true in every Appellate Circuits. Can any of you learned judges explain to me why? Is this what we the people pay federal judges over $100,000 a year plus perks to do? Is this what passes for intellectual honesty in the federal Appellate Courts these days? Can any of you judges explain this to me?

An eyewitness to this Commission's Atlanta March 23rd hearing wrote me, quote. "Pete, you did a fine job during the Commission hearing. I sat in the back and observed senior Judge Hatchet (phonetic sp.) who sat in the back midsection. He started freaking out, looking at the U.S. Marshall, not once or twice but six times. When Peggy mentioned the thousands of 732 complaints for judicial misconduct that had been filed, he got up and left and called in extra U.S. Marshals. I joke not. By the time the extra Marshals had arrived, the meeting had adjourned. The wicked flee when none pursue. The righteous are bold as

lambs."

Can any of you learned judges explain to me why this distinguished panel does not possess the integrity to place a true and exact copy of Peggy David's (phonetic sp.) complete remarks from that hearing on its website? Will my remarks to you today appear on your website? Is this panel aware of the revelations regarding seven United States Supreme Court Justices receiving expensive trips and cash honoraria from West Publishing Company while West litigated in actions before that Supreme Court? I have seen nothing from N. Lee Cooper, Esquire and his private country club American Bar Association about such conduct. Conduct that would make the most depraved South American dictator blush.

Judge Rymer, can you explain this to me? Is Mr. Cooper too busy? *The Minneapolis Star Tribune and American Spectator Magazine* had the integrity at the time to publish the facts. Did Mr. Cooper miss those reports because they're so hard to read through the cigar smoke in the back rooms where most cases are decided and the fix is arranged?

JUDGE MERRITT: Mr. Simpson, you're reading your statement that you have submitted to us and you're now about halfway through.

MR. SIMPSON: Sir, no. Sir, you allowed--

JUDGE MERRITT: Do you want to read the whole statement to us?

MR. SIMPSON: Well, I would certainly like to read the next section which speaks directly on the federal Courts of Appeal and how they operate.

JUDGE MERRITT: If you would --

MR. SIMPSON: I notice, sir, that you --

JUDGE MERRITT: -- We have this statement and it'll be made a part of the record. If you would like for it to be on the website, I'm sure we can put it on the website. But we have it here before us, so why don't you --

MR. SIMPSON: Mr. Merritt --

JUDGE MERRITT: -- summarize whatever it is that --

MR. SIMPSON: Mr. Merritt, you allowed licensed members of the bar extra time. Will you deny we the people --

JUDGE MERRITT: I'm going to hold you to your time allotted.

PROFESSOR MEADOR: Mr. Simpson, I had understood when we got the request, when you put in a request to appear, that you requested three minutes. Is that correct?

MR. SIMPSON: Yes, sir. And I apologize for running long.

PROFESSOR MEADOR: We scheduled the morning based on that assumption. I can understand why you want to take more than three minutes but --

MR. SIMPSON: Well then, may I be allowed just two or three more and I will take my leave of you.

JUDGE MERRITT: Why don't we conclude with whatever you have to tell us at five minutes until 11. That will give you four or five more minutes.

MR. SIMPSON: I will count on you, sir, to keep the time.

Here's what we face in the Appellate Courts today. The 8th Circuit Judge is Richard Arnold. He sits on that panel alongside his brother

Morris Arnold in willful and premeditated violation of the very oath they both swore to uphold. The anti-nepotism statute at 28 United States Code 458. The 8th Circuit Court of Appeals lies to Congress, they falsify the number of complaints filed against these corrupt judges, and they respond that this is a problem for the legislature.

In our caste system legal system, like in England's in 1066, there are two sets of rules. One set of rules for me and another set of rules for the privileged elite like Richard and Morris Arnold and the lawyers and judges crowded into this hearing room this morning. Can any of you explain to me why our magnificent system of constitutional government has degenerated into the nightmare that I have lived for the last seven years? Can you tell me the last time a federal judge was impeached for trampling the rights of an American?

Let me repeat this for clarity and emphasis. Richard and Morris Arnold sit in willful premeditated violation of the very law they swore to uphold. Of course, regular folks like me know that

the 745 federal judges in America can't be bothered with petty annoyances like having to obey statutes passed by Congress. Those are for peasants like me and my family and millions of other Americans, not the modern Mandrin ruling elite like the Arnolds and their privileged friends.

Do you wonder why lawyers and judges are held in such contempt and derision by the American people today? Do you really ponder why respect for the law and for the judges who are to impartially administer that law has vanished with nary a trace? May I brazenly suggest to you that you might consider waking up and smelling the coffee. If you recall, violation of the judge's oath of office is grounds for impeachment. Hide and Hatch have been told by hundreds and hundreds and hundreds of Americans of the situation regarding the Arnold Brothers in St. Louis at the 8th Circus. They laugh in our faces or worse.

Now I want you to understand that I believe Richard Arnold and his brother belong on the bench. They belong on the bench awaiting their turn to use the telephone in the maximum security wing of

the federal penitentiary at Marion, Illinois where they ought to be for suborning perjury, fraud and obstruction of justice. You see, after 23 hours in lock down, you only get one hour out to use the phone and you have to wait your turn on the bench.

Of course, we all know if the Arnold Brothers fraud is exposed and they're removed, they'll keep their fat pensions and their freedoms, remaining members in good standing of the American Bar Association. If Mr. Cooper was here, perhaps he could explain to us how the corrupt do always seem to find a way to protect their own. When we are powerless to rectify situations like this, we create jokes. You know what you call a lawyer with an I.Q. of 61? Federal judge. You know what you call a lawyer with an I.Q. of 41? Federal Appellate Court Judge.

The federal judge's oath of office at 28 United States Code 453A comes to us from ancient precedence. It is found in the sacred thet at Deuteronomy 1, 16, 17 and Leviticus 19, 15. And Congress in 1983 codified our national need to study and apply the teachings of the Holy Scriptures in our

everyday life. Today in the hands of judges like Ron and the Arnold Brothers, the judicial oath is a cruel joke made on the very people whose taxes pay the six figure salaries of these politically connected ambulance chasers. Can any of you justify this to me?

Sheriffs having eyes to see --

COMMISSIONER: It's five minutes 'til. Your time is up and the court will stand in recess temporarily. Thank you.

[END TAPE 1, SIDE B; BEGIN TAPE 2, SIDE A]

COMMISSIONER: ...couple of apologies (indiscernible)

COMMISSIONER: Mr. William Richmam, Professor of Law, University of Toledo and currently a visiting professor at the University of Michigan Law School. We're happy to have you here.

PROFESSOR RICHMAN: Thank you for inviting me. It's a great honor. It's also sort of a little bit of a reunion. I know most or many of you by telephone, but having met personally, this is a probably lonely scholarly field that we labor in here. Relatively few are interested in the workings of

federal appellate courts.

I wanted to start out with an apology for my remarks being a tad incendiary perhaps. I gather now that that's not for me to -- since the ground is already burned over. I'll start also with a family story. I have a 21 year old daughter and a 15 year old son and my wife and I play with them a game of what was it like when you were young? And it's very difficult for children to place their parents chronologically. They know that you aren't dinosaur friends and associates but they do sometimes ask crazy questions. They did when they were young about whether there were airplanes and whether there were automobiles when we were young.

So what we did was we finally began telling them what some things were like when we were young. There were no VCRs, for instance. We had three channels on the television. The phones had dials on them and then we tell the crunch line. We tell them when we were kids sometimes a kid would want something and not get it. That blows them away.

If I were to have the same discussion with

my professional children, my students, and they asked me what things were like when I was young, I would be able to say that when I first entered the profession and I'm not feeling very old but within my professional life time amazing change has occurred in the United States Courts of Appeals. For the first 70 years of their existence, they operated as common law courts have operated for generations, accountably, personally, they heard oral arguments in nearly every case, issued a reason, published precedential opinion in nearly every case and basically did their own work. They had for most of that tradition no or one law clerk.

Today, this is the traditional model in the article. We learn it the learning hand (phonetic sp.) model. Today, that routine no longer exists. We now have a set of appellate expediting mechanisms including limited oral arguments, unpublished opinions, unprecedential opinions, and a cadre of parajudicial personnel including law clerks who've trebled in the last what, 30, 35 years and central staff that now outnumber judges in many circuits.

Today, fewer than half of the Circuit Courts hear our oral argument in at least half of the cases they decide. Published precedential terminations account for less than a third of merits terminations. Some who have investigated this believe that the Circuit Courts have turned themselves into de facto (indiscernible) courts if you compare a non-argued, minimally conferenced or wholesale conference where 40, 50, 60 cases are discussed at a time. If you will compare a case where there's no argument, a wholesale conference, no written opinion besides a firm see local Rule 21 or a one sentence affirmance that is unprecedential and unpublished. If you compare that to a Supreme Court denial of certiorari (phonetic sp.) they're functionally equivalent. The United States code of course says that the Circuit Judges must give an appeal in writing, decide every case on the merits but if you wash that in the cynical acid of the realist, what you come up with is a process that looks very much like a denial of certiorari. This is what we call the new certiorari.

There are additional results of the last

30 years worth of appellate reforms. The quality of the Court's work has diminished. This is most obvious with opinions. My partner, Bill Reynolds, and I did a survey 15 years ago in *The University of Chicago Law Review* where we looked at about 1,000 published opinions and a very disappointing number failed to meet the most minimal standard of could you tell from the opinion what happened in the case and why the Court decided the way it did? That was a standard that we thought could have been met easily by 150 words of opinion. Many, many failed that test.

The diminished quality is also apparent in the appearance of justice. A litigant who gets no oral argument, not merely pro se litigants but represented litigants who get no oral argument, knows that there is a huge active central staff. That's the very little assurance that the judges have decided her case rather than the staff.

Further, the impact is disparate by class.

COMMISSIONER: You are a lawyer (indiscernible) oral argument is provided to any lawyer who wants oral argument. I think that may be

true in the 7th Circuit. It's certainly true in the 2nd.

PROFESSOR RICHMAN: Yes.

COMMISSIONER: It's certainly true in the 6th.

PROFESSOR RICHMAN: Actually, I wasn't aware of it in the 7th until today -- or maybe it was the 6th.

COMMISSIONER: They have oral argument and there are no -- except sometimes you get a bench decision in the 6th Circuit. There are no one line (indiscernible) But I grant you that that does vary from circuit to circuit. I don't personally approve of that way of doing business, so there's a great of variation among the circuits as to how oral argument is handled and how the opinions are handled. Of course, there is a variation with respect to publication. When you say that something is unpublished, it doesn't mean that it's inaccessible. It simply means that it is not in the (indiscernible) books. It is in the case in most courts, many courts, on the electronic system. So I don't think you are

describing accurately the entire appellate system.

PROFESSOR RICHMAN: You're certainly correct. I'm not. I'm describing it in gross and I learned today that the 6th Circuit -- I really should know better because that's my home base -- provides oral argument to any lawyer who requests it. These statistics basically come from a study of the (indiscernible) 4th of the --

JUDGE BROWNING: It's hard to get the real situation just from the statistics. One of the things that has changed from the traditional model that I'm sure you're aware of is that the character of the case load over the period you're talking about -- let us say 40 years --

PROFESSOR RICHMAN: I would place 1970 as the beginning.

JUDGE BROWNING: -- has -- well, it really starts before but --

PROFESSOR RICHMAN: Judge Browning --

JUDGE BROWNING: -- case loads from 1960 or '62 or '65 to the present that have increased across the Courts of Appeal 12 to 15 fold and the

aftermath of the pro se -- the last speaker is a good example of the type of pro se litigation that is occurring. It did not exist very often according to your traditional model.

PROFESSOR RICHMAN: Can I have a word?

JUDGE BROWNING: Taking that into account--

PROFESSOR RICHMAN: Can any of the learned judges explain why it was that he was scheduled directly before me?

JUDGE BROWNING: I can't.

PROFESSOR MEADOR: May I ask you a question? You speak of the certiorari, the new certiorari. Now, what you're saying in effect I guess is that what has happened in most of the Courts of Appeals is that suddenly and without announcing it as such they moved into essentially discretionary reviews.

PROFESSOR RICHMAN: Exactly.

PROFESSOR MEADOR: Now I can agree with that. However, let me throw this out and see what you say. It seems to me it is a discretionary review of

a different type from the discretionary review in the U.S. Supreme Court. It is more like the discretionary review you find in Virginia Appellate Courts and the Code of Military Appeal which is a discretionary review but it is a validly and realistically (indiscernible) whereas the U.S. Supreme Court is not, taking into account the importance of the question, whether the timing is right, etcetera, etcetera, a lot more attractive whereas this kind of discretionary review you find so (indiscernible) present day Courts of Appeals does involve a look at the (indiscernible) and when the one liner (phonetic sp.) says a thing, that means that in the view of those judges, there is nothing calling for a question on the merits. Would you agree or not agree with that analysis?

PROFESSOR RICHMAN: Oh, I certainly agree. I used the Certiorari as a metaphor. I don't intend it to be literally correct. It is a metaphor for a changing way that the Circuit Courts have operated in the last 30 years.

JUDGE RYMER: May I ask you a question? If I reviewed the bottom line of your written comments

correctly, it is that there's no problem adding judges and that's what we should do. I'm not expressing an opinion on that. My question is if more judges are added, some structural change is at some point in time going to have to happen. We can't just simply keep adding bodies.

PROFESSOR RICHMAN: That's right. Although I would say that adding bodies is better-- adding bodies without structural reform is better than what we do today.

JUDGE RYMER: Well, what if you added two or three hundred judges per Circuit?

PROFESSOR RICHMAN: Better than what we do today but still -- but nowhere near as good as it could be.

JUDGE RYMER: So you wouldn't have a two or three hundred judge in bang (phonetic sp.)?

PROFESSOR RICHMAN: We might do away with in bangs. I don't know.

JUDGE RYMER: That's what I'm talking about. All right. So you say okay, just keep adding judges to --

PROFESSOR RICHMAN: But you're right. The structural reform is a better idea --

JUDGE RYMER: Well, all right.

PROFESSOR RICHMAN: -- than purely adding judges. Yes.

JUDGE RYMER: Okay. Do you have any suggestions with respect to structural?

PROFESSOR RICHMAN: Well, Judith McKenna (phonetic sp.), who is your staff person today -- is that a name for you? (indiscernible) -- has a very fine monograph (phonetic sp.) on possibilities for structural reform.

JUDGE RYMER: Yes, I know that. But that's more or less what we're here for.

PROFESSOR RICHMAN: I think inevitably you're going to end up with another tier, either between the Circuit Courts and the Supreme Court or between the District Courts and the Circuit Courts. There must be some device to make sure that judges hear all appeals and that all appeals have precedential value or have precedential effect.

PROFESSOR RICHMAN: What is your view of

the possibility of an Appellate function by District Courts or District Judges, more accurately, patterned in a way after the 9th Circuit's BAP (phonetic sp.)?

PROFESSOR RICHMAN: I don't have a problem with it provided that the capacity is large enough. We today have 179 Circuit Judges and, based on the AOs and the Judicial Conference's staffing models, we need 100 more or at least we did in 1996 when I did this research. It may be now that we need 120 more. I haven't kept pace. But if we can get that additional capacity to hear those appeals in a way other than by a truncated (phonetic sp.) solution, by using the District Courts, that's fine.

PROFESSOR MEADOR: Your position is the system needs more judge power.

PROFESSOR RICHMAN: Yes.

PROFESSOR MEADOR: And you're not particularly hung up one way or another on how that's structured. Is that what you're saying?

PROFESSOR RICHMAN: I may have some personal views one way or the other but I think the force of this argument is that there's insufficient

capacity and the result is that litigants, lawyers and the judges themselves get short changed. It is quite clear the judges are working very hard. Working as hard as they are, they just can't handle the case load with the traditional appellate process. The nouveau process is not the same. It's not as good. It forfeits what made the federal appellate courts great which is that they did their own work in every case.

And I think that additional capacity at the District Court or between the District Court and the Court of Appeals would be fine. I caution against any sort of division between fact appeals and law appeals because I don't think one can establish --

COMMISSIONER: Let me say that the traditional model, I question whether the traditional model that you describe is in fact traditionally modeled. The traditional model surely was the Marshall Court. I mean by that Chief Justice Marshall.

PROFESSOR RICHMAN: I was thinking of the 1890 efforts as traditional model.

COMMISSIONER: But I would think that that

was a model as seen by lawyers as one that produced good opinions and Chief Justice Marshall (indiscernible) I mean in terms of judges doing their own work and they delegated it to Chief Justice Marshall to work and he was a quick and good lawyer and the Chief Justice and I have never heard it criticized that the court would have been better off had more judges on the Marshall Court writing opinions. And so --

PROFESSOR RICHMAN: You're not going to ask me to distinguish between Chief Justice Marshall and the 30 or 40 staffers (indiscernible)

COMMISSIONER: It's not -- all I'm saying is that traditional models, it is thought that each judge did the work in each case. That is not accurate.

PROFESSOR RICHMAN: No, I simply mean that the court's judges did the court's judges' work. The judicial --

COMMISSIONER: You're basically complaining that there's too much bureaucracy.

PROFESSOR RICHMAN: Too much bureaucracy,

too much improper delegation, delegation of purely judicial functions to nonjudicial officials.

COMMISSIONER: How would you handle a situation where more or less half the case load consists now of pro se cases, that is pro se plaintiffs, sometimes pro se defendants.

PROFESSOR RICHMAN: I (indiscernible) with three judge panels of Circuit Judges unless there was some other form of (indiscernible)

COMMISSIONER: Would you hear oral argument?

PROFESSOR RICHMAN: I would. Yes. I think there's much to be gained from it. I guess with incarcerated appellants you've got a little bit of a problem.

COMMISSIONER: Yes.

PROFESSOR RICHMAN: But I've long favored taking the --

COMMISSIONER: Those pro se cases were not a part of the traditional model.

PROFESSOR RICHMAN: Right. Well, there were. I mean there were always pro se litigants.

COMMISSIONER: But they were few and far between.

PROFESSOR RICHMAN: Right.

COMMISSIONER: You would hear oral argument.

PROFESSOR RICHMAN: A little less vehement also.

COMMISSIONER: You would have oral argument without appointment of counsel for a pro se litigant. Is that right?

PROFESSOR RICHMAN: I would. Yes. I don't think it wastes much time. To my mind, the display function, the face to face meeting between the disgruntled litigant and the bench, has a declaratory function, a jurmatic (phonetic sp.) function, even if there's nothing to the appeal. We announce that we have justice for all and we don't show it. I mean it may exist, but we don't show it.

COMMISSIONER: And you would add judges in order to do that?

PROFESSOR RICHMAN: I would. Yes. And I would add enough at least to meet the appellate

staffing models.

I wanted to talk for a minute about a whole range of arguments that I call the judicial establishment. That's a lame term. I guess what I mean by that is the judicial conferences calling for moderate growth, the conferences of several circuits asking not to be increase wholesale and two judges, Judge Newman and Judge Tjoflat in particular who write vehemently against expansion. I call that the judicial establishment. It's fairly lame. Obviously there are bunches of Circuit judges who have argued strongly for expansion. Judge Rhinehart and a judge in the 5th Circuit whose name right now wants to get away from me. Carolyn Deneen King. So it's a lame term but it's the best I could come up with.

COMMISSIONER: Judge Arnold (indiscernible) add judges. But there are a number of judges who -- and we have added judges.

PROFESSOR RICHMAN: Right. Right, but we've added them in dribs and drabs. We need, by our own staffing models, another 100 at least.

COMMISSIONER: We have three times as many

judges now, three times as many as (indiscernible)

PROFESSOR RICHMAN: Right. In 1960 there were I think 65, 68. Now there are 179. Something like that.

I will go through these arguments with you if you want.

COMMISSIONER: Let me ask you about an alternative. Most of the increase comes from increased federal jurisdictions of one kind or another, some by Congress, some by courts, and then by (indiscernible) the ostensibly enhanced federal jurisdiction. What about the possibility of using state courts in those (indiscernible)?

PROFESSOR RICHMAN: I have no problem with it as a societal solution.

COMMISSIONER: Working out (indiscernible)

PROFESSOR RICHMAN: I have no problem with it as a societal solution, but I would be extremely disappointed if your Commission made that a major suggestion because it's a dodge. You can not implement that. The Congress --

COMMISSIONER: The Congress would not.

PROFESSOR RICHMAN: The Congress won't do it. When the Congress decides that battered women need federal protection or that some other group or some other traditionally state law handled issue needs to be federalized, the pressures which move Congress towards federalization are not going to be resisted by the federal judiciary. There's no constituency --

COMMISSIONER: I wasn't talking about -- you take my question to mean that we should ask Congress to reduce jurisdiction. That is repeal --

PROFESSOR RICHMAN: Or stop increasing it.

COMMISSIONER: Repeal federal (indiscernible) statutes.

PROFESSOR RICHMAN: Right.

COMMISSIONER: What about the possibility of 1) in diversity cases, making diversity cases much more discretionary with some criteria?

PROFESSOR RICHMAN: I have no grief with diversity jurisdiction one way or the other.

COMMISSIONER: That's for example.

PROFESSOR RICHMAN: It's 25 percent of the District Court load and 10 percent of the Court of

Appeals load. It's not going to help you much.

COMMISSIONER: It is much of the federal Court of Appeals load of --

PROFESSOR RICHMAN: (indiscernible) cases.

COMMISSIONER: -- non-pro se --

PROFESSOR RICHMAN: Right.

COMMISSIONER: -- argued cases where the major time taken up is much larger.

PROFESSOR RICHMAN: Right. I guess my thought on that is you can nibble at the edges of this problem with jurisdictional reforms, but Congress is not going to do anything major.

COMMISSIONER: You think that they wouldn't open up some discretion, that that's -- what about the possibility of a kind of reverse removal type of assignment of jurisdiction to state courts, not federal courts?

PROFESSOR RICHMAN: I think it's --

COMMISSIONER: Judge Newman and some other judges have argued for more discretionary diversity cases as well as mechanisms to reassign --

PROFESSOR RICHMAN: Let's look at the

history of very, very moderate jurisdictional reform requests coming out of the federal judiciary. The Federal Court Study Committee made a number of them. One or two were implemented. Most never even were introduced.

PROFESSOR MEADOR: (indiscernible) a prudential answer.

PROFESSOR RICHMAN: Exactly. It's not going to happen. It is purely prudential. Whether it's wise or not, I mean we could argue about that but I don't think it's important to argue about it because it's not going to happen. Sadly for us but the political realities are otherwise.

I really have a very brief, simple message which is we need more capacity. If we added between the District Courts and the Circuit Courts, I can live with that. If we add between the Circuit Courts and the Supreme court, I can live with that. I think that's much less popular, certainly among the judiciary. This article is primarily designed to deal with a set of arguments that have been propounded against radical expansion and to some extent it seems

to me to be killing a gnat with a 16 inch gun. Taking those arguments seriously. Many of them are not very meritorious. Many of them really warrant no very serious treatment.

We did it because we wanted to remove all the window dressing and get down to what is there by way of principled opposition to a larger appellate bench? We found that if you remove all concerns about collegiality, status --

COMMISSIONER: You (indiscernible) collegiality only as status quo.

PROFESSOR RICHMAN: No, no, no, no. They're two different problems. But distressingly, if you read the defenses of a small federal bench, these themes come up over and over again. I mean I'm not attributing this without having seen it in the writings of Judge Newman, Justice Scalia (phonetic sp.), Judge Tjoflat. Fine judges. But I simply deal with what they have written for publication. These themes appear.

The quality candidates rationale is hopeless. There are 800 state appellate court judges

and 645 district judges, 5,000 law professors. Surely we can find 100 good circuit judges from among that bunch. It would cost $80 million. Well, wool and mohair supports cost $180 million. Forty universities get more than $70 million. It's not a serious argument.

The unstable (indiscernible) is the one that the defenders, where they got the opposition to expansion betting on the most and first, there's simply no evidence for it beyond the anecdotal. All of the systematic studies, all of the systematic opinion research polls, particularly circuit judges and district judges, indicates that there really simply isn't a problem.

COMMISSIONER: I think the law is just as stable with 100 judges (indiscernible) the law as would three judges.

PROFESSOR RICHMAN: We don't know but we know that there's no evidence --

COMMISSIONER: Doesn't appeal to common sense.

PROFESSOR RICHMAN: Doesn't appeal to

common sense. But I mean one of the things I learned when I first started doing empirical research is that there's a real good reason for disparaging argument from anecdote and common sense when there are numbers and studies around and that is that many times when you eyeball the numbers and then when you study the numbers and perform the manipulations, you don't get the same results.

The other point you make which I think is a very good one is where is (indiscernible) Is there going to be a difference between three judges and 2,000 judges? But the difference may come in between 1,500 and 2,000 or it may come in between 500 --

COMMISSIONER: We're never going to know the answer to those problems.

PROFESSOR RICHMAN: Exactly. So it's a problem of burden of proof and it seems to me that the burden belongs on the anti-expansionists because they want us to give up the known value of the traditional federal appellate model in return for unknown gains in consistency.

PROFESSOR MEADOR: Your argument for

adding judges I take it rests on the -- compared to those who want it, we have testimony from judges on specific courts saying no, we don't need more judges on this court, that court. So the disagreement I think has to do with an underlying premise about the value or validity of the current process. Given the current process going on in certain appellate courts, (indiscernible) they don't need more judges. So what you're saying is that process is flawed.

PROFESSOR RICHMAN: Exactly.

PROFESSOR MEADOR: If you're correct, we do need more judges. Is that what you're saying?

PROFESSOR RICHMAN: Exactly. I think the process is flawed regardless of whether identical outcomes would occur in every case by the traditional process and by the current process. It's flawed because the Appellate Courts do not simply serve any disposing function. They serve a disposing publicly and confidence function.

COMMISSIONER: I suggest that you look, if you're going to do empirical research, at specific courts. The 1st Circuit maintains -- does most of the

things you want a court to do. The 2nd Circuit and your own Circuit, the 6th Circuit maintains argument in every case. There are no orders of affirmance. There is a reasoned disposition of at least 500 to 1,000 words in every case, even though in which the staff was involved. Obviously we are more reliable than in times past. That is --

PROFESSOR RICHMAN: If you are, you shouldn't be.

COMMISSIONER: Well, maybe in an ideal world we shouldn't be but in --

PROFESSOR RICHMAN: But --

COMMISSIONER: -- we would have to add so many judges to the court. Our court, you know, we've got three or four law clerks for every judge so you're talking about --

PROFESSOR RICHMAN: And how many staff attorneys?

COMMISSIONER: About 20 something staff.

PROFESSOR RICHMAN: How can you defend staff attorneys? I mean it strikes me --

COMMISSIONER: -- half the dockets pro se,

non-argued cases and you just heard the last gentleman here. How much time are you going to spend with that kind of argument?

PROFESSOR RICHMAN: The 10 minutes that it takes. I mean I understand that's a bitter pill, but I don't see any way of assuring the litigants and the lawyers. In the 6th Circuit you say a lawyer can always get oral arguments. That's not true in every circuit. I take the challenge seriously. I have another life. I'm also a conflictive laws scholar. I write books and articles on choice of law and jurisdiction. So maybe another generation of scholars will come along.

I want to report only that there is a way to get to a much more traditional model for deciding appeals and the way is simply an increase of about 80 percent in the size of the circuit bench or, if you prefer, another tier between the District and the Circuit or between the Circuit and the Supreme Court.

COMMISSIONER: If you're going to gather up all the law clerks and you're going to hear the arguments in all the pro se cases, then you're talking

about a lot more than 80 percent.

PROFESSOR RICHMAN: No. No. Two hundred fifty five merits dispositions per year would be an extra 100 judges. That's your model, not mine.

COMMISSIONER: Well, I can tell you that in our court it wouldn't. You'd have to add a lot more than that.

PROFESSOR RICHMAN: I guess then my answer would be that the restrictions on who gets to appear before the Court ought to have to do with who's rowdy, who's not going to inform the court of anything, rather than we don't have enough judges.

PROFESSOR MEADOR: Well, you said a moment ago, I thought, that you would be satisfied to achieve this added capacity by a review at the District level which would mean adding district judges and get your capacity built up that way rather than adding circuit judges. Did I understand you correctly on that?

PROFESSOR RICHMAN: Certainly.

PROFESSOR MEADOR: So it wouldn't necessarily be adding circuit judges. It might just be added district judges.

PROFESSOR RICHMAN: More capacity however you get to it. More appellate capacity.

COMMISSIONER: All right. What else do you want to tell us?

PROFESSOR RICHMAN: Well, these other arguments, I'm sure you're moderately familiar with them. The unstable (phonetic sp.) law I believe is the one that people rely on most. There is no evidence for it. Even if it's true, it just shows us that consistency and capacity are competing values, not which one should prevail. And I think the interchange we had a minute ago about burden of proof is the most crucial one there.

The new mechanisms. You're obviously thinking about those right now. The one that you seem to be -- Professor Meador has written mostly or --

COMMISSIONER: What is the evidence that the law is more stable (indiscernible)

PROFESSOR RICHMAN: Oh, I don't think it was.

COMMISSIONER: So I mean the law has always been, in the United States at least, non-rigid

(indiscernible) non-rigid, expanding --

PROFESSOR RICHMAN: Oh, no. No, no. I'm not arguing -- you've got me wrong. That's the anti-expansionist argument is that expanding will make it too unstable. I think that's nonsense.

COMMISSIONER: It's always been (indiscernible)

PROFESSOR RICHMAN: Of course. Andif you want to go back to Jerome Frank, he believes that some Freudian desire we have for a just father that leads us to believe that we could ever hope for stability in the law. My colleague at Theas, Louise Weinberg, says to hope for certainty is kind of like a baby crying because he can't touch the moon.

PROFESSOR MEADOR: What do you do with (indiscernible) theory about a known bench and (indiscernible) the ability of decisions through known bench?

PROFESSOR RICHMAN: Well, you heard the representative of the Chicago lawyers. I don't know the name of their organization.

COMMISSIONER: Council of Chicago.

PROFESSOR RICHMAN: Council of Chicago Lawyers who discounts it. I don't have a real strong thought one way or the other about it. I think the incentives for appeal and the lack of disincentives for failure to appeal will control whether the folks appeal, not whether there's a known bench. It may have some effect. I can't say that it won't. But--

PROFESSOR MEADOR: It may (indiscernible)

PROFESSOR RICHMAN: I believe so and I believe that even if it were true we'd still be stuck with consistency and capacity, our competing goals. Even if we could show that increased capacity means more inconsistency, we still haven't shown that we don't need increased capacity. We've just shown that it's going to cost us some and until we can show that consistency ought to be the only goal, then it seems to me the prima facia case for capacity is overwhelming.

COMMISSIONER: You don't think there are any values in those smaller benches?

PROFESSOR RICHMAN: I do think there are values in a smaller bench. There's additional

prestige, additional comfort, maybe additional efficiency in deciding with people that you know well. I just don't think that those values are commensurate with failing to deal with in the traditional appellate way 40 percent of the case load. And it's going to get worse. It's going to get down to eight or 10 percent of the case load eventually. If we keep going the way we are, there are going to be traditional full oral arguments, written, published opinions, reasoned published opinions in a small minority of cases. That strikes me as just not what our federal courts want to do.

PROFESSOR MEADOR: Thank you.

PROFESSOR RICHMAN: Thank you very much. I enjoyed it.

JUDGE MERRITT: Our last witness is Collins Fitzpatrick. He is the very able Circuit Executive for the 7th Circuit. He helped plan our trip here and we appreciate that very much, Collins.

MR. FITZPATRICK: Thank you. At long last, I'll still welcome you to the 7th Circuit. I don't have a great proposal. I just have a modest

proposal. And this reflects solely my own views but for about a quarter of a century now I've been reviewing all the briefs that come into the 7th Circuit and I set the calendar for the Court. So I have looked at a lot of briefs during that time.

The proposal is for a four year experiment in which appellant attorney's fees would be awarded to the defendant appellee if the appeal is affirmed. The experiment would include only cases whose sole basis of jurisdiction is diversity citizenship under Section 1332 of Title 28 of the United States Code.

The proposal runs against two tenets of American law. One is that everybody pays their own attorney's fees and the other is that parties of diverse citizenship should have access to the federal court. But I really don't think it runs contrary to those proposals because somebody with a plaintiff in a case with diverse citizenship can still file, they can still sue in federal court, and you only have to pay the other person's appellate attorney's fees if the plaintiff loses twice, once in the trial court, once in the Court of Appeals.

The benefit is that it provides what I think is a strong disincentive to a losing plaintiff who might otherwise bring not a frivolous appeal but an insubstantial one. I tend to bring it home by picturing yourself at an all night poker game in a legal jurisdiction, o course, where this can go on.

COMMISSIONER: You're saying if the District Court judge has disaffirmed the appellant in a diversity case would pay the costs which would also include counsel.

MR. FITZPATRICK: Appellate counsel fees only. The proposal I'm making goes only one way and the reason it goes only against the plaintiff because the plaintiff in effect has had two choices. They chose to bring the suit in the first place. They chose to bring it in the federal court. And then after losing, they chose to bring it on appeal. You know, if this worked --

COMMISSIONER: (indiscernible) cases are brought (indiscernible) I would think. The defendant loses--

MR. FITZPATRICK: Correct.

COMMISSIONER: -- and appeals. Now would that --

MR. FITZPATRICK: I wouldn't take that into consideration. In effect, the plaintiff has had two opportunities to win their litigation and lost at both trials. The defendant is dragged in. The defendant doesn't want to be there the first time. And so their only choice is to appeal the losing decision in the District Court.

PROFESSOR MEADOR: Be even-handed. Why wouldn't your proposal say that the party who invokes federal jurisdiction bears the cost if that party loses on appeal. That would cut both ways.

MR. FITZPATRICK: You could do it that way, Professor Meador, but again, it doesn't meet my -- what I'm trying to do is craft a fairly narrow exception that's going to have an impact on appellate case load without bringing up the opposition forces on the diversity jurisdiction question. Here under my proposal, the plaintiff has brought the defendant into court, not just once but twice, and it doesn't matter to me whether it's in the state court or in the

federal court for this equity purpose. It only matters that they were brought in twice, once in the trial court and once in the Court of Appeals, and the plaintiff has lost in both courts.

Let me get back to the poker game. You're playing poker, you've lost every hand there is. The night's pretty late. You're getting weary. The guy who's won everything says, I'll tell you what. How much do you have left? You say $10. We'll cut the (indiscernible) my winnings against your 10 bucks. Well, you'd be a fool not to take that kind of a risk and play one more hand, even though your luck has been abysmal all night because the opportunity to win back what you have lost is so great.

And I suggest that's exactly what happens in the appellate court. Parties have spent tens of thousands of dollars for interrogatories, requests for documents, depositions, hundreds of hours have been spent on pre-trial motions, substantive motions as well as hearings in the District Court and, even if the case is decided on a motion to dismiss or for some rejection and there is no trial, the total attorney's

fees and costs is astronomical.

You're the losing counsel at the trial court and your client and you have to decide to appeal. Well, as long as the appeal isn't frivolous, as long as you can hang your hat on something, why not appeal? There's very little cost in time and money to rework the trial court memoranda that has already been presented to the District Court. In this day and age with computers, it's very easy to prepare a new brief, do a little bit of extra research, check the cases out since you filed the memorandum. You can put together a very presentable brief at minimal cost.

So you get one more chance to win and you get a chance to win big and the losing plaintiff only has to ante up the attorney's fees, the appellate attorney's fees and the appellant for his attorney and the appellate costs which are minor. I've got two reasons for my --

COMMISSIONER: May or may not be minor.

MR. FITZPATRICK: Minor in comparison is what I said. They're never going to match the costs of the trial. The discovery alone seems to me to be

just --

COMMISSIONER: A lot of it goes off on summary judgment. It doesn't necessarily mean that the appeal is from (indiscernible)

MR. FITZPATRICK: No.

COMMISSIONER: Most diversity trials, most (indiscernible) diversity cases, the plaintiff feels because of the District Courts grant summary judgment for the defendant without maybe too much expense, having been (indiscernible) That happens.

MR. FITZPATRICK: I would suggest though that that's rare that the trial court costs are going to match the appellate court costs. I think they're are always going to be substantially more.

COMMISSIONER: When you finish on this topic, I've got some questions I'd like to ask briefly about the 2nd Circuit.

MR. FITZPATRICK: There's two reasons for my proposal. The first is that the trial court loser may not be willing to take an insubstantial appeal if he or she has to reach into their own pocket, not only to pay for their attorney's fees but to pay the

attorney's fees on the other side. I suggest there's a psychological insult to a losing party to ever have to pay the attorney fees on the other side, that's in addition to just the outlays from the pocket.

And then the second reason is one of equity. The defendant has been brought into the court, had to pay their own attorney's fees to defend in the trial court. Then the case goes on appeal and they have to again defend themselves and pay out of pocket costs. And I think that yes, in our system, American law, the plaintiff does get a free bite. What I'm suggesting is that the plaintiff doesn't get two free bites.

We could expand this to other cases, but I think that by limiting it to diversity cases, diversity cases are ones in which most of the time the appellate court is not getting to the body of law. Probably it's best to compare it to the sucker growing on a tree. It may be helpful, it may turn into a limb, but most of the time it's just a sucker and it's going to be snipped off and it's going to be snipped off by the state Supreme Court that makes the decision

as to what the law is in that state. So it's not adding to the body of law.

Now, when I said this was a modest proposal, I meant it. There were only 3,700 appeals last year in all the Courts of Appeals and only half of those were terminated on merit. So we're talking about 1,800 - 1,900 appeals across the country.

COMMISSIONER: Thirty seven hundred diversity appeals?

MR. FITZPATRICK: Thirty seven hundred, but only half of those are decided on the merits. And if this proposal was adopted, in order not to create additional work for the judges, I would have the Clerk of the Court assess the fees with a right of review to the authoring judge of the affirmance so that we're not creating, as I said, additional fee disputes before the judges.

COMMISSIONER: I was just going to ask you some questions about the 7th Circuit. You're fortunate in that you're sitting -- not sitting but you are serving a court with a preeminent bench. Maybe they're the best in the country or certainly one

of the best in the country and one of the best (indiscernible) of the way your court has decided to handle the cases with the quality of the bench becomes an interesting question. One, I understand the 7th Circuit continues oral argument in most cases where council (indiscernible)

MR. FITZPATRICK: Right. And we have some pro ses who argue, too. Never when they're incarcerated.

COMMISSIONER: Right.

MR. FITZPATRICK: And the pro se has to write a lucid brief.

COMMISSIONER: In order to -- who makes the judgment about pro se argument?

MR. FITZPATRICK: About whether they're set? I do. But the panel can -- the system in ours is that I can make the initial decision but the three judges always can change that if they want. They can give more time, they can take away time. There may be cases -- in fact, this frequently happens. There are cases that are submitted without argument because we have an incarcerated pro se or we have a pro se who

has not written a lucid brief and then it goes to a factual panel where the judges talk about it and decide, you know, we need counsel on this case. Appoint counsel and it goes through the argument stage.

PROFESSOR MEADOR: What are these cases where a counsel requests argument but argument is denied?

MR. FITZPATRICK: We don't have it.

PROFESSOR MEADOR: I thought you said nearly all cases where counsel requests it. It was the nearly all that I assumed there must be some--

MR. FITZPATRICK: No. I don't know of any cases that we've ever denied counsel. If one counsel wants it and if we just automatically put them on, if this is a counsel of case, I set it for argument.

PROFESSOR MEADOR: So in all counsel cases where counsel requests it, you set argument.

MR. FITZPATRICK: Right.

PROFESSOR MEADOR: That's true in the 2nd and the 6th and probably the 1st. I'm not quite sure on the 1st but it's true in several courts.

MR. FITZPATRICK: We've had cases, too, I should point out, where both counsel asked to waive argument and, just like in the 6th Circuit, the court says no. There's something here that needs to be argued.

PROFESSOR MEADOR: But in most cases you would permit them to waive.

MR. FITZPATRICK: Right. A lot of times, like the (indiscernible) cases that come from southern Illinois, for example, or southern Indiana, it's not a big money case and I'm sure, although we don't know why, counsel is asking to have it submitted in order to save cost.

PROFESSOR MEADOR: What do you use the staff attorneys for? Pro se cases?

MR. FITZPATRICK: We have two different areas. One, they work up the motions, all the motions that come into the court, and make an oral presentation to the judges on each motion. There are some procedural motions such as extensions of time that the staff attorneys would rule on directly. That's about a quarter of the 20 people who work on

the motions process. And that's everything from procedural to substantive such as 1292B, Mandamus (phonetic sp.) injunctions phase, etcetera. And that system works well because the presentation is oral to the judges, so it moves the cases along --

COMMISSIONER: (indiscernible)

MR. FITZPATRICK: -- very quickly. The other cases fall into two different categories. One, we have what we call short argument days. It's nine cases, set two days in a row, 10 minutes a case usually, they're usually one issue cases and there'll be one staff attorney assigned to work on a case with the three judges. That staff attorney will prepare a memorandum, give it to the judges who will have that, read the briefs and the memoranda and then if they're in agreement with the way this has been written and the recommendation, the judge will then use that memorandum to prepare a reason to unpublish the order. Most of the time it's not published.

COMMISSIONER: That might be a pro se case?

MR. FITZPATRICK: Very seldom. That

probably is more or less your sentencing, your criminal sentencing cases where they're arguing relevant conduct, obstruction of justice --

COMMISSIONER: Some 1983 cases and simple (indiscernible)

MR. FITZPATRICK: Correct. One issue. They tend to be Social Security, the substantial evidence questions and --

COMMISSIONER: What do you do with the staff with a pro se cases that are not --

MR. FITZPATRICK: Okay. Assignment is very similar. A law clerk is assigned to the case, works up a memoranda, and then in bunches of about nine to 12, there'll be a conference with three judges. The judges will have the staff attorneys there, they'll have read the briefs and the memorandum and they'll have a discussion much as they would have had if there had been oral argument. So we refer to these as collegial decision making as opposed to what I call linear decision making where it goes from one judge to the second judge to the third.

PROFESSOR MEADOR: Do you have staff draft

opinions or just the staff memo?

MR. FITZPATRICK: They do a memo but the memo is clearly -- the staff attorney is told to keep in mind that we'd like to be able to, if possible, convert the memorandum to an unpublished order if the judges so desire.

PROFESSOR MEADOR: Is there a high degree of similarity between a final opinion issued by the panel and staff memo?

MR. FITZPATRICK: I think in all fairness I'd have to say it depends on the judge and the panel and how good the staff attorney had done. We get frequently, and I'm sure this doesn't come as a difference from Judge Rymer and Judge Merritt's experience, you have some staff attorneys or law clerks who want to write on eery particular issue there is that could be conceived of in this case and the judges are not interested in covering every conceivable issue. They think this case involves one issue and so they'll rewrite it and then just cover that issue that they want covered. So it really depends on who the judges are and what the quality of

the work the staff attorney has done.

COMMISSIONER: One way to ask that question is how much more or less delegation is there by the judge or judges to a staff attorney then there would be by a judge to the judge's elbow (phonetic sp.) clerk and I gather it would be more or less the same.

MR. FITZPATRICK: It's the same. There's no difference. We really watch for that because we don't want an undue delegation and the judges have been very good about -- I mean when their names are on it, their names are --

COMMISSIONER: I take it some judges delegate it to their elbow clerks more than other judges.

MR. FITZPATRICK: That's correct.

COMMISSIONER: One other question. The 7th Circuit is publishing (indiscernible) more opinions (indiscernible) than any of the other Circuits. Is this a recent thing with Judge Posner or has this been tradition or am I wrong?

MR. FITZPATRICK: No. Actually, I got a

call shortly after Judge Posner was on the bench, maybe three years afterwards, from a reporter wanting to know why Judge Posner was sitting at twice as many cases as all the other judges and I said he wasn't. He's sitting at the same number of cases. And they said well, why does he have twice as many opinions? And I said we've got a standard that addresses what cases should be published and if that case adds to the body of law, it ought to be published and if it doesn't add to the body of law, then it shouldn't be. And if you read Judge Posner's decisions, it's rare for one not to be adding to the body of law in some fashion.

COMMISSIONER: So Judge Posner accounts for the additional --

MR. FITZPATRICK: He accounts for, I'd say, a portion of it.

COMMISSIONER: And other judges, I guess, do some of the same.

MR. FITZPATRICK: Right. And I would say that we let each judge decide whether or not to publish. If a judge wants to publish, that's the

final decision. Nobody says you can't publish. Clearly, in my humble opinion, there are cases that are published that should never be published. They don't add anything to the body of law.

JUDGE MERRITT: Anything else you want to talk about?

MR. FITZPATRICK: No. Have a safe trip back.

JUDGE MERRITT: We appreciate your appearance here, all the good work you do, and we appreciate your helping us here in (indiscernible) Do my colleagues have anything further the want to ask? If not, we're not in court but I guess I should say we'll stand in recess.

MR. FITZPATRICK: Thank you.

(The proceedings were concluded.)