COMMISSION ON STRUCTURAL ALTERNATIVES

FOR THE FEDERAL COURTS OF APPEALS

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P-R-O-C-E-E-D-I-N-G-S

Approximately 9:00 a.m.

CHAIRMAN WHITE: I guess you know who you're dealing with. My name is Byron White, by the way.

There is the best District Judge in the West.

JUSTICE BROWNING: I like you introducing me to this audience that way. There's some indication, they don't agree with you.

CHAIRMAN WHITE: Anyway, Bill Browning.

This is Gil Merritt from the great state of Tennessee. He was the prior Chief Judge of the 6th Circuit and was a member of the Executive Committee of the Judicial Conference for a good long time.

Did I get out of order?

Anyway, here is a Circuit Judge from the 9th Circuit, Pamela Rymer. If you'd like the pleasure of sitting with somebody -- I had it a couple of years ago.

On the end is the Executive Director of

the Commission, Dan Meador, a retired professor of law at the University of Virginia. If he's retired, boy, I wonder what he was when he wasn't.

I think the first witness is the biggest fellow in the 9th Circuit, Procter Hug.

JUDGE HUG: Thank you very much, Justice White.

I appreciate this opportunity to appear before you. We're very pleased that this Commission was appointed to study this matter that is so vital to the federal court system. The mandate of the Commission directs a national study with special reference to the 9th Circuit and it's this particular reference to the 9th Circuit that I wish to address at the outset.

As Chief Judge, I can confidently represent to you that the great majority of all of our judges in the circuit, including the circuit judges, the district judges, the magistrate judges, the banker's judges and the great majority of the attorneys who practice before our federal courts are opposed to any division of the 9th Circuit. It's

the opinion of the overwhelming majority of the judges and the lawyers of the 9th Circuit, the Circuit and the Circuit Court of Appeals are working well and that any advantages that might be gained by dividing the circuit in any of the ways that have been proposed would be greatly outweighed by the advantages lost and the disruption and expense of a division of the circuit.

It's not our function to attempt to tell other circuits how they should operate in meeting the steadily increasing caseload. It is our function, however, to express why a large circuit and circuit court which we have been fine tuning for over 20 years should not be torn apart. But rather, should be left intact to serve as a viable model for an option to deal with the ever increasing caseload over the next five, ten, and 20 years.

The focus of the study on the Federal Courts of Appeals is most appropriate because that is where the structural problem exists. It's like a pyramid. At the top of the pyramid is the Supreme Court. There is no structural problem there. The

Supreme Court has the ability to regulate its caseload. At the trial level, there is also no inherent structural problem in providing the increased numbers of judges as the caseload increases. The problem arises in the middle of the pyramid: how we're to structure the intermediate courts of appeals.

As the caseload grows at the trial level, it's obvious that the number of appeals will increase and the question is how these appeals are to be handled. One possible solution, of course, would be to limit the jurisdiction of the federal courts and thus, the number of cases that come into the federal system. Judge Wiggins will address this issue. Perhaps Congress will slow the growth, but I believe that there's little doubt that the caseload of the federal court system will continue to grow as it has in the past. Thus, in formulating the structure for the federal court system of the future, we must focus on how this increasing caseload is to be handled by the Circuit Courts of Appeals because this dictates how the circuits are

to be structured.

With the existing statutory appellate structure, there are three alternatives, as I see it, for the courts of appeals. The first is that when a circuit believes that the prime objective is to keep the circuit small at all cost and to take all the cases that come along and to handle them in some way, in my opinion, this is the worst solution. The question then becomes how are these tremendous caseloads are being handled? And whether the inevitable reduced time that judges themselves can spend on their cases can be justified by the desire of the judges to remain a comfortably small circuit court?

The second option would be to continue to divide the circuits so as to maintain a small number of circuit judges. The Hruska Commission thought the appropriate number was nine. If we were to divide all circuits with more than nine judges on the court, there would be 12 new circuits. We would now have 24 circuits. Within the next 20 years, we would have 30 or 40 circuits, even if the maximum

number were increased somewhat. This would not only involve a division of some of the states in two or more circuits like Texas, or Florida, or New York and other states, but it would inevitably involve a fourth tier in the circuit structure.

The third alternative is to allow the courts of appeals to grow in order to provide the adequate judge power to resolve these cases and to develop procedures that allow the larger court to operate efficiently and effectively. The controlling objective is not the size of the court but instead, the number of judges necessary to devote the judge time to the decision of a case that the case requires and deserves. I think this is the best approach. This is the approach that the 9th Circuit has taken.

From the standpoint of the 9th Circuit, the balance of a large state, California and the eight smaller states is the best solution for our circuit. California does not dominate the circuit court with 40 percent of the judges in california and 60 percent of the judges in the other states of

the circuit. We are a unified and well balanced court, representing a wide spectrum of the cultures of our nation. On our court, we consider the diversity and the geographical and professional backgrounds of our judges from throughout the nine states to be a real strength in our circuit for interpreting our national law. We should not create another small circuit or leave California alone as a circuit, nor should we split California or combine it with another small state that it will dominate, or create some other bizarre division when the circuit is well balanced and working well as it is. We surely should not do so for political reasons only because some members of Congress are unhappy with one or two decisions.

We have provided a report for the Commission that details exactly how our circuit and circuit court operates. The document that I attached to my written presentation summarizes the arguments why we are convinced that our circuit is working well and it answers some of the common criticisms. In the limited time that I have, I'd

like to address some of these criticisms.

One is that the time from the notice of appeal to the determination of a case has been about 14 months, whereas the national average is about 10 months. The criticism is unfair because we've been operating with such a large vacancy factor. The meaningful and fair observation is that once the case gets to the judges, our circuit is the fastest in the nation for cases submitted without oral argument and is the third fastest for cases orally argued. Why then the four month delay?

It's simple. It's because our cases ready for calendaring before our panel are left in a holding pattern because of the lack of judges to consider them. We would be well within or below the national average if we had our vacancies filled. If we had, for example, the nine judgeships that were vacant all last year, we would have been able to have had 120 more argument panels and heard 720 more cases on oral argument calendars. This would have eliminated the delay that we're currently experiencing. It is only because of the

extraordinary effort of both our active and senior judges in this emergency situation that we've been able to keep even reasonably current.

Another criticism we hear is the lack of consistency because we're a large court with a large number of possible panel combinations. No doubt any attorney who has lost a case or a judge who has been reversed believes that the decision is inconsistent with the law that he cited. The empirical study, however, of Professor Arthur Hellman found no evidence that the size of our circuit lead to in-trial circuit conflicts or inconsistencies. A similar conclusion was reached in a thorough study published by the Federal Judicial Center.

Another criticism is that we publish too many cases to keep track of and thus, the law is difficult to discern. Annually, we publish between 700 and 800 opinions. Interestingly, the 5th, 7th and 8th Circuits publish about the same number of opinions as the 9th Circuit. In fact, last year, the 8th Circuit published a few more. For those of us who have practiced in small states --

CHAIRMAN WHITE: Maybe the evil is present in those other circuits.

JUDGE HUG: Could be. Could be. I don't think so though. I was just about to say, and that's kind of a good question to lead into what I was just about to say.

For those of us who have practiced in small states --

CHAIRMAN WHITE: I didn't intend it to be leading.

JUDGE HUG: Oh, you didn't?

CHAIRMAN WHITE: Go ahead.

JUDGE HUG: Well, it worked out well.

Those of us who have practiced in small states where there are a dearth of published opinions, we recognize that the greater handicap is when there are gaps in precedents. I believe that the size of our circuit, we're able to choose those cases that add meaningful precedent, and yet do not fill the books with opinions that are simply redundant. We've developed techniques to avoid inconsistency with the issue coding that we have

detailed in the report. Of course, the prime mechanism for avoiding inconsistencies is the responsibility of each panel to be aware of and to carefully follow circuit precedent. Our judges make every effort to do so.

Our modern 11 judge en bank process is one of the major factors that enables our large court to function effectively. Any active or senior judge can call for a bank vote supported by a memorandum articulating the reasons for the call. This generally stimulates a lively exchange of thoughtful memoranda over E-mail from active and senior judges supporting or opposing the call. The full court is involved in this process.

Now some argue that this doesn't appropriately represent the court. Yet, of the 180 cases, the en bank cases we've had since 1980, 33 percent of them were decided unanimously and 72 percent of them were decided by a majority of eight to three or greater. Our rules provide that a judge may request a full court review of the decision of an 11 judge en bank court. In the past 17 years,

there have only been three such requests and in each case,t he majority of the judges voted against the full court review. In fact, the first two I recall, there were only four votes for such a call. The last one was more close. I think that this clearly demonstrates that our court is quite content to have the 11 judge en bank court be the final decision of the 9th Circuit Court of Appeals.

Another criticism that has been leveled unfairly against the 9th Circuit is the lack of collegiality among our judges. This criticism has been expressed by those from across the continent who have never served with our court or experienced the relationship that our judges have with each other. We are, in fact, a very collegial court. We are friends with each other. Even though we may disagree vigorously on points of law, it is never extended to being any sort of personal antagonism.

COMMISSION MEMBER: Judge Hug, may I ask a question about that?

JUDGE HUG: Yes.

COMMISSION MEMBER: This matter of

collegiality seems to mean different things to different people. In a lot of the writings about it, collegiality in appellate court, there are several points made. One is, it is very important to the quality of the decisional process, et cetera. Some say in the writings about it that it is necessary that the judges, in order to maintain collegiality, work together frequently, sit together frequently, get to know each other well and so on.

I'm wondering if you could comment on that view of collegiality, and if you could give some kind of estimate -- I know it may not be very precise -- as to how often each judge of the court sits with each other. In other words, say Judge A, how often would he sit with Judge M? Over what period of time will they likely sit together?

JUDGE HUG: Well, I think you're quite correct that collegiality involves more than just being friends. It involves being able to work together, to know each other's opinions, to know how each other think. I think the question is a very good one in that respect. I am pleased to say that

on our court, we do know each other very well. We know the opinions that other judges have.

You're asking how often we sit together. Our computer structure is such that every judge is supposed to sit with another judge at least within two to three years. Now, in addition to that, the judges sit together on this 11 judge en bank court and on our capital case rotation. So, I would say that we sit together at least, with every other judge, within a couple of years. We see each other a lot more often. We receive E-mail from each other a lot more often. We know very well the positions, the feelings, the feelings on the law of the other judges of the circuit. The fact that we don't sit as a panel of three, you know, every two or three months doesn't mean we don't know very well what the other judges are thinking and how they're going about their decisions.

CHAIRMAN WHITE: Didn't I read that all of your judges get together for an outing?

JUDGE HUG: Yes, that's a very important meeting. I think one of our most important meetings

to the court is the annual symposium that we have. We get together and --

COMMISSION MEMBER: And that's a program on the law?

JUDGE HUG: That's right. For half-a-day or a little longer, about five hours, we discuss for three days, the problems or the advancements that we can make with the court. We have a regular program presented and the chairman of that symposium organizes the calendar, really, for discussion of those issues that the judges feel are most important that particular year.

CHAIRMAN WHITE: And are your circuit judges required to attend your judicial conference?

JUDGE HUG: Well, Congress changed the rule unfortunately, so they're not.

CHAIRMAN WHITE: Yes, yes. Well, Procter, you could have a court rule.

JUDGE HUG: Well, maybe we should have. We certainly encourage it.

CHAIRMAN WHITE: Anyway, the attendance is good?

JUDGE HUG: Attendance is good. The attendance is good of the district judges and bankruptcy judges and magistrates. It's an important time for all of us to get together and exchange views, and exchange views with the Bar. We feel it's very important to not deal in isolation; that we're exchanging views with other judges and particularly with the Bar. Those conferences are an ideal situation for doing so.

COMMISSION MEMBER: Judge Hug, may I ask a question?

You opined that in 20 years, if things go as those who would have split circuits wish them to go, we'd have 30 or 40 circuits. What if the 9th Circuit were left alone for 20 years? What would its size be? And I guess the question that has come up at other hearings -- and I know you're aware of it because of the Seattle hearings. The follow-up question, I guess, is how big is too big? Or is there such a thing as too big?

JUDGE HUG: I think the key answer to that is that it should be within the court and

within the circuit. When a circuit got to a position where the circuit court was too big and not operating efficiently and effectively, I think the judges of the court and the judges throughout the circuit and the lawyers are going to know it. That's the time when we should do something about it.

Now, the 5th Circuit decided almost unanimously, in the way they were operating they thought they should split. That's not the case in the 9th Circuit now and I don't think it has to be the case in the 9th Circuit for any time in the immediate future at all. What happens along the way, down the line, is something for the circuit and the circuit court to evaluate then.

I'd like to emphasize that we consider ourselves a very effective court. We've instituted many innovations that I've put out. In my written things, I've mentioned a few: the long-range planning process, issue coding to avoid conflicts, mediation and settlement program -- which we got a lot of help from the 6th Circuit on, I might mention

-- the appellate commissioner and our motions and screening and conference calendar.

Now, I'd like to just take a moment to particularly comment on this program because I think it's so important for the decisional process. Three judges meet for five days a month to consider motions and cases that appear to be clearly governed by existing precedent or have jurisdictional defects or are frivolous.

CHAIRMAN WHITE: Mr. Chief Judge, I gather that you have one, three, five, seven and is it nine -- nine, 10. Your staff, I gather, decides which weight to give these cases.

JUDGE HUG: That's right.

CHAIRMAN WHITE: As I understand the statement that you've sent in, the staff looks at the cases and decides the weight. And only the number one, the lightest weight, is screened.

JUDGE HUG: That's right.

CHAIRMAN WHITE: All the others are automatically on the oral hearing list, right?

JUDGE HUG: That's right, with one

exception. During this past year, we've experimented with something figuring that some of our three-way cases were actually more easily decided and were governed by existing precedent. Therefore, we've experimented with judges looking over what the staff has done. So, we've put a few of the three-ways into that category and that has worked out well.

There is a fail-safe device though that if any one judge on that panel thinks that the case should be orally argued, it is orally argued. I think the real strength of that whole program is that we get three judges there together, all addressing the same case at the same time. And with the experience of those judges and the preparation of the staff attorney, we're able to determine, I think, quite fairly whether it can be decided in that process and if so, we go ahead and decide it. But if it should not, we put it on the argument calendar.

CHAIRMAN WHITE: Are all the number one weight cases counseled? Are most of them

uncounseled?

JUDGE HUG: Most of them are uncounseled.

CHAIRMAN WHITE: Well, how about the ones that are counseled?

JUDGE HUG: Some are counseled, but some of those are either frivolous or determined in some other way.

CHAIRMAN WHITE: Well, even if they're counseled, the counsel doesn't get a word in edgewise about whether or not oral argument should be given?

JUDGE HUG: He does have an opportunity to write in and request that it be orally argued. Then if any one of the judges believe that it should be, it is. But there is an opportunity to do that.

CHAIRMAN WHITE: Right, but he's not present?

JUDGE HUG: He is not present. That's right.

CHAIRMAN WHITE: Thank you.

JUDGE HUG: Right.

Well, in conclusion, I would like to say that not only I've mentioned our court. What is equally important is the value of our circuit-wide institutions and the adverse institutional effect that division would have on the 9th Circuit throughout the entire circuit and others will discuss this.

I would just close with this thought. Any discussion about a policy decision as serious as breaking up a 100 year old institution ought to begin by determining who has the burden of proof. The burden should be on those who propose to split the 9th Circuit to show that a particular proposal will advance the cause of justice and will do so with a greater efficiency and effectiveness than the 9th Circuit has been able to do for the last century. This burden has not been met.

Thank you.

CHAIRMAN WHITE: Thank you very much.

Aren't you from Montana?

JUDGE BROWNING: Elte, Montana.

CHAIRMAN WHITE: And weren't you the

former Chief Judge?

JUDGE BROWNING: I was. And I tell you, it's a great circuit. I joined our --

CHAIRMAN WHITE: But you haven't taken senior status?

JUDGE BROWNING: No, don't urge me too strongly. I will in due course.

That's one of the things that you ought to notice, everybody ought to notice. There's talk about how this court in some respects -- the kind of decisions we make don't please particular people. I think we ought to remind everybody that the present court is a transitory matter. We have 28 vacancies that are in the process of being filled. Within a year, I don't think I'll know anybody on this court. It's a changing institution. It doesn't operate statically. Just wait a little while. If you don't like the way we decide them, just wait a few years because there's a lot of people coming up.

CHAIRMAN WHITE: Tell me about it.

JUDGE BROWNING: No judicial institution should be changed because of the particular point of

view of the judges that are on it at the moment. Everyone knows that it will only lead to instability and inappropriate pressures being put on the court. Just be a little patient anyway. The way the thing works, it will change and you ought not to destroy the institution because you don't like the way the particular judges on it now look.

I want to second strongly our Chief Judge's suggestion that this Commission should urge the Congress not to divide the circuits or take (indiscernible) any other way, but instead to let them continue the programs that they've had underway that have enormously increased the productivity of the federal courts over the last 30 years. There's a remarkable exhibition of what federal judges innovating, doing their work can accomplish. I think you should let them continue to do it. Until they really do fail, no effort should be made to change the structure.

That was the conclusion reached by the three studies that preceded you. They all concluded there ought to be no divisions or a change in the

structure of the Federal Courts of Appeal. But instead, they should be encouraged to continue to innovate and experiment. The last of those reports filed in 1995 and adopted by the Judicial Conference encouraged the spirit of experimentation and innovation that has long existed in the federal courts and do not realign unless compelling, empirical evidence demonstrates that the adjudicative and administrative functions of the court are failing.

The fact is, as Procter has said, that the Federal Courts of Appeals are working better today than ever before. They're handling more appeals. They're doing a more thorough job. They're doing it in a timely manner than they have at any time in their history. That's true of our court. Despite its major obstacles, we stand now as the third highest among the circuits in the productivity for each active judge. Our termination to exceed our filings and minor delays that now exist will disappear when our vacancies are filled. I absolutely guarantee it.

Much of the discussion in Seattle a few days ago was directed to the proposition Procter has mentioned, wondering whether we are reasonably consistent in our holdings. I say that all of the hard evidence requires an affirmative answer to that question. Hellman's definitive studies have been mentioned. Let me say it is also my personal experience. I sit every month out of eight months a year on a calendar of approximately 30 cases. We almost never have an argument from a lawyer that there are inconsistent controlling decisions within the 9th Circuit. It's a very rare occurrence. How can that be to hear some talk? The fact is, there's no evidence to that effect that there is any substantial difficulty.

Conflicting decisions are not a large part of my life. I go on month-after-month hearing case-after-case. That's not the problem. It's not presented to us by the lawyers. I think it really doesn't exist. The fact is that we have a very successful system for locating issues that are the same (indiscernible) for the same panel and all the

other things that have been on report that essentially has eliminated conflicts except for a very few in the 9th Circuit. We respond to those within our en bank process. I think we've calculated the total number of en banks that have occurred in our court over the years we've had that system --

CHAIRMAN WHITE: Are those few just in deliberate?

JUDGE BROWNING: Are deliberate? I don't think there's any judge on our court that would deliberately misapply another decision of the court. Usually, lawyers spend most of their lives arguing that other cases are distinguishable from theirs.

CHAIRMAN WHITE: Well, certainly, there are a lot of deliberate conflicts with other circuits.

JUDGE BROWNING: Oh, deliberate -- yes, that's true. I'm only talking about the internal situation.

CHAIRMAN WHITE: But is there a rule in

your court that if you want to overrule a precedent, you have to go --

JUDGE BROWNING: Yes. The rule to put it affirmatively, is that every panel has to follow the decisions of the prior panels of the court. If you didn't do that, you really have chaos.

COMMISSION MEMBER: Judge Browning, may I ask a question?

JUDGE BROWNING: Sure.

PROFESSOR MEADOR: You mentioned the Seattle hearing the other day. You may have heard some testimony -- we've heard it elsewhere too -- that there is a perception among some lawyers at least and among some district judges that there are inconsistencies and that the outcome of an appeal depends on the luck of the draw with the panel you get.

What is your response to that discussion?

JUDGE BROWNING: Well, I would say, Professor Meador, at the outset that perception lacking evidence, any substantial evidence, is a

poor basis for restructuring a court. I think basically, all you have when you get right down to it -- I've talked many times with the people who have worked on the problem. If they asked the person what cases are in conflict, they almost never have a case in mind. If they do and you look at it, the differences are pretty obvious.

I don't say that it never happens. The only cases I vote to take en bank are those in which I'm satisfied there was a conflict. That's less than a third of those that we take en bank and then --

CHAIRMAN WHITE: Well, how did that happen (indiscernible) conflict? The lawyer didn't realize or the panel didn't realize that it was creating a conflict?

JUDGE BROWNING: I must repeat, I would never vote to decide a case before me inconsistently with the prior decision of our court, and I think that's true of all of our judges. When a conflict occurs, usually it's no --

CHAIRMAN WHITE: Somehow they got there.

JUDGE BROWNING: Pardon?

CHAIRMAN WHITE: Somehow they got there.

JUDGE BROWNING: Somehow they got there.

But I think lawyers spend their lives, as I said before, distinguishing prior cases and sometimes you don't agree that they're properly distinguished. That's the way it usually comes up. We have an en bank process. Somebody says "take this case en bank because it conflicts with a prior decision of our court." We then have an exchange of memoranda from all members of the court, half arguing that there is a conflict but half arguing there isn't. They're different cases. That's the way it comes up.

CHAIRMAN WHITE: Yes, but I would suppose that all of your en banks are not dealing with supposed conflicts. They're just wrong.

JUDGE BROWNING: No. There are two grounds --

CHAIRMAN WHITE: They're just wrong. The panel got it bad.

JUDGE BROWNING: There are two grounds

for granting an in bank review under the statute and under our rule. The first is to keep the law of the circuit harmonious. That's conflicts. I vote for those. The second ground is if a case is of extraordinary importance. I never vote for those. That's in the eyes of the beholder. But that's two-thirds of the cases we take en bank are in that category. If you have a clear conflict, you'll get a unanimous vote of the judges of this court to take it en bank. That's my view. Those who have studied it rather than just reacted to it emotionally sustain that.

Now, Judge Rymer made a point with me the other day that I hadn't thought of. It isn't just the conflict in decisions that counts, it's the rationale. If you're sitting as a district court judge trying to draw an instruction, you don't just look at the decision. You have to look at what the reasoning is in order to come to a way in which to instruct the jury. I don't think we've been careful enough about that, about keeping our language consistent, but we can be and we will be. We've

already discussed it in our court. We'll be working on it.

The one thing about this court that I'm absolutely sure of is that they will look at the problem in the face and they will try to find the best solution, and they'll act on it. I think that's one that we can improve considerably. But as far as conflicts and decisions are concerned, I say again, they've not been part of my life for the last 35 years, very, very rarely. Now I know you sat on the Supreme Court and thought such should be granted in a lot of cases because there were conflicts between the circuits. I think that's the function of the Supreme Court to resolve those conflicts, not ours. If another circuit goes another way, you get two points of view up there and then you can resolve it. I don't think it's our function to resolve those. We make the choice on the basis of how we see the law as to what the right rule, right (indiscernible) should be.

You've asked how large can a court be? Our record on determining how many judges can

function effectively on an appellate court is lousy. I just counted a few facts here that I think you'll be interested in. I hope so. Judge Charles Allen Wright reported that when he was clerking in 1947 on the 2nd Circuit, everybody thought the absolute maximum number was six. That's the number of judges they then had on the 2nd Circuit. The Judicial Conference of the United States in 1964 said it was nine. Eight years later they said it was 15. Justice Burger said that he thought the optimum figure was nine and he announced that we couldn't function effectively if we had as many as 13. We've been functioning effectively with a good many more than 13 for a good many years.

Judge Chewfa testified before this Commission that the maximum number was 12. That happens, not coincidentally, to be the number of judges on his court. Six circuits have more than 12 judges. I'm sure if you go to those circuits and ask them, they will say that "we think we're doing very well, thank you very much, with our 12, or 13, or 14 judges."

CHAIRMAN WHITE: We've noticed that.

JUDGE BROWNING: Yes.

We've moved, Justice White --

PROFESSOR MEADOR: Judge Browning, may I ask a question on a slightly different line?

If you listen to all the claimed advantages of a very large circuit, it tends to take you on maybe to thinking about whether those people who advocate abolishing all circuit lines and having a single nationally unified court of appeals that might function through various kinds of divisions. I'm wondering what you might say about that? Do the advantages claimed for a large circuit that we hear in the 9th Circuit lead you on ultimately to that sort of conclusion that if they're good in the huge circuit like this -- or all the advantages you have -- why not extend it nationwide and abolish all circuit lines?

JUDGE BROWNING: Well, the spirit of an institution is perhaps its most important part. My feeling toward the judges on our part are 28 plus 10 seniors, 38. I really love them all, you know? You

live with them. You work with them. You get to know them well and you really do. It doesn't take a lifetime. I know how our judges think. I know how they're going to vote in most cases. In most cases, we all vote the same.

We sat on a calendar together in Hawaii and a couple of weeks ago, we had 28 cases. We may have one or two disagreements and that's all.

JUDGE RYMER: You don't have to disagree with the other two of us (indiscernible) make it unanimous.

JUDGE BROWNING: I think it's important that you have a number that you can live with and you can get to know. Anyway, the good old 9th Circuit is something that we are proud of. We want to work to keep it together. All of the circuits, you're going to find, feel the same way about it.

You say "abandon the 2nd Circuit"? You couldn't get them to do that for love or money. They believe the 2nd Circuit is the queen of the circuits and they want to keep it. I think that's important to the quality of the work that they do.

When we moved from seven to nine, nine to 13, 13 to 23, 23 to 28, every time we made those moves, there were people who said "with the larger number, it will not work." They were repeatedly wrong.

So, I urge you, don't try to determine what the right number is. There's only one way to determine it and that's to try it. You'll find out soon enough, as our Chief Judge said.

COMMISSION MEMBER: You've never had a chance to try your 28 judges, have you?

JUDGE BROWNING: Oh, yes. We operated with 28 and it was fine.

COMMISSION MEMBER: And how long?

JUDGE BROWNING: Oh, how long without -- quite a while without a vacancy. I think so. Our vacancies are fairly recent, last two years, say, or three. We've had 28 -- if I may, Your Honor, submit in writing an analysis of how long we sat with 28.

CHAIRMAN WHITE: Don't worry. I know.

JUDGE BROWNING: I know. I repeat, nobody knows how many are too many. The one way to do it is to try it.

May I take one more moment to speak about the suggestion -- because I know you were interested up in Seattle -- that we decide our cases by region. I want to point out, as Judge Goodwin did up there, we tried that 20 years ago. We kept it and we had a six month experiment plan which took our three regions. The judges in those regions heard the appeals from those regions. After five months, we unanimously decided to give it up. We thought there were discrepancies developing among the decisions in those three different areas. We felt there was a real loss of collegiality. The full paper record on that experiment and how it worked and didn't work. I urge the Commission to examine it and arrive at their own conclusion. We were ready to try it. We're ready to try it again if there's any point in that.

Finally, I want to urge the Commission that in circumstances in which you exist, what you say is going to be enormously important. You were created to make recommendations to Congress. Presumably, Congress will not necessarily follow,

but they will certainly pay attention to them. What you recommend and what you say is going to be exceedingly important to us. Again, I urge you to look at our record if you aren't satisfied that circuit should continue to live and do as it is now doing, and I'm confident you will. Thank you very much.

COMMISSION MEMBER: Judge Browning, may I ask a follow-up question about when you tried the experiment of adjudicative divisions as opposed to administrative decisions?

When the court decided that that was a failed experiment, was that on the basis of the empirical data you think we should have to make our decisions? Or was it a preference of the judges based upon that experience?

JUDGE BROWNING: My guess is the latter, and that's my recollection of it. I wasn't feeding -- it was harder to keep together and have a uniform body of law when you're getting hit from three different tribunals.

COMMISSION MEMBER: Well, I mean, was

that supported by empirical data or was that the perception of the judges afterward?

JUDGE BROWNING: As far as I'm concerned now, 20 years later, it's perception. How much data do we have on it? I can't tell you.

COMMISSION MEMBER: Okay, sir.

JUDGE BROWNING: I can tell you we'd be delighted to have you have it.

COMMISSION MEMBER: Thank you.

JUDGE BROWNING: Thank you.

CHAIRMAN WHITE: Good morning, Judge Wiggins.

JUDGE WIGGINS: Good morning, Justice White.

Justice White and Members of the Commission, my name is Charles Wiggins and I am a Senior Judge on the 9th Circuit. I've been a Senior Judge now for about three years. I'm sort of new in the saddle.

I don't have any material in front of me because I can't read it. I'm suffering from a problem that may be unrelated to Dan Meador's

problem, but the point is that I'm just about blind now. My secretary prepared material that I could read and it had one word on every page, and I would just flip back and forth.

I have been appointed to the court -- I was appointed to the court in 1984. I practiced law in Southern California for, oh, I guess about 50 years now, 45 years. Interrupted, I think, by my service in Congress. I served in Congress in 1966. I was selected in '66 and served on the Judiciary Committee for 12 years and left Congress in '78. I don't have many colleagues left in the Congress, some on the Senate side.

While I was in Congress, I served on a number of commissions including the Hruska Commission. I may be one of the sole surviving members of the Hruska Commission. I served on that commission and I think I participated in the decision that ended up with a recommendation by the Hruska Commission to divide California. I made a mistake then and I've grown to understand the nature of that mistake and I fully endorse the

recommendations of my Chief Judge Procter Hug not to divide the 9th Circuit.

I want to start with some of the arguments made by those who advocate the division of the circuit. Some of my colleagues of whom I have great personal respect. They're very bright judges but they make some of the foolish arguments and I think I am not being impolite if I point them out to you. The notion that the circuit is too big is a commonly repeated phrase around the country. "This circuit is too big". Well, why is it too big? It was created large. It was created more than 100 years ago and it was larger then than it is now.

But as a practical matter, the communication between the circuits, the travel time between areas in the circuit has greatly diminished. We have the ability to use E-mail instantly anyplace in the circuit. We have a telephone. We have jet travel that reduces the time of travel enormously. When the circuit was created in 1851, the travel between Sacramento and San Francisco was two days. It's two hours now. The notion that the circuit is

too big is just a canard and it ought to be put down by you.

We are getting smaller, to tell you the truth, and we're going to get much smaller in the years ahead. The notion of electronic video arguments is coming just in a year or so and the notion that we're going to have to travel to distant points in the circuit is going to be a thing of the past in just a few years. Judges will not have to travel. They will be able to hear arguments in their own circuits. Now, I don't think that will be terribly popular with the bar representing some people on the civil side because they like to travel. They get paid for it, and they do. I think that that will be reluctant for them to accept the notion. But judges will force them to accept the notion that they assemble in their own hometowns and judges assemble in their own place of city and they have electronic arguments on videotapes. It's just a year or so away.

In any event, I would like you to --

COMMISSION MEMBER: Judge Wiggins --

JUDGE WIGGINS: Yes, sir.

COMMISSION MEMBER: -- may I interrupt you for one question?

If I understand what you're saying, you're saying each panelist of the three judge panels would hear these arguments on a video screen in his or her own chambers.

JUDGE WIGGINS: Yes, I think so.

COMMISSION MEMBER: Then how would they deliberate as a panel?

JUDGE WIGGINS: Electronically, by mail.

COMMISSION MEMBER: Through a video?

JUDGE WIGGINS: Probably, it would be worked out experimentally, but I would think that they would be all tied up on telephones and literally having a conversation at the same time amongst the members of the panel.

COMMISSION MEMBER: But they wouldn't have a face-to-face deliberative session as they do now, following oral arguments?

JUDGE WIGGINS: They would not. That may be a shortcoming and perhaps the panel would

work it out.

COMMISSION MEMBER: It may not be. I'm just curious. I hadn't thought about it.

JUDGE WIGGINS: Yes. And I'm not creating a model that is going to be imposed, but I know that that's coming. I know that it's coming and you know that it's coming. It's existing now in certain places in the circuit and certain places around the country.

JUDGE RYMER: Indeed, Judge Wiggins, I just participated in a video conference last weekend. I would assume that conference could be held in the ordinary course on the video hookup which would, in effect, be face-to-face.

JUDGE WIGGINS: Yes. I would think so. I don't think that that's beyond working out by the panel. The panel may want to assemble in a certain city to hear arguments physically, but I think that the technology is almost here -- well, it is here in the military -- but it is not transferred conveniently to the courts but it will be just in a matter of days.

COMMISSION MEMBER: If that is the way of the future, does that lead to the conclusion that it really doesn't make any difference how big or how small the circuits are? That numbers become irrelevant in such a circumstance?

JUDGE WIGGINS: I am reluctant to abandon the notion of geographic circuits because of the spirit of federalism in the United States, and states' rights, interests, but I think it ought to be understood as a function of the United States government. We are United States judges and we don't have parochial concerns. The people who advocate divisions have really parochial concerns and you ought to understand that. A judge who --

COMMISSION MEMBER: Well, isn't that what federalism is all about in some ways --

JUDGE WIGGINS: Yes, it is.

COMMISSION MEMBER: -- parochial concerns.

JUDGE WIGGINS: That's right, but we abandon that notion when we put on our mantel as a United States judge. We have to serve the United

States government and we do serve the United States government by interpreting federal laws that are enacted in Washington, DC and signed by the President, and that are applicable everywhere. That's a very important function. I think that we should not abandon that notion.

COMMISSION MEMBER: But Judge Wiggins, let me ask you this, if I may?

How do you square that proposition with what you just said earlier that you favor regional circuits? That you would not want to abandon the regional circuit design?

JUDGE WIGGINS: Yes, yes.

COMMISSION MEMBER: Well, how do you put those two statements together?

JUDGE WIGGINS: Yes, I can't reconcile them because they are inconsistent. I would think that if we had to do it all over again, maybe we could operate as one giant circuit for the United States with administrative divisions locally. Well, I'm not sure that I would favor that because it's a compromise. The compromise is mandated by the

Senate of the United States. You know, there are the sorts of the problem here. The Senate of the United States has two senators from every local state and they tend to favor their local states. They do, and I suppose that's to be understood. But they would not abandon them.

You know, the notion of maybe we should do away with the 1st Circuit, merge it with the 2nd, all of that -- that's hypothetical because it won't happen. We couldn't recommend that. I recommend in my prepared statement that we chisel a little bit and take on the circuit that may be most vulnerable, the DC Circuit, and that we at least recommend -- that you recommend that it be merged with the 4th Circuit. But you know, I think that's -- pick on the DC Circuit.

COMMISSION MEMBER: The 4th may not want them any more than the 10th wants Arizona, Judge Wiggins.

JUDGE WIGGINS: Yes, I understand. I understand that and I was a little reluctant to even put that little dig into the thing.

CHAIRMAN WHITE: Judge, perhaps you don't want to answer this. If you took a poll on the judges on the 9th Circuit, how many of them would favor the split in the circuit?

JUDGE WIGGINS: I can answer that only with reference to the circuit judges.

CHAIRMAN WHITE: Yes, that's what I mean.

JUDGE WIGGINS: There were at the last meeting, about 22 or 23 persons present.

CHAIRMAN WHITE: That had senior judges in it, I guess?

JUDGE WIGGINS: Yes. There were, I think, 22 or 23 -- Pam, you were there -- on that order. I believe the answer that you seek was around 20 to maybe 4 or 5. That's just about the way it is. That's just about the way it is.

COMMISSION MEMBER: That's your opinion anyway.

JUDGE WIGGINS: Well, yes, and I'm very confident in that opinion.

COMMISSION MEMBER: Yes.

JUDGE WIGGINS: I can represent that that's probably the way it is, but there has not been a definitive vote taken.

Let me conclude by asking you not to trifle with the circuit. The proposal has been made that maybe we would consider administrative divisions, judicial divisions. Why would you do that? Why would you do that?

I think that the answer has got to come from you. You would simply be physically dividing the circuit without achieving any benefits from it. You know, I've come to love this circuit. I recognize that I made a mistake serving on the Hruska Commission and I don't want that repeated if it's at all possible. I urge you not to do that. If you would come up with some -- and if I may say it -- cockamamie proposal, that you justify it and permit me to take you on in the Senate of the United States and in the House because that's where the political game is going to be played.

Well, in any event, I much appreciate your opportunity for permitting me to testify. If I

can answer any questions you may have, I'd be pleased to do so.

CHAIRMAN WHITE: Thank you, Judge. We appreciate your coming here and good luck to you.

JUDGE WIGGINS: Yes, thank you, Judge.

CLERK: Call the next panel, Honorable Joseph Sneed, Mary M. Schroeder, David Thompson.

CHAIRMAN WHITE: You may proceed, Judge Sneed.

JUDGE SNEED: Thank you, Justice White.

I don't know whether I'm the ants at the picnic or the skunk. In any event, I offer a different view to what has been just presented.

As my formal statement indicated, I favor dividing the 9th Circuit, placing California, Nevada, Arizona and Hawaii in the Southwestern Circuit which will retain the 9th Circuit designation, and the new Northwestern Circuit which will contain the remaining states of the present 9th Circuit and be designated the 12th Circuit.

CHAIRMAN WHITE: You would not divide California?

JUDGE SNEED: I would not divide California. I think that's a mistake. It was a mistake in the Hruska Commission and would be a mistake for you to divide it.

COMMISSION MEMBER: Judge Sneed, we have statements from the State Bar of Hawaii and the Federal District Judges in Hawaii, both of which say that if the circuit is to be divided, Hawaii should go with the Northwestern states. Could you explain why you would take a different view about where Hawaii ought to be?

JUDGE SNEED: Well, first, geography. It's closer aligned geographically with the Southwestern part of this West Coast. Secondly, much of its law is derived from California, and it seems to me quite logical that it stay with California. Their personal desire with alignment with the Northwest springs from motives that I don't really comprehend. They may be dissatisfied with the performance of this circuit as it exists and would prefer to go somewhere else than somewhere else.

COMMISSION MEMBER: Well, one of the things they say is that if they were left with California and Arizona and Nevada, they would be so overwhelmed by California. That if they were with the Northwestern states, they would have a more position of equality with those states where the population is smaller and so on.

JUDGE SNEED: Well, they're certainly overwhelmed by that standard now in spades, and they have existed under it rather satisfactorily in the past. But if that is their wish, as far as I'm concerned, I would let them go where they wish to go. Certainly, California, Nevada and Arizona have enough to do. The advantage from my standpoint, and the standpoint of the remaining 9th Circuit as I have described it of Hawaii's presence, would be that they bring two Senators. We all know that Senatorial representation within a circuit is terribly important in having judicial appointments processed --

COMMISSION MEMBER: Could I, Judge Sneed, ask you a question?

Your view of the reasons for splitting the 9th Circuit or altering its present structure, are they based primarily on questions, let's say, of collegiality in the sense that it's just too many judges?

JUDGE SNEED: Well, collegiality plays a part.

COMMISSION MEMBER: What are your basic reasons?

JUDGE SNEED: Basic reason for my position is this, when you get a court against a merge toward 40 judges, you've got an almost impossible en bank situation. If there is an Achilles Heel in the mega-circuit, it is in the en bank process. You just can't have an en bank process that will take care of the traffic in the en bank evaluation that has 20 or 30 judges on it.

COMMISSION MEMBER: What about this 11 judge --

JUDGE SNEED: It becomes less and less representative and resembles more a kind of a roll of the dice.

COMMISSION MEMBER: And that's made up each time at random?

JUDGE SNEED: That's selected each time.

COMMISSION MEMBER: Suppose it had a longer and a more stable --

JUDGE SNEED: An interesting proposition. I don't know whether the court would ever be happy with it because it would create, as it were, tiers of judges.

CHAIRMAN WHITE: Well, Judge, is it usual that you or any other individual judge refuses to be bound by this 11 man judgement?

JUDGE SNEED: Of course not. But being happy with it and satisfied that it represents the majority of the court is something else.

CHAIRMAN WHITE: Well, you've got a precedent that you follow.

JUDGE SNEED: Yes. But it is a precedent that does not or may not represent the majority well of the court.

COMMISSION MEMBER: Well, what if you had the full 28 compliment and had it on ballot, and

it turned out that it was half-and-half?

JUDGE SNEED: That could happen.

CHAIRMAN WHITE: Well, let's say if we're --

JUDGE SNEED: It's unlikely, I might add.

CHAIRMAN WHITE: Let's say there was a large majority for one side and not so many people on the other side, and you were the one that didn't like the decision.

JUDGE SNEED: That's a common occurrence in my life.

CHAIRMAN WHITE: Well, that is all you were talking about --

JUDGE SNEED: No, no. What I'm talking about is, as the court grows in size and you stick with an 11 man en bank, the makeup of that 11 person en bank becomes more and more unrepresentative of the total court.

JUDGE MERRITT: If you were going to make a new en bank process for the circuit, is there anything in particular you would do to change the en

bank process?

JUDGE SNEED: The en bank log?

JUDGE MERRITT: The en bank process?

JUDGE SNEED: For me, to be perfectly forthright with you, Judge Merritt, to me the en bank process limits the size of circuits.

JUDGE MERRITT: That's what's driving --

JUDGE SNEED: That's what drives most of my feeling about this. But the en bank process which is crucial to the existence of a harmonious law within the circuit, is the key to how large a circuit can get.

COMMISSION MEMBER: And the purpose of the en bank process is to keep order in the decisional process --

JUDGE SNEED: Absolutely.

COMMISSION MEMBER: -- and that is not occurring, you think, satisfactorily in the 9th Circuit?

JUDGE SNEED: In my opinion, it may be occurring more-or-less satisfactorily, but it doesn't represent a model to me. It certainly

doesn't represent a model when we talk about 35 to 45 judges in the 9th Circuit.

COMMISSION MEMBER: Judge Sneed, the materials I've read indicate that your objection is probably the driving force in the split of the 5th. Would you agree with that, having --

JUDGE SNEED: From my experience -- and I grew up in Texas, incidentally -- I would say that's absolutely correct.

COMMISSION MEMBER: Thank you.

JUDGE SNEED: Now, there are other reasons for my position, but as I say, the key reason is this en bank problem. The size of the circuit can not grow indefinitely and maintain an 11 man en bank.

Now, let me say very candidly, I helped design the en bank process of 11 people. Judge Browning and I worked very close together to do that. We were dealing then with 23 judges as I recall -- or 21. I'm not sure which -- and it made a great deal of sense to say, "well, at least we'll select a number that is approximately half of the

circuit." I conducted some private drawing experiments in the privacy of my chambers over a long period of time, to determine whether statistically that would work out. I thought it did. I think as the circuit grows in size, that 11 man en bank becomes less and less viable.

COMMISSION MEMBER: Well, let me ask you this. If we look at the future decades and all of the circuits increase in size with this circuit continuing to increase in size, the problem then under your submission would be to try to come up with a more satisfactory sort of mini-Supreme Court for these larger circuits.

JUDGE SNEED: You're absolutely --

COMMISSION MEMBER: We've got a Supreme Court which is going to resolve conflicts, but we need a better process, kind of a mini-Supreme Court inside these larger circuits.

JUDGE SNEED: I don't know whether I would call it the mini-Supreme Court or some other name, but I agree with you absolutely.

COMMISSION MEMBER: Yes, we'll call it

that, but I --

JUDGE SNEED: You see, to me, when we confront this kind of problem, we either have got to go to the mega circuits as the prior speakers actually have advocated, or we have to go to smaller and smaller circuits. The reason for that is case filings are going to increase indefinitely. There's no way to stop that.

COMMISSION MEMBER: But you wouldn't have to do that latter if you could figure out a way to have a kind of controlling mini-Supreme Court within a larger circuit. If you could figure out a way to do that effectively, you wouldn't have to --

JUDGE SNEED: Within how many circuits? One circuit?

COMMISSION MEMBER: Within a circuit -- if you could figure out a way to keep some order within the larger circuit as they get bigger, then you would solve that problem.

JUDGE SNEED: But that's a modified en bank procedure in my mind.

CHAIRMAN WHITE: Have you, yourself,

ever voted for an en bank made up of all the judges, all the active judges?

JUDGE SNEED: No.

CHAIRMAN WHITE: Why not?

JUDGE SNEED: Because it doesn't work is the main problem. If you have 28 judges sitting on one case --

CHAIRMAN WHITE: Well, you --

JUDGE SNEED: -- and that was the regular en bank procedure, you wouldn't solve many conflicts within a year.

CHAIRMAN WHITE: Well, you had 28 judges for a long time.

JUDGE SNEED: That's right. And as was previously stated, we've never done it. But does that 11 en bank not become less and less representative as the size of the circuit grows?

COMMISSION MEMBER: I guess there's a question about whether the representative nature of the en bank in the electoral representative sense is really the touch stone of what the en bank process should be. I don't know.

JUDGE SNEED: Well, you see, we may be hung up on words, and I think that's what your key point is when you say en bank. En bank means the entire body.

COMMISSION MEMBER: We're also dissatisfied sometimes with what the Supreme Court does, but we don't -- I mean, that may not be representative either.

JUDGE SNEED: I know, but the committee, Supreme Court, you refer to happens to be one of our colleagues next door, maybe.

COMMISSION MEMBER: We don't think the Supreme Court right now is very representative of the nation because we don't have any representative, and haven't had for more than a decade, from the South. But we accept their decisions.

JUDGE SNEED: Oh, yes, so do I when I don't like them.

COMMISSION MEMBER: Judge Sneed, on these en bank calls, those that do go en bank or suggested to go en bank, how many of those are because of what are perceived to be, or demonstrated

to be intra-circuit conflicts between panels, and how many are what Justice White referred to as the court thinking the panel got it wrong?

JUDGE SNEED: Most of them, in my opinion, are the latter.

COMMISSION MEMBER: The latter?

COMMISSION MEMBER: Judge Sneed, let me ask this. What do you think of the proposal to have the court of appeals here organized into geographical divisions? Each division -- say, there were three divisions of maybe ten judges each or something like that -- within itself would have an en bank process so it stayed harmonious, and then a kind of super circuit-wide en bank of a more stable continuing nature, to pick up on Judge Merritt's notion -- the kind of little Supreme Court within the circuit to keep the divisions on the same track.

How do you react to all of that?

JUDGE SNEED: Well, my initial reaction is it would work, but it's almost the equivalent of splitting the circuit.

JUDGE RYMER: If you separate the

concept of the court of appeals from the circuit, it's not because you retain the advantage of administrative flexibility of the circuit with smaller operating units --

JUDGE SNEED: The administrative apparatus of the circuits grows and shrinks or is small, depending on the size of the circuit and the nature and extent of its business. So, as far as I perceive it, you might as well have three circuits rather than this --

JUDGE RYMER: Well, is your difficulty with the size of the circuit or with the size of the court of appeals?

JUDGE SNEED: My position basically, aside from factors relating to the volume of business, involvement of staff, et cetera -- essentially is that an en bank process as we know it simply doesn't work as the circuit grows and grows in members. Now, Judge Merritt has offered an alternative to that, but it seems to me it verges closely -- and so has Professor Meador -- verges closely to dividing the circuit.

Now, I'm perfectly willing, as I mentioned in my paper, to live with a very large circuit but I'm not happy to live with one with 40 judges and an 11 man en bank. If the en bank gets larger, it seems to me becomes unwieldy. Now that, really, is the bedrock of my opposition. I would favor the unlimited en bank. I favored the growth of the circuit up to its present level. I do not favor expanding its growth to 35 and 40, that's with our en bank structure. That's the reason I think fundamentally, that the circuit ought to be divided.

CHAIRMAN WHITE: Don't you think that your idea that you would divide the circuit doesn't solve --

JUDGE SNEED: It doesn't solve all of it. It solves it for a while and that's --

CHAIRMAN WHITE: Well, for a while.

JUDGE SNEED: For a while.

CHAIRMAN WHITE: It leaves California practically alone.

JUDGE SNEED: No. I think California would have, under my preferable alignment, eight

Senators and would not be alone. However, I do, in my papers --

CHAIRMAN WHITE: How many judges would California have to have to handle just its own cases?

JUDGE SNEED: I wouldn't hazard a guess at this point, but I would say it will be somewhere between 15 and 20.

CHAIRMAN WHITE: And then --

JUDGE SNEED: Ten at a minimum.

CHAIRMAN WHITE: So, you would have the same problem with 11 man en banks?

JUDGE SNEED: It could be increased, perhaps, to 15 if it was necessary but at some point, this relationship between the size of the court and the en bank process requires an adjustment.

CHAIRMAN WHITE: Well, I mean, it doesn't sound to me like the way you would split the circuit doesn't even solve your --

JUDGE SNEED: It's a compromise, Justice White. It's a compromise.

CHAIRMAN WHITE: It's a compromise but it doesn't do much for your basic objection.

JUDGE SNEED: It delays it for a few years.

COMMISSION MEMBER: It looks like to me that your basic objection being what it is about resolving the en bank problem isn't all just to change the en bank process. I mean, you can imagine the stability of the law in the United States if we made up the Supreme Court each time, new for each case drawing on let us say court of appeals' judgement or something.

JUDGE SNEED: Oh, yes, I know.

COMMISSION MEMBER: It would be a disaster.

JUDGE SNEED: Yes.

COMMISSION MEMBER: I mean, we wouldn't have any stability in the law of the United States.

JUDGE SNEED: I understand that and that's part of my concern.

COMMISSION MEMBER: Yes, okay.

JUDGE SNEED: Not only that but, as I

say, the chance of the en bank panel not really representing the majority of the court.

COMMISSION MEMBER: Well, I'm not sure that it's the representative part of it that's the problem. It's the instability of it.

JUDGE SNEED: Either way you phrase it.

COMMISSION MEMBER: Judge Sneed, excuse me, but when you came on the court --

JUDGE SNEED: Twenty-five years ago.

COMMISSION MEMBER: Sir?

JUDGE SNEED: Twenty-five years ago.

COMMISSION MEMBER: Well, the court sat en bank to hear --

JUDGE SNEED: Yes. When we jumped from the 15 we were at one time when I first came on the court up to, I think it was 23, we decided on the 11 man en bank.

COMMISSION MEMBER: When you reached 23?

JUDGE SNEED: Right.

COMMISSION MEMBER: How did the court work as a court of 15 with the en bank process?

JUDGE SNEED: Very well. Very simple.

Everybody was there. It really served the en bank purpose.

COMMISSION MEMBER: And did they take any number of cases for en bank decision?

JUDGE SNEED: That was very early in my career, but they were taking them when I came on. We took some thereafter, but it was a closer court. I mean, we were more closely bound. We saw each other more frequently. We knew exactly where each other stood. Now, we know where each other stands but there's so many different people to know where they stand. It's a much more mixed bag in that sense.

One other factor that I would mention -- and I say this very candidly -- the judges themselves on this court are really doing less and less of their own work. I am, and I think every other judge is. We're relying more and more on staff for various reasons: the volume of cases, the structure, and so on.

CHAIRMAN WHITE: Well, thank you, Judge. It's been an interesting discussion.

JUDGE SNEED: The skunk at the picnic will withdraw.

CHAIRMAN WHITE: Oh, no. Oh, no. Just think of what a skunk skin was worth.

Judge Schroeder?

JUDGE SCHROEDER: Good morning. I am Mary Schroeder. My home is in Phoenix, Arizona.

I am here because I am next in line to serve as Chief Judge of this circuit. I would like to take this opportunity to welcome those of you who have not been here before to our building here in San Francisco. Judge Sneed, Judge Hug and I spent seven years overseeing the reconstruction of our 1905 building and the construction of a brand new structure inside of it. So that, we have a building that was designed in the 19th Century to carry this court through well into the 21st Century. It is my hope that it will be a court that is not divided.

I have been a very close observer of the administration of the circuit at least since the time that Justice Kennedy was appointed to the

Supreme Court and I realized that I was in the line of succession to be Chief Judge. I have known all of the chiefs extremely well who have served during my period of time on the court since 1979. I think it is not at all inevitable that a court of this size should succeed as well as it has. I believe that its success in adjusting, in innovating, in meeting the demands of the present and the future is due, in very large part, to the outstanding leadership that we've had.

COMMISSION MEMBER: The one thing that there seems to be some general agreement on is that the en bank process for a court of this size is a difficult thing to arrange satisfactorily. And that the 11 person rotating, random court is not entirely satisfactory, is that right?

JUDGE SCHROEDER: Well, that was the concern in 1979 when the limited en bank was adopted. It was the lynch-pin of the courts not being divided at that time.

My experience -- and I have watched it closely. It is my not always enviable position in

this court to be what is called the En Bank Coordinator. That is, I am the referee and have been for some six or seven years of the en bank process, up until the time a case actually goes en bank before 11 judges. I think you should understand that the en bank process incorporates a very lively debate among all of the judges as to whether or not a case should go en bank. The vote is taken and it is done in a quite deliberative fashion. The court understands, I believe, that when the case goes en bank and the 11 judges are drawn -- and of course, the chief judge is a member of each of the en bank courts -- that then that 11 judge court hears further argument, has further deliberations.

It has been my experience that the court has treated the en bank decisions with great respect. We understand that this is an adjudicatory process in which there are a lot of different kinds of input that goes into the decision. I believe that the fears that this was going to be unstable and unpredictable have not really been borne out,

and that most of the positions are very well debated and represented on the en bank courts.

COMMISSION MEMBER: Wouldn't it be a more stable situation if you, say, had X number of members of an en bank court that were the most senior, active judges of the court, or the most junior -- but you know, where it stays like it is for a while, where the changes that occur are slow?

You've got the same kind of problem, in a way, that the Supreme Court has. If you make a lot of changes kind of at random in the Supreme Court, you're going to get a lot of instability in the law. But if the court remains constituted in a pretty definite way over a longer period of time, you tend to get some stability. Now, I'm just suggesting, couldn't you do the same thing? Wouldn't that be more effective?

JUDGE SCHROEDER: Well, we did debate having a fixed panel that was representative of the three baby judges, the three most senior judges and some in-between. We opted against that because we thought that it was better in terms of collegiality

and in respect of the process itself, that everyone had an opportunity to participate in the same way. I think the view of the overwhelming majority of the judges is that it has worked out very well. No one has proposed that that system be changed. So, I believe that the system has worked well and has a great deal of respect by the judges.

CHAIRMAN WHITE: You're quite sure that this 11 person en bank does not create instability?

JUDGE SCHROEDER: I don't think that that has created instability. I believe, as I said in my statement, that if a court has divisions among it, it is because of the differences of point of view; the social outlook, perhaps, of the judges. That can happen in a court of any size.

I came from a court of nine judges to a court which very soon became 23 judges and then 28. I don't want to go back to a small court. While I speak only for myself, we have a great many backgrounds of judges on our court. That's one of the wonderful things about the court. We have several who have come from small state courts into

the federal system, and I don't think that any of them want to go back to a small court. There are great strengths in having many colleagues and being able to share your views and have the input of the views of (indiscernible) colleagues.

I would like the Commission truly to take away the understanding that this court has survived disasters that no other court has had to face. Some of them have been of human origin and some of them not of human origin. But we have, for the past three or four years, had a great number of vacancies which has made things very difficult. We have survived an earthquake that left us homeless for years here in the tenderloin of San Francisco. We have had, over the past decades, to face repeated charges that we should be divided and have had to cope with a number of different proposals for division that have been very distracting.

I'm very delighted that this Commission has been appointed and I hope that you will help put those kinds of distractions to rest for my chief judgeship.

COMMISSION MEMBER: Would you settle for most of it, Judge Schroeder?

JUDGE SCHROEDER: Most of it at least. I'm still sending Judge Hug vitamin pills and I hope he's taking them.

My concern is for the future. We are seeing communications change very rapidly. I believe the next frontier is not in changing the structure of the appellate courts but in adopting to the changes that we are seeing in technology. We're playing catch-up. We're just beginning to understand how to use databases and how to get at the decisions of other courts quickly, how to know what issues are pending within all of our courts so that we can be prepared better to decide those issues. I have learned from watching this court that the courts improve through a process of evolution and adjustment. I think that the 9th Circuit has been the leader in this.

COMMISSION MEMBER: Do you think this video conferencing methodology as it comes on will likely be the wave of the future?

JUDGE SCHROEDER: Oh, I think we will use it to a great extent. I'm not a believer in doing away with face-to-face oral arguments with a lawyer standing before a court. I certainly believe that judges should get together on a face-to-face basis which we do, quite frequently. But I think that in the future, we will not be dependent on air travel in order to have some kind of face-to-face communication. The 2nd Circuit is using it quite extensively now.

COMMISSION MEMBER: -- use it, but the judges still travel but the lawyers don't.

JUDGE SCHROEDER: The lawyers.

COMMISSION MEMBER: But for it to be fully effective in certain cases, it needs to be judges as well as lawyers.

JUDGE SCHROEDER: Oh, yes, and we're only a step away --

COMMISSION MEMBER: Do you think that's what's going to happen.

JUDGE SCHROEDER: Oh, I think so. And I think we're only a step away from doing that for our

motions. For many years, we did motions by telephone. If you can do it face-to-face on a screen, it's an improvement.

COMMISSION MEMBER: What does that add to the equation about the structure of courts of appeal if the wave of the future is a heavier use of video conferencing say, 10, 15, 20 years hence, only the most important cases are argued face-to-face, the rest of them are dealt with in that way? What do you think that means for the structure of the courts of appeal? Not just the 9th Circuit, but other courts as well?

JUDGE SCHROEDER: Oh, I don't think it's inevitable that that is what will happen. For example, courts now nationwide are deciding 30 to 40 percent of the cases -- the federal appellate courts without oral argument. I mean, I see the capacity for video as permitting there to be argument in some of those cases and so you'll have a better quality decision. I don't think it means that we're going to do away with or diminish the quality of human participation in face-to-face --

COMMISSION MEMBER: So you don't really think it means anything in respect to the structure of the courts of appeal?

JUDGE SCHROEDER: No, except I think there's great potential for greater efficiency and for greater collegiality.

CHAIRMAN WHITE: I suppose that if you used the video technology, it might substitute for a lot of the staff work.

JUDGE SCHROEDER: That is my hope, Justice White.

CHAIRMAN WHITE: It is?

JUDGE SCHROEDER: I think that most of the reliance on staff that has come to pass that Judge Sneed referred to, which is certainly not unique to this court, but is the fact that we've gotten so good at producing documents. I think if we can get a little more face-to-face human contact --

CHAIRMAN WHITE: And I suppose it might even get into your calendar work, the category of cases that has just number one weight?

JUDGE SCHROEDER: Yes, I think that could happen too.

CHAIRMAN WHITE: Especially if they are counseled.

JUDGE SCHROEDER: If they're counseled, yes. I believe that we should offer some form of argument to as many counseled cases as we can.

So, in conclusion, I would simply like to say that this court has been and will continue to be, if I can have anything to do about it, an extraordinarily resilient institution. It deserves positive recognition for that. It has overcome obstacles no other court within memories had to face and none of these problems have had anything to do with structure and none will be solved by restructuring the geographical alignment.

I thank you very much.

COMMISSION MEMBER: May I ask one more question?

JUDGE SCHROEDER: Yes.

COMMISSION MEMBER: If Congress were minded to divide the circuit, how would you

recommend that it be divided?

JUDGE SCHROEDER: Well, there's really no good answer to that. The most often proposed split is the one that Judge Sneed addressed, which is to split off the Northwest and leave the four states. There are problems with that. Hawaii doesn't want to be a part of it and California has never had sufficient judges to decide its own caseload. We would immediately have a court that would have to add judges in order to just cope with the existing caseload.

So, I don't think there is a very acceptable split from the standpoint of judicial administration. Perhaps the most politically acceptable one would be just (indiscernible) the Northwest, but I certainly hope that will not happen.

CHAIRMAN WHITE: Thank you, Judge.

JUDGE SCHROEDER: Thank you.

JUDGE THOMPSON: Good morning.

CHAIRMAN WHITE: Good morning, Judge.

JUDGE THOMPSON: My name is David

Thompson and I am a judge of the 9th Circuit Court of Appeals.

CHAIRMAN WHITE: Yes.

JUDGE THOMPSON: Like the trial lawyer said when he was addressing the jury, "I don't mind if you look at your watches, but if you start putting them up to your ear, I'll know I'm in trouble."

We have 28 slots on our court, 21 are filled. We have seven vacancies and we have the work of 17 dedicated senior judges that help us. Our judges come from each state, counting the seniors and the actives, of all of the nine western states. We have male, female, Hispanic, African American, Asian, Caucasian. Some of our judges were trial lawyers, some were career judges, some have been law professors. We have this tremendous diversity which I suggest is a benefit and one which comes primarily from a large circuit.

If you recall your days as a trial lawyer when you were faced with witnesses on the other side of the case who were aligned by kinship

or employment or association, remember the trial lawyer saying that "the farmer and the farmer's wife and the hired hand are all one witness." And indeed, we used to view them that way. In a smaller circuit where you have a more unified viewpoint, background, experiences, the tendency is that you may well get a one judge appellate banner. The likelihood of that happening in the large circuit is greatly diminished.

We've talked about the en bank process in the 9th Circuit and whether it is representative and whether it's consistent. I think the thing you should bear in mind is that in 1997 in the 9th Circuit, there were 8,500 case terminations. Over the years, there have been 30 to 35 en bank votes. Typically 15 to 20 cases go en bank. But the law of this circuit is made by the three judge panels as it is in any circuit.

With an 11 judge en bank court, let's suppose we had a circuit with 11 circuit judges. You had a decision by the en bank court of 11 judges. Do you say we have achieved a purity of

justice as a result of this? All of our judges have participated. We have this marvelous decision. Suppose you have 28 judges and your en bank court is 11. Has the decision become less pure? It's still an 11 judge decision. How has that decision -- the purity of justice been tainted by the fact that 11 judges have signed on to it?

JUDGE MERRITT: Can I suggest that there is a problem.

JUDGE THOMPSON: Yes, sir.

JUDGE MERRITT: That is, if the next decision in the same general field is going to be by a court of 11 different judges, you are likely not to be able to maintain much stability in the law of the circuit. No one would suggest, I suppose, that the Supreme Court of the United States be reconstituted every three months or at each case for the simple reason that you would not maintain stability very well. It would seem to me that you've got the same problem with an en bank process which is supposed to maintain stability of the circuit. You've got the same problem with an en

bank process that reconstitutes the court each time for each case.

JUDGE THOMPSON: That's absolutely correct. The only fallacy in the whole thing, Judge Merritt, is it hasn't worked out that way.

In our 9th Circuit, so long as we have had the 11 judge en bank court, we have not had another 11 judge court, en bank court, overruling the earlier 11 judge en bank court. Experience and the facts are that there has been consistency as a result of our 11 judge en bank court, even though theoretically, the problem you suggest, sir, is absolutely there.

JUDGE MERRITT: What would you say about the 11 judge en bank if the court grew to 40 active judges?

JUDGE THOMPSON: I would say it's the same. If we're looking for purity of decision, of justice, you have the same justice because you still have the 11 judges deciding it. If we are looking for a decision that is representative of the judges within the circuit, it is less representative. But

the challenge to the circuits from your own materials, as I understand it, is to dispose of the caseload expeditiously and effectively, consistent with fundamental concepts of fairness and due process. I submit that would be achieved through the 11 judge court.

There are other institutions in our 9th Circuit. We have talked here about the circuit court, but let me mention briefly our Conference of Chief District Judges in our circuit. This conference meets twice-a-year. Judge Browning has been on that conference. Through it, there is an exchange of ideas and there is an exchange of expertise from this wide area. All of the districts in this 9th Circuit participate. The wider the sampling, the greater the chance for innovation which has been the case.

But there's another thing. Those of you who may have practiced trust law would be familiar with the spray or the sprinkling trust. You know, the theory like the garden hose. You spray the water over to the bare part of a lawn where it's

needed. So, on the trust, you take the benefits and you sprinkle them, spray them to the beneficiaries where it's needed. Here in our 9th Circuit, because of the number of district judges we have, we can spray or sprinkle judges to the dry part of the lawn where they're needed. If there's a death or a resignation in a particular district, or a high volume of cases, we can take judges from an area that's not so heavily impacted, and spray and send judges into the area that needs it. The large circuit can do that.

CHAIRMAN WHITE: It seems to me, didn't I read that this spraying comes from the central, mostly?

JUDGE THOMPSON: From the central district of California?

CHAIRMAN WHITE: Yes.

JUDGE THOMPSON: It's got the greatest water power and the biggest hose.

CHAIRMAN WHITE: Yes. And yet, the caseload of the Central District is increasing the most rapidly.

JUDGE THOMPSON: Yes, it is. If you think of the sprayer and the place from where the judges come, they don't come from the Central District. They are put into the Central District. The Central District is the district that needs the judges.

CHAIRMAN WHITE: All right.

JUDGE THOMPSON: For example, we have another institution is our Conference of Chief Bankruptcy Judges. They have the same ability to exchange information and to share judges. But they have a unique program, the Workload Equalization Program. By this program, a bankruptcy judge in the Central District, Justice White -- and perhaps Chief Judge Mund might talk more about this -- will have a simple Chapter 7 distribution case. You know, there's not much for a bankruptcy judge to do in a Chapter 7 case unless there's an adversary proceeding, a question of dischargability. Now we have a case within a case.

What the Central District has been able to do is to transfer these adversary proceedings,

the case-within-a-case, to Idaho or to Alaska, to districts that are not as heavily impacted. The transferee judge then handles the pre-trial motions, all of the discovery, and will actually conduct the trial. He will come into the Central District and try the case. The Southern District of California in San Diego has done the same thing. You can do that in a large circuit. If you split the circuit, we can't.

COMMISSION MEMBER: Nobody's really complaining about the circuit nature of large circuits. I haven't heard anybody say that the problem is not the court of appeals. It's the circuit nature of it. Nobody says that. Everybody says the problem is the court of appeals. When somebody points to a problem, they all say it's the court of appeals. They don't say it's anything else, do they?

JUDGE THOMPSON: Well, there are no other problems. I agree with you, Judge Merritt. If the only problem is the court of appeals, then I'm very much relieved because I don't see a problem

there.

COMMISSION MEMBER: Good going.

JUDGE THOMPSON: Thank you, sir.

COMMISSION MEMBER: Thank you.

(Recess.)

CHAIRMAN WHITE: Ladies and gentlemen, we're running a little bit behind. We're going to let you know when your time is up and maybe we'll even give you notice that you've only got two minutes.

Who is -- oh, I know who it is, Cathy Catterson. I understand that you are the single person who administers the entire circuit.

MS. CATTERSON: During my lunch hour, I do that.

CHAIRMAN WHITE: Well, anyway, go ahead. I appreciate that talk we had some months ago.

MS. CATTERSON: Thank you. Thank you, Your Honor.

My name is Cathy Catterson. I am the Clerk of Court for the 9th Circuit. I have been so since 1985. Prior to that, I worked in a variety of

staff positions in the 9th Circuit since 1979.

In starting, I don't want to really repeat all the things that have been said this morning. I really would like to respond to questions. There may be a few things I can hit on from my perspective as the court manager.

Before doing so, I really would just like to say to the Commission, I think you have a tough job. There's a lot to be done. There's a lot of information out there and I wish you well in your endeavors.

The other thing, as was mentioned by Chief Judge Hug and other judges of the court, is that we open our files to you. We have a lot of information, happy to share it with the research staff that's working on the project. We invented the wheel a few times around here and have learned from our mistakes, learned from our successes and would really be happy to share that information with the Commission.

You have my statements. You have the report that the court prepared and submitted to the

Commission. I would just like to hit on a few major items and then really try to respond to your questions.

The one thing that has been mentioned is that we have an excellent court staff, from my perspective. I think one of the challenges in a large court is finding that balance between what's the role of the judges and the role of the court staff. I think we've tried to achieve that. We've worked together as a team in making that happen.

I would like to comment briefly on really, I guess, four topics. One is the Administrative Units Plan, sort of the history of that and how it evolved, particularly with regard to the court staff. Secondly, the use of technologies -- all of these topics have really been referred to already. Third, a little bit about the statistics of the court of appeals and then finally, maybe a little bit about sort of the innovations that the court has evolved over the years, particularly through a long-range planning process.

The Administrative Units Plan, I think

as you know, evolved in response to the Section 6 report in 1978, the omnibus judge (indiscernible). When you go back into our files, it's somewhat interesting to read how that came about. I think in response to a comment by then Chief Justice Burger that we should divide into these administrative units. What's interesting to know is that prior to doing that, we did try this regional calendaring experiment. I might add that that was actually recommended by then Chief Judge Browning, which goes to show you that he's always willing to try something.

COMMISSION MEMBER: And he may be wrong.

MS. CATTERSON: The experiment, as mentioned, was tried for the six months. We have a lot of information in the files showing how the panels were drawn, how the caseload was supposed to be balanced among and between the various regions, what the goals of the program were. As noted, it was deemed to be not a particularly successful experiment.

COMMISSION MEMBER: How did you draw the

panels? Did you set three divisions of the court up on a territorial basis?

MS. CATTERSON: Yes, it was geographically based. But what the records show -- and I must say, I was not here at the time. I was just coming to the court in 1979. But what the records indicate is that there was an attempt to balance. So, there was, at some points as it was first proposed, Las Vegas was going to the south at some points, and --

COMMISSION MEMBER: You're trying to get the numbers right so you can take care of the caseload?

MS. CATTERSON: Correct, right.

COMMISSION MEMBER: You mentioned experimentation. I don't believe you ever experimented with subject matter panels though, did you?

MS. CATTERSON: There was a number of attempt to do so, but no, we have not. I think our issue coding has really been -- in our trying to put cases together that raise the same issues is more of

a response to subject matter paneling, or subject matter assignments.

COMMISSION MEMBER: So, we don't know whether that would work or not?

MS. CATTERSON: I think the court has discussed it on numerous occasions and has not embraced the idea.

COMMISSION MEMBER: But you still don't know whether it would work, do you?

MS. CATTERSON: Correct.

COMMISSION MEMBER: You haven't tried, right?

MS. CATTERSON: Well, correct, yes. In fact, that was a number of times Judge Browning has proposed that as well in certain limited areas that we attempted to try it.

The Administrative Units -- but as indicated, the experiment did not continue. What it did demonstrate was that there was an imbalance among the cases, among the regions of the circuit, in terms of the age of cases. That evolved into trying to sort of schedule panels so that the age of

the cases would remain the same.

JUDGE RYMER: Was there any administrative reason why the court of appeals could not be organized either geographically in divisions, or in divisions that would float -- that is, that would not be geographically based, but would simply be composed of, pick a number, nine people, 11 people, 12 people, whatever. Is there any administrative reason why that could not be supported as the circuit is presently supported?

MS. CATTERSON: Administratively, no. I think you could do it. But it was interesting as the plan was first adopted, the Administrative Units Plan, it was sort of the reverse. Under the plan when it was then adopted in 1980 is that we were going to have phases of this plan. The conclusion was sort of the reverse that the judges should stay together for adjudicative purposes, but we should divide the staff. I think at that point, we've said we're going to do phase one where we send a few people to the south and one person up north. But then we're going to consider phase two and see how

more staff could be decentralized.

I think with the introduction of technology that it's recognized, at least as long as the court remained adjudicatively united, there was really no reason to do that other than, I mean, they are administrative units. The staff that are in the administrative units really are there primarily to provide administrative support. But to answer your question, I think, yes, we could centrally administer three different -- in my judgement would be almost three different courts of appeals. I think particularly with the changing growth of technology, electronic case files and the like, to some extent the use of video conferencing would aid in that.

But as I point out, I think we've kind of gone almost a little bit of 180 degrees in the Administrative Units Plan in that now we're talking about -- or at least what I'm hearing the proposal is to split up the judges and keep the staff together.

JUDGE MERRITT: About the en bank

process, do you know about how many en bank petitions you get and how many votes you take where a judge suggests an en bank vote? Do you know?

MS. CATTERSON: Judge Merritt, I believe we get in the neighborhood of maybe about more than 1,000 en bank suggestions a year. I believe -- Judge Schroeder knows better than I and the judges of the court -- there may be votes in the neighborhood of between maybe 35 to 50. There's also a lot of other discussion going on prior to the vote, you know, recommendations.

COMMISSION MEMBER: Is it your perception that the votes are often -- of course, you're taking all of the active judges voting, the votes are often close in the en bank, whether to en bank a case or not?

MS. CATTERSON: I am not privy, Judge Merritt, to all of that, but my impression is is that they're not all that close. There may be a few cases in which they are close.

COMMISSION MEMBER: Do you know whether there are many cases that fail by two votes or three

votes where, you know, you've got seven or eight or nine people who voted for en bank and it fails?

MS. CATTERSON: I really don't know that that well, to be honest, Judge.

CHAIRMAN WHITE: You have two minutes left.

MS. CATTERSON: Technology, I think we've heard a little bit about that.

Statistics, I would just urge the Commission when we're looking at all those median times -- I think that vacancies on the court have had a significant impact on the court. I think through the efficiencies that have been referred to earlier by our conference and oral argument, the ability to sort of attempt to keep up. But the delay is in the period of awaiting from completion of rethink to getting an argument date. I think when you look at the statistics, you will see that that is supported by it.

But I would say that statistics -- I mean, I always hear you could find a good statistic to present any argument if you could find it, but I

would tell you to look carefully. As Judge Hug pointed out, if we had had our full compliment, I think the court would have literally been able to reduce its backlog.

The other just one point is with regard to the caseload of the court. Justice White spoke about our 1, 3, 5, 7, and 10 process. Where we have seen the growth in the caseload of the court is in the one weight category. The 3, 5, 7 and 10 have remained with a one or two percentage increase over the last five, ten years.

CHAIRMAN WHITE: How many are the lowest weight category -- how many of them are counseled?

MS. CATTERSON: Of the one weight screening? Molly Dwyer, who is our chief deputy would know better, but I would say about 80 to 85 percent are pro se cases.

CHAIRMAN WHITE: I see. All right.

COMMISSION MEMBER: What percentage of your cases get put in the highest category?

MS. CATTERSON: The 10 weights are very much a limited blockbuster, as we call them. Maybe

20 cases a year. The bulk of our cases, about another third of the cases, are in the 3 weight category. About 15 to 20 percent are in the 5 weights; five to seven percent in the 7 weight category.

COMMISSION MEMBER: Ms. Catterson, I know your time is up, but does your office provide the staff attorneys for the court?

MS. CATTERSON: Yes, Your Honor.

COMMISSION MEMBER: How many are there?

MS. CATTERSON: I believe there are -- I think we are authorized -- I believe the number is about 42, 48 -- 48 authorized positions. We are able to sort of fluctuate that number a little bit because the court has a policy of having a five year cap. So that means that we have the ability to sort of hire newer people at lower salaries. Therefore, we can more-or-less get more bang for our buck.

COMMISSION MEMBER: Does the total number continue to go up annually or periodically?

MS. CATTERSON: It's a national formula that is tied into the caseload of the court of

appeals.

COMMISSION MEMBER: Thank you.

CHAIRMAN WHITE: Thank you.

Mr. Circuit Executive?

MR. WALTERS: Thank you, Justice White.

My name is Greg Walters. I am the Circuit Executive for the 9th Circuit. I promise to keep my remarks brief.

As you know, my office has submitted voluminous materials to the Commission and I won't try and reiterate what is in all of those. I'd like to focus my remarks on three simple facts and these are:

(1) That the 9th Circuit is, in fact, much more than the court of appeals.

(2) That the judges and the staff of the 9th Circuit do not want to see this circuit split.

(3) That this circuit has a long tradition of experimentation, innovation and leadership that is thriving and should serve as a model for growth in the rest of the Judiciary.

As you know, there are 28 active and 17 senior judges, but there are also 99 active district judges in this circuit and 52 senior judges. In fact, there are 53 senior judges now with Judge Bill Browning taking senior status a week or so ago. In addition to that, there are 75 bankruptcy judges and 70 magistrate judges -- almost 5,000 employees in the Clerk's Office, Probation and Pre-trial Offices, and Defender's Office in this circuit. In total, we have 342 judicial officers out here hearing 369,000 cases.

That's a lot of judges. That's a lot of cases. That's a lot of judges handling a lot of cases. But the fact of the matter is that that won't change a bit if you split this circuit. If we divide it into two or into three sections, we will still have 342 judicial officers handling 369,000 cases. The only difference that we will have if we, in fact, divide this circuit along those lines is that we will have two or three administrative units supporting those judges rather than the single and coherent home that we have now.

I think that would be a mistake and I think it would be an expensive mistake. I've calculated and submitted to you my estimate that the start-up cost of establishing another circuit is going to be somewhere in the neighborhood of $42 million. It's going to cost at least $4 million dollars, maybe a little bit more than $4 million, every year thereafter to run a second circuit in terms of duplicative expenses. I think that's an expense that is not necessary and should go away.

Let me turn to my second point which is that the judges of this circuit do not want to see this circuit split. You've heard that really, amongst the circuit judges, there's just a handful of judges that would like to see the circuit split. The same kind of relationship is true amongst the district judges, magistrate judges and bankruptcy judges. In fact, I think even stronger. The Judicial Council of this circuit, which is our governing body, the body that I actually work for, voted in April to oppose any effort to split the circuit. They reconsidered that again in May and

voted again to oppose any effort to split the circuit.

CHAIRMAN WHITE: What was the vote?

MR. WALTERS: There was one vote in May, Justice White, that disagreed with that position. There were nine voting members on the council, so the vote was eight to one.

COMMISSION MEMBER: How many of the members of the council are there?

MR. WALTERS: There are nine. We have a nine member council, four circuit judges, four district judges and the chief judge are the voting members. We also have senior district judges, magistrate judges, and bankruptcy judges. They do not vote.

COMMISSION MEMBER: There have never been any complaints, as far as I know, about the way the circuit itself is administered. All of the suggestion has to do with the court of appeals, doesn't it?

MR. WALTERS: That is certainly my viewpoint.

COMMISSION MEMBER: I mean, where the criticism comes from people who are suggesting a split, it doesn't have to do with the circuit itself as a unit so much as it has to do with what people perceive are weaknesses in the appellate process?

MR. WALTERS: That is correct, sir.

CHAIRMAN WHITE: Well, isn't there a lot of criticism that the staff is doing too much of what the judges ought to do?

MR. WALTERS: Well, that, I think, is --

CHAIRMAN WHITE: That's administration?

MR. WALTERS: I think Judge Merritt's point is that that is a court of appeals issue and not a circuit-wide issue. I don't think we have that criticism leveled anywhere else in the circuit at the district court or bankruptcy court level. But I think that I have certainly heard that at the court of appeals level, that the staff is (indiscernible).

But I have a unique position in that I travel not only this circuit and meet with the judges regularly, but I travel many other circuits

and meet with judges elsewhere. That criticism is not a 9th Circuit criticism. That is uniform throughout the United States.

I agree with Judge Merritt and I won't belabor my point here, but I will just say that this circuit runs and runs very well. There is very little criticism on the way that we operate as a circuit as a whole. I think if you turn to the -- you heard in Seattle that the Federal Public Defenders unanimously oppose splitting this circuit and like the structure that we have built here. I think if you talk to the clerks of court or to the chief probation officers, it may not be unanimous in support of this institution as we've billed it, but I think it would be very close to unanimous. There may be one or two, but I'm not aware of who they would be.

I think that same kind of a pattern holds with the district judges and the magistrate judges. We took a poll some years back, actually, at one of our circuit conferences and there was overwhelming support in keeping the circuit intact.

There was 85 percent of the judges at that time that voted in favor of keeping it intact. I don't think that there's been much attrition in those rates since then.

I will save your time and I will close with that. Thank you very much.

CHAIRMAN WHITE: Oh, good. Thank you, sir.

THE CLERK: Will the next panel come forward? The Honorable Terry Hatter, Geraldine Mund, Honorable George Nielsen, Elizabeth Perris, and the Honorable Sandra Snyder.

JUDGE HATTER: Mr. Chairman --

CHAIRMAN WHITE: Judge Terry, you may proceed.

JUDGE HATTER: Thank you.

Mr. Chairman, other Members of the Commission, and Executive Director, Professor Meador, I'm Terry Hatter. I'm the Chief Judge of the Central District of California.

It's interesting to me as I've listened to Judge Merritt, in particular, when he says that

he understands that the problem is the court of appeals. Well, I think he's been listening to a lot of district judges. They often say that. In fact --

COMMISSION MEMBER: You don't say that on the 6th Circuit, do you?

JUDGE HATTER: Oh, yes, every circuit, I believe. In fact, the definition they give of an appellate judge is one who comes on to the battlefield after the battle has been won, just to shoot the wounded or some say, "to resurrect the dead." But I think that that's just an anecdotal kind of thing that you get from district judges. They don't say the same thing when they sit by designation with the circuits. They all of a sudden have a different mind-set about it. So, I don't put much stock in that.

I listened, however, to our Circuit Executive and I quite agree with him that this circuit is run very efficiently. I'm glad that the Chairman has looked at some of my remarks where I attempted to give you the thoughts of some of my

fellow judges. While I am the chief judge, I don't pretend to represent some 27 active judges, 12 senior district judges, 21 to 22 bankruptcy judges and 20 magistrate judges. We have over 80 judicial officers in our district alone.

If you're talking about structuring and all, it may be that the Central District of California needs its own circuit. I don't know. We represent more than a third of the population of the entire 9th Circuit, over 17 million people in my district. Yet, we have great diversity on the bench as well as among the litigants and the lawyers representing the --

CHAIRMAN WHITE: Are you getting enough work out of seniors?

JUDGE HATTER: Oh, we could not make it if it were not for seniors. Justice, you've helped with the 9th Circuit and other circuits. Our seniors have provided us with a tremendous amount of work. I must say, even though I'm not a senior myself, I take great umbrage with this notion that they have to be certified for 25 percent. Our

seniors do far more than that. It's an insult to them. They help at the circuit level, as one of our senior judges points out, with the mother load for providing judges in other parts of this circuit where there's a need. If you were to take California out, then I don't know where you would get most of your visiting judges to help.

It's particularly of great concern to me as a district judge that I can report to you. While I don't represent all of the divergent views of my colleagues, I can say that they're unanimously opposed to a split of California. California has enough problems, as you know. I mean, we may not even have a state bar as I stand here, at least an integrated state bar. But while we have fought among ourselves for time and memorial, certainly from the time that California entered the Union, as to whether we ought to be split perhaps into two or even three states. We don't want the great Northwest, or those within the beltway, to tell us that we have to be split. It doesn't make very much sense that you would have members of the same bar

operating under different circuit law itself.

COMMISSION MEMBER: Judge Hatter, let me ask you this question.

JUDGE HATTER: Yes?

COMMISSION MEMBER: One of the proposals that has been made to this Commission along the way, more than once, is that one way to address the court of appeals problems -- that is, the heavy burdens, the load, the need for ever more judges there -- is to shift some of the review function to the district level --

JUDGE HATTER: Yes.

COMMISSION MEMBER: -- by constituting by analogy to the Bankruptcy Appellate Panels.

JUDGE HATTER: That's right.

COMMISSION MEMBER: Constituting district judge panels -- you might even have two district judges and one circuit judge --

JUDGE HATTER: Yes.

COMMISSION MEMBER: -- but these panels at the district level reviewing certain kinds of cases. What is your reaction to that proposal?

JUDGE HATTER: Well, I've sat on appellate panels in Guam and in the Northern Marianas. In fact, the very last one in the Northern Marianas before they got their own Supreme Court. It functioned well administratively, or it's just one other layer. Our decisions then went on to the 9th Circuit. You can't do it without the person power. We're already inundated with cases. I don't know how that would operate more than just theoretically unless we were able to not only fill the vacancies that we have right now -- we have at least three among the district judges. It would require not only filling the vacancies, but providing more person power. Conceptually, it could work.

I looked at Professor Resnick's paper and I agree with her on a lot of these things that you, as a Commission, ought to be looking not at numbers -- and I'm sure you're not just looking at numbers because that's not what this is about. We know, however, that it is about a political move. If there is to be this political push and you are

part of it, then I would suggest, as I did in my papers, that we try the experiment that was not really given much of a chance back in 1979. That is to go to formal divisions.

You would have the judges resident in each division, which may be pretty much based on the administrative units that we have now. Have those judges decide the cases in their particular or respective divisions. Where there's a problem, you could have a limited en bank. Of course, I'm very interested, as you are, in what this limited en bank ought to consist of, how it would operate. I quite agree with Judge Merritt that it should not be just drawn as though you were at a crap table in Las Vegas. I would envision, for example, if we were to have divisions that there might be four judges in each division who would be selected by their respective fellows, and then the chief judge. So, you would have a limited en bank of 13. Then, of course, the majority of that body could ask for a full en bank, and together with some of the kinds of technological advancements that we already have, we

could have a full en bank.

COMMISSION MEMBER: Repeat that. You had three administrative --

JUDGE HATTER: We would have three administrative units --

COMMISSION MEMBER: -- or four --

JUDGE HATTER: -- four judges and the chief judge, so you would have 13. If seven of that 13 wanted to have a clede en bank, a full en bank, you could have that. There's no reason if the number were to grow to 40, that you could not have that with the teleconferencing.

COMMISSION MEMBER: We've concentrated so heavily on the 9th Circuit, but let me ask you a question.

JUDGE HATTER: Yes.

COMMISSION MEMBER: Judge John Newman from the 2nd Circuit --

JUDGE HATTER: Yes?

COMMISSION MEMBER: -- suggested that we try -- that our Commission make some recommendations about jurisdiction. We haven't had

much luck in trying to get Congress to do anything about, say, diversity or implant (indiscernible).

JUDGE HATTER: Of course.

COMMISSION MEMBER: He suggested that in certain categories, adjacent diversity being one of them, maybe other categories that depend heavily on state law, say, like ERISA cases, that you have to file those cases in state court, to begin with. You can then, if it is a diversity situation or a federal question like an ERISA case, you can then petition to remove to the federal court, but only under certain criteria. That is, you would have to show that the case has some potential for home cooking or has some potential for whatever --

JUDGE HATTER: Certainly.

JUDGE HATTER: Make up a set of criteria. That will tend, over time, to counteract this tendency to ever nationalize the law in the United States. At least you wouldn't just be having everything always increasingly in federal court.

What's your view of that as a way of trying in the future to combat this ever increasing

federal jurisdiction?

JUDGE HATTER: Again, it is a way that could work, but I'm not sure it could work politically any more than on the criminal side where we're having so many what ought to be local matters handled in our district courts. We're becoming courts of general jurisdiction, as you know. It concerns me greatly. I don't disagree necessarily with my colleague on the 9th Circuit who has suggested that there should be no cap on the number of judges. So you take care of all of the matters that come before you and you don't worry about what Judge Newman has said.

But I think Judge Rhinehart perhaps goes a bit farther than I would go because I think, indeed, that there ought to be a cap on the kinds of matters that are handled in the federal court. I think we ought to be a court of limited jurisdiction. That we ought to be handling matters of constitutional dimension and not the things that our "brethren and sistern" in the local courts can handle.

CHAIRMAN WHITE: Two minutes.

JUDGE HATTER: All right, thank you.

I just want to make it very clear that while we have some divergent views among the district judges, the bankruptcy judges. And my colleague, Chief Bankruptcy Judge Geraldine Mund will be speaking to you with more particularity about the bankruptcy capitol of the nation which the Central District also happens to be. But we are, in general, opposed to the split of the circuit and unanimously opposed to any split of California. It just does not make sense at all in any way that you would want to reach a structuring that would meet the needs of the Northwest, and we know that there are some parochial needs there.

The suggestion is that if there's to be a split of the circuit even, that it should certainly have states and jurisdictions like the Northern Marianas and Guam that follow California law. Not only do they follow California law, but there are other common historical relationships between these jurisdictions and they ought to be

maintained: Arizona, Nevada, California. And of course, one of the benefits since California is so large and should not be split, is that you do have all of the other districts within the circuit that counterbalance California.

CHAIRMAN WHITE: Thank you, Judge.

JUDGE HATTER: Thank you.

CHAIRMAN WHITE: You're very informative.

Judge Mund.

JUDGE MUND: I'm Geraldine Mund.

CHAIRMAN WHITE: Welcome.

JUDGE MUND: I'm Chief Bankruptcy Judge for the Central District of California which, as Judge Hatter said, is the largest bankruptcy court in the United States, possibly in the world. I'm here to take you into the wonderful world of bankruptcy.

First of all, there are three points I'd like to make. The first is, administratively, the 9th Circuit works very well for bankruptcy. Secondly, that if there is to be a split, the

concept of splitting California would be a tragedy. The third is that the creation of many small circuits will have a very serious and negative impact on the practice of bankruptcy law throughout the United States.

As to the administration, if as Judge Merritt says, the problem that needs to be solved is a perceived problem that the court of appeals is somehow not putting out a uniform body of appellate law, don't harm the administration that's here in order to solve that problem because the administration works very well.

First of all, unlike my colleagues of the district court in the Central District of California, we are a borrowing court, not a lending court. We have 114,000 cases filed last year. We have approximately 10 percent of all the bankruptcy cases in the United States are filed in the Central District of California. For the last five years, we've been going to Congress to try to get five additional judges. We're still waiting. We are often in desperate straits and when we were in

better situation, we were also a lending court lending judges to Alaska who, at that time, were going through a bankruptcy boom. Now, we borrow from Alaska, from Washington, and from Oregon. So, the bankruptcy fluctuates tremendously, the caseloads fluctuate. In the course of a year, they move throughout the nations, up, down, sideways.

COMMISSION MEMBER: Beyond your three points, may I ask you about a fourth one?

JUDGE MUND: Sure.

COMMISSION MEMBER: Do you have any suggestions to make at all about changes in the appellate process in bankruptcy cases, the procedure or the forums or anything related to bankruptcy fields? Any changes there?

JUDGE MUND: Well, there are bills pending before Congress right now that will have a direct appeal to the circuit. From the bankruptcy perspective --

COMMISSION MEMBER: Is that bypassing the district court?

JUDGE MUND: It would bypass the

district -- I believe that they both --

COMMISSION MEMBER: That's a good bill.

JUDGE MUND: Yes. I think that our district judges agree every bit as much as our bankruptcy judges. I believe that it's a very controversial bill.

CHAIRMAN WHITE: Yes, but it would bind the district court.

COMMISSION MEMBER: I'm willing to live with that, Mr. Justice.

COMMISSION MEMBER: We could just let them apply for (indiscernible) in the Supreme Court directly.

JUDGE MUND: I like that one, too. In answer to the question --

CHAIRMAN WHITE: Well, you know what they would do. It would get denied.

COMMISSION MEMBER: That's the point.

JUDGE MUND: Actually, one of my cases actually got all the way up to the Supreme Court and it was very interesting to go and hear the argument on it. The Supreme Court, of course, said I was

right and the 9th Circuit was wrong, so I'm all for that.

In answer to the question, if it were administratively possible, it would best to have bankruptcy appeals go directly to the circuit. Having an additional level of appeal, be it to the district court which is not a very effective level of appeal because it's not binding law. We have well over 30 district senior judges in our district.

COMMISSION MEMBER: You mean to go from the BAP to the circuit?

JUDGE MUND: No, I mean to go from the bankruptcy court to the circuit would be most effective.

COMMISSION MEMBER: What would happen to the BAP? What would happen to the BAP in that arrangement?

JUDGE MUND: If it were not needed -- in other words, if the circuit were able to handle this mass of appeals, from the point of view of the bankruptcy practitioners, the parties involved, it would be best to have only one level of appeal. Two

levels of appeal is very expensive, very time consuming. However, you're talking about unleashing upon the circuit, a huge mass of cases that are now being sifted out at the BAP level.

So, unless Congress is willing to give many more resources to the circuits, which they have not been willing to do, then I have to say that having a Bankruptcy Appellate Panel in place is very, very important. I think it weeds out cases. It allows the circuit to handle the cases that they must handle. They do handle many bankruptcy cases, but there's an awful lot of cases that just don't go any further.

CHAIRMAN WHITE: What would you think if the BAP decision bound the district court?

JUDGE MUND: I published an opinion on that.

CHAIRMAN WHITE: What?

JUDGE MUND: I published an opinion on that as the precedent of that. I think that at the present time, the district court and the BAP are as two circuits sit side-by-side. I don't think they

bind each other.

CHAIRMAN WHITE: Yes.

JUDGE MUND: The Article III, Article I is a highly political problem. Therefore, I don't think that the Article III district judges could be bound by an Article I Bankruptcy Appellate Panel. However, it would be lovely if it could be.

CHAIRMAN WHITE: Oh, well, you mean that the marathon case wouldn't prevent it?

JUDGE MUND: That it would not prevent it, or it would prevent it?

CHAIRMAN WHITE: Would.

JUDGE MUND: Yes, I think marathon would prevent it, would prevent the Article III district judges from having started (indiscernible) binding from an Article I Bankruptcy Appellate Panel if there were no Article III decision that was made as part of that, yes.

COMMISSION MEMBER: As a constitutional matter, you think?

JUDGE MUND: Well, you know, you're --

COMMISSION MEMBER: Marathon.

JUDGE MUND: -- you're well away from where I'm actually feeling that I'm comfortable answering. You know, standing on one foot, probably I would say yes, as a constitutional matter, but boy, I'm no constitutional scholar.

COMMISSION MEMBER: In terms of administration, you think the BAP should be binding?

JUDGE MUND: As terms of administration, I would like a direct appeal from a bankruptcy court decision to a binding decision. Now, whether that's a BAP with cert to the district court thereafter, or whether it's to -- I'm sorry, cert to the circuit court thereafter, or whether it's directly to the circuit court, I don't care. I think the BAP happens to be wonderful. I think that the 9th Circuit and its size allows for a wonderful Bankruptcy Appellate Panel because we have the resources. I think that we're on the cutting edge. We created it. We brought it back as soon as the marathon decision was taken care of and we were able to. We have been studied -- and I won't speak more to it because Judge Perris is here on behalf of the

BAP.

Any other questions on that or should I hit my other points?

CHAIRMAN WHITE: Go to it.

JUDGE MUND: Okay, I'll go to it.

The size of our circuit and diversity allows the districts to create fine programs. You'll hear more from Judge Nielsen about the Conference of Chief Bankruptcy Judges and our educational programs. We have this Workload Equalization Program that Judge Thompson talked about. In my district, for instance, as I stand here, Judge Perris, who is from Oregon, is receiving 100 adversary proceedings from our Riverside Divisional Office to help us out with some of our workload. You can't do that in a smaller circuit and you can't do that in a circuit that is too homogeneous because the caseloads all go up at the same time.

COMMISSION MEMBER: Let me ask you this about that. If the circuit were divided and the 9th Circuit were left with California, Arizona and

Nevada, that would still be a large enough circuit, would it not, to achieve all that you're describing now?

JUDGE MUND: Not really. First of all, Arizona has five -- has seven judges and Nevada has three bankruptcy judges. We have 21. That's not a whole lot of extra judges to help us with our need. The entire state of California economically went to slump at the same time. Nevada is one of the fastest growing bankruptcy filing districts in the nation right now. Arizona was going absolutely crazy with their filings. Judge Nielsen can give you more facts on that if you want that. We all went up at about the same time because, again, economically we're very similar. The Pacific Northwest went down about that time. A lot of movement went from California up there. A lot of the economics went up there, so they've been able to step in and help us.

Now, when they start going through a slump, hopefully, the Pacific Southwest will be in firmer place and we'll be able to step in and help them. There really is a balancing back and forth

within the bankruptcy courts that regionalization will hurt, not help.

CHAIRMAN WHITE: Now, your time is almost up.

JUDGE MUND: Okay. Then let me just very quickly hit my other two things. That is, the split of the state of California. I just --

CHAIRMAN WHITE: We may not have time, but go ahead.

JUDGE MUND: All I wanted to say was that in my letter that I wrote to the Commission, the bankruptcy courts are the commercial courts of the United States. We cover a huge amount of state commercial law within our courts, and it's critical that we have one court that covers a state and that we not split the state of California between two bankruptcy courts.

CHAIRMAN WHITE: Okay.

JUDGE MUND: I thank you very much.

CHAIRMAN WHITE: Thank you.

CHAIRMAN WHITE: Judge Nielsen?

JUDGE NIELSEN: Justice, ladies and

gentlemen, if it doesn't disappoint the members of the Commission, I'm not going to talk very long. Quite frankly, I'd rather try to deal with your questions than (indiscernible) much, but I do want to make two points.

One point has already been made in the paper that we submitted to you. I say we because all of the Arizona bankruptcy judges have supported it. We tried to spell out how absolutely vital the administrative structure of the 9th Circuit is in supporting us. I know that you would like to concentrate more on the problems. But again, the point is this, we can't lose that structure. We need it very badly because throughout the 9th Circuit, there's 70-some bankruptcy judges sitting in courtrooms slightly less grand than these dealing with very -- what some people might view as very mundane problems, but very important problems to the people involved. The numbers are absolutely horrendous, as you know. I suppose if pressed, I would have to admit that Arizona is not the center of the universe, but even in our state, we generate

between 22,000 and 24,000 new bankruptcy cases every year. We have to deal with that with seven judges.

JUDGE MERRITT: How many appeals are there from your bankruptcy court? I know you may not know the precise number, but approximately how many appeals?

JUDGE NIELSEN: Chief Judge Merritt, I don't frankly know. I don't track the appeals that closely. We do know that they run approximately 60 percent to the Bankruptcy Appellate Panel and about 40 percent to the district court. And speaking of that, let me risk a beating from every district judge in this room and make an alternative suggestion on abolishing district court appeals. I am well aware of the fact that no one ever wanted to be a district judge to handle bankruptcy appeals with the possible exception of Judge Browning, of course.

But the fact of the matter is this, an awful lot of our work, however grandly we like to talk about the Chapter 11 work and the big mega cases -- and I've had a case involving $1.5 billion

in claims and that's grand. But an awful lot of our cases involve questions like -- the way I put it is "who gets the Chevy? Does the debtor keep the Chevy or does the bank get the Chevy?" That doesn't sound like a lot in the grand scheme of things, but I can tell you to the individual litigants, even the creditor, that's an important question.

It is not realistic to think that when I make that decision sitting in Phoenix or Tucson or the other places in Arizona that we sit, including Bullhead City by the way, it's not realistic to think that someone is going to appeal me to San Francisco on that question. We need the availability of district judges, or bankruptcy appellate judges to hear these appeals or I fear we're going to lose a lot of those --

COMMISSION MEMBER: Can I ask you a question again? I know you don't know the specific figures, but anecdotally, most bankruptcy appeals raise questions of state law. That's my perception. Now, some raise questions of federal law under the bankruptcy code. But is it your perception that

most of the appeals, they're really appealing a question of state law that the bankruptcy court has decided, a commercial state law?

JUDGE NIELSEN: Judge, that's not exactly my sense. The sense of it I get is that a good half of the people who are unhappy with me are raising bankruptcy code issues.

COMMISSION MEMBER: They are.

JUDGE NIELSEN: And about the other half are raising Arizona law issues. But we need to keep up on that commercial law because we apply a lot of it.

All right, those are the two main things I wanted to tell you. It's so important that we have an economical way to appeal me in those rare instances when I make a mistake. Please appreciate the importance of the administrative structure to the day-to-day job that we do.

CHAIRMAN WHITE: I thought that one of the big problems is that that should have never had a biding precedent with the BAP.

JUDGE NIELSEN: That's a fairly hot

issue, whether or not a bankruptcy judge -- I don't have any difficulty in saying that the BAP can not bind a district judge at all. It's a debated issue whether or not the BAP can bind an individual bankruptcy judge. I don't see that that's an important question.

Number one, what I'm looking for every day in my back-to-back hearings that I start at 9:00 in the morning is, I'm looking for precedent. I'm looking for an answer to the issues.

CHAIRMAN WHITE: Well, where do you get it?

JUDGE NIELSEN: I get it from the BAP because this 9th Circuit BAP is the longest established BAP with the greatest number of published cases out there. When I get a case in point, I apply it. Because if I don't apply it, if I go in another direction, if I get appealed and the appeal goes to the BAP, I'm going to get reversal.

CHAIRMAN WHITE: Hasn't the Bankruptcy Commission in effect done away with the BAP?

JUDGE NIELSEN: I'm speaking solely for

myself, the Commission made a poorly reasoned decision to recommend doing away with district court and BAP, appellate jurisdiction, and go to these direct appeals.

CHAIRMAN WHITE: Well, what they urge is that they want some binding precedent that will let the bankruptcy judges know what the law is.

JUDGE NIELSEN: That's correct. They were concerned about too many level of appeal. Please keep in mind, appellate courts do something else besides establish case law. They resolve individual cases. The problem I have with the large number of consumer cases that I have is, if you do away with these intermediate appellate structures, a lot of these appeals are not going to be filed and people are just going to be denied their rights.

CHAIRMAN WHITE: All right.

JUDGE NIELSEN: I appreciate your kind attention and it has been a distinct pleasure to appear before you.

CHAIRMAN WHITE: Thank you. Thank you very much.

JUDGE PERRIS: Justice White, Members of the Commission.

CHAIRMAN WHITE: Judge Perris.

JUDGE PERRIS: My name is Elizabeth Perris. I'm a bankruptcy judge from the district of Oregon. I appear today on behalf of the Bankruptcy Appellate Panel which I served as a member for five-and-a-half years. I'm no longer a regular member of the BAP, although I do sit protium regularly.

I should make it clear, I'm not here representing the judges of the District of Oregon, the bankruptcy judges. I know you heard from Judge Reddon on behalf of the district and magistrate judges of the District of Oregon a few days ago. The bankruptcy judges have never collectively taken any position on the circuit split.

I really want to talk about two points and also talk to the question that was raised earlier about the bankruptcy appellate structure. The two points I want to make are, the 9th Circuit's unique culture and resources have really made the BAP experience possible, I think. The 9th Circuit

made the decision quickly after the code was adopted, to form a Bankruptcy Appellate Panel. Judge Browning and the members of the court were very supportive, and there have been a lot of bumps along the way in the road, not the least of which were the 1984 amendments in the wake of marathon that required consent. The 9th Circuit took the lead in going to the Rules Committee and asking that there be the possibility of consent by inaction as opposed to affirmative consent.

The 9th Circuit is, once again, I think, on the cutting edge of thinking about bankruptcy appellate structure in the wake of the Commission's recommendation and the resulting introduction of HR 3150, which does provide for direct appeal to the circuit from bankruptcy court decisions. That would, of course, add to an already overburdened court of appeals; in the 9th Circuit, approximately 1,000 appeals per year. The 9th Circuit promptly formed an ad hoc committee and looked into what the options were. In fact, the 9th Circuit has made a request of the Judicial Conference to consider

proposing an amendment to the direct appeal to the circuit recommended by the Commission, that would allow the circuits, if they chose, to retain or create a Bankruptcy Appellate Panel which would hear appeals with consent. But that would be the one appeal (indiscernible) right. An appeal from there would be on a discretionary basis to the circuit. That's accomplishing the Commission's goal of only one appeal has a right which is part of the problem in the bankruptcy system that the Commission was addressing. Two appeals is a right or costly and took a lot of time.

So, I think the 9th Circuit has really shown its leadership in trying to use to the fullest, it's judicial resources in dealing with bankruptcy appeals.

COMMISSION MEMBER: Well, let me ask you this question.

JUDGE PERRIS: Yes?

COMMISSION MEMBER: A moment ago, I raised a question about a proposal that the Commission has had to -- this is outside the

bankruptcy field, this proposal to shift some reviewing functions to the district level by having district court appellate panels by analogy to the (indiscernible).

One of the arguments that was made in one of the hearings against that was that district judges would not function very well in reviewing other district judges. There seemed to be some problem about reviewing one's colleagues, even though from another district. Now, in the bankruptcy field, has there been any problem about bankruptcy judges are somehow reluctant or uncomfortable in reviewing the work of other bankruptcy judges?

JUDGE PERRIS: Absolutely not. I think the people who have served on a BAP find it not a very personal experience. You don't think of yourself as reviewing this person or that person. You think of yourself as reviewing a decision.

In fact, one of my colleagues, Judge Myers, has done his own informal study of whether there's any difference in reversal rates between

judges who are sitting on the BAP and judges who aren't sitting on the BAP, and what the reversal rates are? Of course, we can't get comparable statistics for district courts reviewing bankruptcy judges, but the indication is there's no difference in reversal rates based on whether you know somebody or you don't know them. I don't think there has been any discomfort at all. In fact, I take some comfort in the fact I respect my colleagues who are reviewing my decisions, and I know who they are.

COMMISSION MEMBER: Is it your perception that the appeals, the bankruptcy appeals, raise, as your colleague said, about 50 percent state and 50 percent federal issues, or would you have a different perspective?

JUDGE PERRIS: Well, I sat on about 550 appeals on the merits in my time on the BAP and it was actually, I think, closer to two-thirds bankruptcy questions, a third state law questions. But it may be, in part, who chooses to go to the BAP versus who chooses to go to the district court.

I do know the answer to your statistical

questions if you have them. I have the 1997 figures for the BAP. The BAP handled 719 appeals of the 1,234 total in the circuit in 1997.

COMMISSION MEMBER: Judge, let me ask you -- I should know the answer to this. If, for example, a litigant in bankruptcy court in Arizona decides to appeal to the BAP as opposed to the district court, is that appeal heard in Arizona?

JUDGE PERRIS: The BAP regularly sits throughout the circuit. In those instances where there aren't enough appeals to justify sending a panel to the district, we've made fairly frequent use of telephonical oral argument. We try and give oral argument to most everybody who wants oral argument.

COMMISSION MEMBER: Thank you.

CHAIRMAN WHITE: Tell me, what would be your suggestion if you had the choice of reforming the appellate maze in the bankruptcy law?

JUDGE PERRIS: Well, if I had the choice, I'd want only one appeals as a matter of right. I want it to go a forum that wasn't terribly

overburdened and if that means Bankruptcy Appellate Panels with discretionary review by the circuit, that would be my choice. If the circuits had more time and resources, I might want it to go straight to the circuit since ultimately, the circuits will be the arbiters.

CHAIRMAN WHITE: Yes. Yes. But you know it doesn't.

JUDGE PERRIS: Right.

CHAIRMAN WHITE: So, you would give the BAP decision much more authority?

JUDGE PERRIS: I would, in part because the BAP's function as three judge panels. I think that makes a big difference in the appellate decision making process than when judges sit and make decisions one judge at a time.

COMMISSION MEMBER: Isn't that also because the BAPs have expertise? That is, they are specialized in bankruptcy and have that expertise too?

JUDGE PERRIS: I think that's an advantage. Some people argue that that's a

disadvantage. That you want to have generalist judges doing your appellate work. But ultimately, the big decisions will be decided by the circuits. If you had a Bankruptcy Appellate Panel followed by discretionary review at the circuit, and perhaps even some mechanism to get some appeals directly to the circuit --

CHAIRMAN WHITE: How do you get away with an Article I -- those people are Article I judges, aren't they?

JUDGE PERRIS: Well -- although some people have suggested --

CHAIRMAN WHITE: Don't you think it would be very strange to give the court of appeals the discretionary appeal?

JUDGE PERRIS: Well, some people have suggested even an Article III Bankruptcy Appellate Panel. Judge George has made that suggestion in some of the writing that has been done. But I agree that you can't get all of the appeals to an Article I Bankruptcy Appellate Panel because of constitutional issues.

COMMISSION MEMBER: The Commission has had that suggestion that there be a panel in the court of appeals to which all bankruptcy fields would go. What do you think of that?

JUDGE PERRIS: Well, that gets into the whole question of specialized panels of the courts of appeal. As somebody who is in a specialized court, I'm comfortable with the notion of specialized courts. But I also respect the concept that generalists should be involved in deciding these cases. I think that's really more of a call on my mind for the people on the court of appeals, how they want to organize their workload.

I know my time is about up. I just wanted to --

CHAIRMAN WHITE: Yes, it is.

JUDGE PERRIS: -- to conclude with one thought. I think that the 9th Circuit has made the most of the bankruptcy judges and it has been good, both for the bankruptcy appellate system and it has helped the circuit in terms of workload.

I thank you for your time.

CHAIRMAN WHITE: Thank you very much.

Judge Marilyn Hall, is it Patel?

JUDGE SNYDER: You're down into the next panel, Justice.

CHAIRMAN WHITE: Oh, that's right.

Lloyd George.

JUDGE SNYDER: Lloyd George, that's it.

Good almost afternoon, Justice White, Members of the Panel. Thank you for allowing me a few minutes to address you. I will be brief. I know that you have heard from magistrate judges when you were up in the north part of the country, so you've heard some of our ideas, I believe.

In a time when judges are not being appointed to the openings that exist as rapidly as we all would like, and certainly in a time when it, I guess, pretty much goes without saying that Congress is not going to create new judicial seats, courts across the nation are having to come up with unique ways to handle the back breaking caseloads. Those of us in the 9th Circuit, magistrate judge level like to think that we offer and happily accept

and allow the buck to stop here. To the extent that we are trying very innovative things in the 9th Circuit as magistrate judges to assist with those caseloads, I'd like to just very briefly touch on them. Again, it may well have been talked about up north. I don't know.

I think we're unique in our use of magistrate judges in a number of ways, but one of the most important ways is that we're assigning several different districts are assigning magistrate judges off the wheel. That means that magistrate judges are being assigned the case and unless and/or until the litigants declare that they do not wish a magistrate judge to handle those cases, those cases are handled through and to conclusion by a magistrate judge. It's working very well.

One of the reasons I think that's beginning to happen more and more, especially in the 9th Circuit -- and obviously, I'm biased -- but I think it's because of the quality of the individuals who are applying for the openings on the magistrate judge level.

COMMISSION MEMBER: That's in civil cases?

JUDGE SNYDER: That absolutely is in civil cases, right.

In my particular district, for example, we've just begun that with respect to prisoner civil rights, non-death penalty, habeas, and all Social Security appeals. Lest that sounds like a level of case that's probably not as back breaking as the others, I don't need to tell you that there are hundreds of them. If the district court had to deal with them, they would never get to the cases that --

COMMISSION MEMBER: It means that there's a rising level of appeals on magistrate judges directly to the 9th Circuit. That's one of the things it means, doesn't it?

JUDGE SNYDER: That would obviously mean that. Anticipating the question in that regard, since this is such a new procedure -- not so much in Oregon and I would hope that if they spoke to that, that they might have told you more about it -- but it's just new in my district. Idaho has been doing

it with some success. I don't know about the number of appeals from there. In the Northern District here in California, it has just begun. So, that remains to be seen.

COMMISSION MEMBER: My point is, the more you use the magistrate judges to perform the role of all of the three district judges, marginally speaking, the more appeals you're going to have to the 9th Circuit. Isn't that right?

JUDGE SNYDER: Well, happily, I guess yes, I would have to agree. But that would also mean that the cases are being handled and perhaps on a much more expeditious basis, timeliness. Maybe the issues that tend to take on a life of themselves and create appeals aren't going to occur. That is something that we've been talking about. A lot of times, timeliness will help, I think.

Justice White?

CHAIRMAN WHITE: What kind of cases -- you say that you just go by the wheel unless somebody objects?

JUDGE SNYDER: On civil filings.

CHAIRMAN WHITE: Yes, yes. But are there a lot of objections?

JUDGE SNYDER: Well, it's in the process. Every district who is trying this -- and we've heard the phrase "cutting edge" used a lot. Everybody does it slightly differently. Let me speak to what I know personally in our district.

A form letter goes out to the litigants. They aren't blind-sided by any stretch of the imagination and they are told that a magistrate judge is assigned to the case and --

CHAIRMAN WHITE: All right. All right.

JUDGE SNYDER: -- that the magistrate judge is qualified to handle the case, and that they may object to that. By signing a particular consent form or not consenting, if you will -- mail it back to the court, then the case either stays with the magistrate judge or it's then assigned to district court judge.

CHAIRMAN WHITE: Well, is there some kind of case that nobody would permit any magistrate to --

JUDGE SNYDER: Well, certainly, criminal cases we can't do that.

CHAIRMAN WHITE: Well, I know, but civil case.

JUDGE SNYDER: I don't know the answer to that question. I think it hasn't been tried. Well, in any civil case --

COMMISSION MEMBER: Are all your civil cases on the wheel, or just some categories?

JUDGE SNYDER: Just some categories for the assignment of just a magistrate judge to that case. But all civil cases in most districts are assigned to a district court judge and a magistrate judge.

COMMISSION MEMBER: Yes, but the special circumstance that you're talking about, for example, you wouldn't necessarily have a list of cases on the wheel. You wouldn't necessarily, say, have diversity cases on the wheel, right?

JUDGE SNYDER: Right, correct. Correct. However --

COMMISSION MEMBER: Excuse me. We do

in our district, but there's an element of risk if you disqualify the magistrate judge. We don't tell you in advance which district judge you're going to get.

JUDGE SNYDER: That's right. That's right.

But it has been our experience in the --

COMMISSION MEMBER: We're having conversations with each other.

JUDGE SNYDER: Right.

We are, having just begun it now and touching bases with my colleagues in the Pacific Northwest who have been doing this for a lot longer than we have, there are not a lot of folks who are declining magistrate judge jurisdiction in those regards. We like to think that in our role as assisting the district court as much as we can, that that is really going to help.

Now, I was anticipating in listening to questions earlier about "well, couldn't you still do that and speak with your colleagues and network, and do all the things that my statement talks about?" I

was thinking of the question, "well, suppose it was just California, Nevada, and Arizona. Wouldn't that be enough magistrate judges to continue to network with?"

Well, with all due respect and just anticipating, no, it wouldn't. There are, as Mr. Walters told you, only 73 of us in the entire 9th Circuit. That is not a lot of magistrate judges to confer with and to network with. We do it extremely well. We meet twice a year. I'm on the phone all the time to my colleagues in Idaho, and Hawaii and Arizona to talk about new ways to assist the district courts. Quite frankly, the courts who have stuck their neck out so-to-speak, and the ones who are doing the more innovated and interesting things happen to be in that part of the country, not in California necessarily. Without going through and citing the different districts, we need those folks a lot. They've been very creative and I think they've helped our courts in the 9th Circuit (indiscernible).

CHAIRMAN WHITE: Can I ask you, are the

cases the magistrate tries and decides -- does it make any difference that the magistrate has tried this case as to the weight that the staff gives an appeal to the 9th Circuit?

JUDGE SNYDER: My experience is not. I've tried a number of cases through jury trial to conclusion. I think only three of them have been appealed and the appeals have come back. The rulings on those appeals have come back as quickly, I believe, as any that I see coming back for all the cases tried by the district court.

So, if I understand your question, Justice, is it when it comes to this building here, because it was tried by a magistrate judge, is it put aside to deal with more serious cases?

CHAIRMAN WHITE: Well, let's put it this way. Would you expect the 9th Circuit to give oral argument to a magistrate case just as likely as a district court decision?

JUDGE SNYDER: I would hope so.

CHAIRMAN WHITE: Well, you'd hope so, but do you know?

JUDGE SNYDER: I don't know. I don't know. I haven't had that experience. But to the extent that the consent derives from a case that originally was with a district court judge, the issues certainly don't change. I don't think that who sits in the robe and presides over the jury trial should make any difference regarding the depth of the issues on appeal.

CHAIRMAN WHITE: All right. You've got maybe a minute-and-a-half.

JUDGE SNYDER: Okay, I can do it.

The one final thing I would like to emphasize, and again, to draw from something Mr. Walters said, that the 9th Circuit is more than a court of appeal. The magistrate judges in the 9th Circuit have used the administrative offices, the executive offices here at the court of appeal probably as much, if not more, than any other agency I can think of. We meet regularly. We put out a newspaper. We have our own on-line communication forum. We put together seminars not just for magistrate judges -- all of that with the assistance

of the folks here.

It works well and it works uniquely well, and I would hate to see it to end. On behalf of the Magistrate Judges Executive Board of which I am chair, I would like to encourage that the circuit not be split. Thank you.

CHAIRMAN WHITE: Thank you.

THE CLERK: Would the next panel please come forward, Honorable Marilyn Huff, Honorable Alan Kay, Honorable Lloyd George, and the Honorable Marilyn Hall Patel?

CHAIRMAN WHITE: All right, Marilyn Huff?

JUDGE HUFF: Good morning. I am Chief Judge of San Diego, the Southern District of California and I'm pleased to speak just on a couple of thoughts before this respected Commission.

I am opposed to the split of the 9th Circuit. The geographical size and diversity of the 9th Circuit is one of its strengths, not its weaknesses in this way. It provides a uniform body of law for admiralty cases. Whether you're in

Guam, San Diego, Long Beach, Los Angeles, Seattle, you'll have a uniform body of law. Drug cases, sadly, prevail --

COMMISSION MEMBER: That's still hard to figure out.

JUDGE HUFF: But it's easier to figure out from one circuit, one large circuit, than 30 different circuits.

CHAIRMAN WHITE: Exactly.

JUDGE HUFF: Drug cases, sadly, pervade across all societal lines. Employment cases, it's important for employers and employees to have knowledge as to the existing law. I also serve as the chairperson of the Fairness Committee of the 9th Circuit. We have a tremendous strength in drawing from all of the diversity of people within the 9th Circuit.

Secondly, the workload of the 9th Circuit does not justify a split. With technological advances, the J-Net, E-mail, faxes, we're better able to communicate now than ever before. And just think of the future. I do think

that it would be a step backward to then become split among regional lines.

JUDGE RYMER: One of the points that has been made is that it is virtually impossible for anyone, particularly district judges, to keep abreast of the law of the circuit because of 8,000 dispositions. Do you have a view on that?

JUDGE HUFF: I think with computers, with ways of -- we're better able to know now than before.

JUDGE RYMER: But what you're saying is, it doesn't matter. I mean, basically, you're making a decision. You're researching it. Do you make any effort to read all of the --

JUDGE HUFF: We try our best to be as abreast of the case law as anyone, but I don't think it would make a difference if there's several regional areas versus one area of law. Because we do attempt to also look at other circuit law too to see the trends, or if there's any distinguishing cases or any other body of law out there. So, I don't think that that's a problem.

Then finally --

COMMISSION MEMBER: What about intra-circuit conflicts where you've got a question for you that you go outside and look at the case law and you say, "I don't know what the law is here." You've got a test pool, but it's being applied in different ways. Do you have that problem very often? They do it in the 6th Circuit.

JUDGE HUFF: On occasion there are, perhaps, two trends and then it may take the appropriate case to resolve that. Because as a district judge, I am amazed. Often, there is no precise case that fits exactly the facts of your case. Then it's up to you to decide what is the law.

Well, I'm not here to say that there are no intra-circuit splits. I am able to say that in general, I think existing procedures on en bank review, for bringing that. If I find as a district court that there is something, I will say that on the record and try to give my reasoning in my opinion or on the record about why I am going the

way that I am, and then leave that alert the appellate court to be able then to resolve this issue.

COMMISSION MEMBER: What about this rotating en bank process?

JUDGE HUFF: It works well. It works well. We have had considerable experience with that. As a district court judge, I think that it has served the 9th Circuit very well in resolving cases. There may be some cases in which I would prefer, as a district court, that they take more. So, my vote would be that they should take more cases en bank because perhaps I have an interest in a particular case because I've been wrestling with an issue and I would like it resolved en bank. But I think that the procedures --

COMMISSION MEMBER: When you get an en bank case, you kind of put a little more reliance on it than you would, all things considered, I would say, a panel case?

JUDGE HUFF: Probably, but not exclusively because we deal with the cases as we get

them, whether it's an en bank case or a court of appeals case. I don't feel that we are in a position as a district court judge to disregard a panel opinion.

CHAIRMAN WHITE: You certainly don't give an en bank decision less authority than the panel?

JUDGE HUFF: I agree with you.

CHAIRMAN WHITE: Yes. And you think that it's firm?

JUDGE HUFF: Yes, yes.

CHAIRMAN WHITE: Yes.

JUDGE HUFF: Finally, because I'm in California, we have struggled with what would be the solution? There is no viable alternative that I can think of that would solve the issue. The coastal state problem? Then you have the situation where we've got Arizona, a port of entry, similar to Southern California. Why shouldn't Arizona be with us? Then you have perhaps California dominating any other matter.

I don't believe any viable alternative

exists to justify the huge expenditure of public monies, and I do think that that should be a factor in your consideration. Why create additional bureaucracy, additional clerk's office, additional circuit executive, additional space, additional administrative time and expense when the 9th Circuit works very well? So, I'm opposed to this.

COMMISSION MEMBER: Isn't that what they did when they split California into four districts?

JUDGE HUFF: To create additional --

COMMISSION MEMBER: It would create additional U.S. attorney, additional clerk, additional executive in the bigger districts. They recreate all that governance machinery and administrative machinery.

JUDGE HUFF: That's true.

COMMISSION MEMBER: So that's because the districts were getting too big to handle their work, I presume.

JUDGE HUFF: But at least --

COMMISSION MEMBER: I mean, I wasn't on the bench when they split them.

JUDGE HUFF: It is true, the trend, at least, for corporations is economy of scale. And that if you look at the marketplace where it's supply and demand, the marketplace is going to bigger consolidated ones for the bottom line. Similarly, you could make that analogy with respect to taxpayer dollars, that one circuit executive handling personnel matters may be better than having two.

Or certainly this courthouse was beautifully renovated and houses the circuit executive. We have been trying to just simply get land for our San Diego courthouse and have been unsuccessful in doing that. To build a whole other structure would cost millions of dollars and I don't believe it is necessary.

COMMISSION MEMBER: I don't believe you can replicate this in San Diego.

JUDGE HUFF: Oh, it would be wonderful.

COMMISSION MEMBER: I didn't quite understand your answer to Judge Browning's question about dividing the state into districts, judicial

districts, duplicating all of the outline there. Do you think that that was a mistake? That there should be only one judicial district in California, for example?

JUDGE HUFF: No, I don't think that's a mistake. Obviously, if there is a need to have districts and to have staff for each district, that can be done. I just think with the 9th Circuit, it's not necessary to have the duplication of resources.

CHAIRMAN WHITE: Thank you.

JUDGE HUFF: Thank you.

CHAIRMAN WHITE: Judge Kay?

JUDGE KAY: Thank you, Justice White.

Chief Judge Merritt, Judge Rymer, Judge Browning (indiscernible), I'm Alan Kay, Chief District Judge of the District of Hawaii. I'll try to be very brief and focus my comments essentially on the 9th Circuit situation.

The judges of our district are strongly opposed to any split of the 9th Circuit. We feel that notwithstanding its size and the numerous

judicial vacancies, that the 9th Circuit is operating in a relatively efficient manner. Moreover, the 9th Circuit has been a pioneer in the areas of self study and innovative adapting to change.

We further feel that with the significant increase in case filings across the country, that the corresponding need for additional judges that other circuits will shortly face the same problems of size that the 9th Circuit has now. It's our conclusion that the interests of Hawaii are well represented and recognized in the 9th Circuit.

Finally, we feel that any split of the 9th Circuit would general substantial expenses. The administrative expenses, as Greg Walters mentioned earlier, would almost double. There would be a need for additional appellate buildings. We feel that any split would be extremely disruptive to the judicial process and to the personnel involved.

On the other hand, if it is determined that a split is necessary, then the District of Hawaii feels that it would be in its best interest

to be aligned with the Pacific Northwest states which we sometimes call the proposed 12th Circuit, rather than to be included with the state of California and perhaps one or two other states.

CHAIRMAN WHITE: Why is that?

JUDGE KAY: Our reason is that even though we do have some affinity in law and commercial matters to the State of California, we feel that this (indiscernible) would be sharply outweighed by our being an inconsequential adjunct district to a circuit that would be completely dominated by California. We do have close ties with the Northwest. We have cultural and historic ties. We have commercial and banking ties. Many of our people were educated --

COMMISSION MEMBER: What does it mean to be completely dominated by California? What does that really mean?

JUDGE KAY: Well, it means that with the number of judges that would be from California in that circuit --

COMMISSION MEMBER: Are they different

from Washington and Oregon and Montana and Idaho?

JUDGE KAY: Well, I think as Chief Judge Hatter of the Central District of California mentioned earlier, at this time with California, there is some balance throughout the 9th Circuit with all the other states involved. And that there's more representative of balance allowed to the other districts. Whereas, with California with a number of lawyer representatives, the control of committees and so on, we feel that we would be dominated.

That concludes my remarks. Thank you for the opportunity to appear before you.

CHAIRMAN WHITE: Thank you, Judge.

Now, I come to Lloyd George.

JUDGE GEORGE: Mr. Chairman, I'm delighted to be here with your Commission. I'll try to be brief. I would advise you that I speak only for the judges of the District of Nevada, but I speak for them and their feeling is unanimous. I'm grateful to be here. I would say as well that the Nevada Bar Association agrees with the position that

the judges take.

We like the 9th Circuit a great deal. We think it's an excellent circuit. We think it's well managed. We think they do some things that are of extraordinary importance. They provide a special kind of collegiality that, in my judgment, goes beyond just circuit judges and their collegiality. I think the circuit has made an asserted effort to make district judges, bankruptcy judges and magistrate judges and clerks feel good about themselves. They have a variety of programs including Conferences of Chief Judges for each of those groups that I think combine to make us a very cohesive group. I think we work very well together.

COMMISSION MEMBER: Let me ask you this question.

JUDGE GEORGE: Yes?

COMMISSION MEMBER: How would all of that be adversely affected by reconfiguring the circuit into California, Nevada and Arizona?

JUDGE GEORGE: Well, I'm not sure that it would, but I see so many difficulties, Professor,

that might come as a consequence of establishing a precedent of dividing circuits. We may be able to, because of the past history, maintain the kind of collegiality that we have. But we have considered very carefully the question of dividing the circuit and we just feel very strongly that there really is no legitimate reason for doing that.

Some of that credit, a great deal of the credit, belongs to some genius in the administration, especially from Chief Judge America's Jim Browning. I think the organization has been established that has made the circuit function and work very well.

JUDGE MERRITT: Are your cases argued primarily in San Francisco, in Pasadena? Where?

JUDGE GEORGE: I'm sorry, Judge Merritt.

JUDGE MERRITT: Where are the cases coming from Nevada, that is appeals that are appeals from your court --

JUDGE GEORGE: They go to both, primarily San Francisco and Southern California. But the circuit has made an effort to accommodate

litigants. For example, the circuit has been able to sit in Las Vegas. We're very pleased about that, and the circuit, again, makes an effort to accommodate litigants. I think, Judge Rymer, that you do that from time-to-time. Just making the presence of the circuit felt is an important thing for our district and we would hope that that would continue. But generally, our cases are heard in San Francisco or in Southern California, Judge Merritt.

We think, as well, that the circuit conference that is conducted -- and Judge Rymer was the chairman of our conference at one time. I still remember her suggesting that all things -- what was it you said, Judge Rymer?

JUDGE RYMER: I'm sure it was really (indiscernible) degree on that.

JUDGE GEORGE: It was a meaningful observation. I'm a senior judge, incidentally, and my memory has problems that it didn't have a few years ago.

JUDGE RYMER: Well, I'm not and my memory is exactly the same. So --

JUDGE GEORGE: All is well that ends is what you said.

Let me just take a moment to indicate that I think the circuit is remarkably well administered. As far as our judges can see, there's a consistency. The decisions are timely. What is really needed in the 9th Circuit is to provide the help that you need and that you're entitled to. I think with the addition of the judges that the circuit is entitled to, all of these things that we criticize would be improved.

Let me just emphasize three brief areas. Number one, whether a precedent of preserving and creating smaller circuits is realistic given, I think, the monumental growth of the federal judiciary. You're all familiar with the projected growth that anticipates the potential for 30 to 40 circuits. It seems to me that the problems attendant with that kind of division are far more significant than the problems perceived in the 9th Circuit at this point.

JUDGE BROWNING: Well, Judge George,

take Professor Meador's suggestion in an earlier question and take the converse of that. What if there were just one circuit court of appeals sitting in division throughout the country with the flexibility to move to where the caseloads were and that sort of thing.

JUDGE GEORGE: Judge Browning, I'm not sure that I can respond intelligently to that. I appreciate the fact that it has been suggested.

JUDGE BROWNING: We don't require intelligent responses.

JUDGE GEORGE: Well that's a break for me.

I think it's a thought -- matter of fact, I think all of these matters are thoughts worthy of reconsidering and thinking because the time is coming, as far as the future is concerned, that we have to think of resolving some of the problems that we're looking at today and that you especially are looking at nationwide. That might be something that should be looked into carefully.

You asked the question, Judge Browning,

is there a time -- and I think it's an insightful question -- when big might be too big? Again, I'm not sure that I can answer it without a lot of careful thought, but I suppose the answer is perhaps so. But I reiterate that in my judgement, that time hasn't come for the 9th Circuit at this point. It just seems to me that there are too many viable alternatives to consider that will correct the problem, beginning with providing judges to the 9th Circuit that are needed. And then the idea of some --

JUDGE RYMER: There's -- that have been appointed to you.

JUDGE GEORGE: I'm sorry, Judge Rymer.

JUDGE RYMER: From the point of view of the district court, what objective markers would you suggest for whether a circuit is functioning effectively?

JUDGE GEORGE: If it is functioning effectively, I suppose --

JUDGE RYMER: How would you measure it other than just "I think it is"? I mean, what

objective indicia are there from the point of view of the district court?

JUDGE GEORGE: There are several that I've mentioned. I think there is a consistency, Judge Rymer. I don't see any difficulty with the lack of consistency.

JUDGE RYMER: Okay, so you'd say that consistency of decisions is one objective marker?

JUDGE GEORGE: Yes. I think collegiality is probably another. I think the timeliness of the decisions is another. I think perhaps the cost concepts, and I'm not able to break those down. But I have a feeling that we would look at greater cost if we started dividing circuits more and creating more potential difficulties. Those questions and the various criteria have been considered. As far as I can see from my readings and from my own personal feelings and observations, the circuit seems to be addressing problems well. If, indeed, it is time to start to do things differently, there are so many other alternatives to avoid.

This multiplication of circuits that seem to me to make a great deal more sense. For example -- and I may be wrong. You correct me if I'm wrong -- my understanding is the last several years, that some 40 percent, not weighted but some 40 percent, of the appeals come from prisoner 1983 appeals. That, to me, is a terrible problem and doesn't really make any sense. You know as well as I do that we have considered questions about chunky peanut butter or smooth peanut butter and I think a potential resolution to that vast number of cases would be to create a structure of administrative law judges, independent judges, who go directly to the prisons and resolve the vast majority of those problems. If a question arises like an overcrowded jail, there's a means through the Administrative Procedures Act to get those kinds of matters before the district court and eventually the circuit court. That, it would seem to me, would be one of the means of reducing what is perceived by some to be a significant overload. The possibility, and I mentioned this in the paper, of some kind of

sentencing appeal process that would invite district judges to sit on appeals questions with, I suppose, some kind of a cert to consider those questions that should go beyond that.

You've talked a great deal about bankruptcy and this is a special area of interest for me. As was mentioned, one of the things that could be done to correct all of the problems, as I see them with the Bankruptcy Appellate Panels, it's a marvelous experiment in specialization and it has worked very well for this circuit. I think nationally, if you had some 25 Article III judges who sat on Bankruptcy Appellate Panels, they could handle the entire nation's bankruptcy appeals. They would be fungible judges. It would avoid the administrative structure. District judges have not only a problem of handling appeals, but they're frustrated because they think they have a responsibility without any authority.

If the Article III authority were taken from the Bankruptcy Appellate Panels, they would really be an independent court and you would avoid

the problems between district judges and bankruptcy courts. It would correct the problem of Bank of Mowery that suggests that they don't have any precedential value. It would give them a precedential value. That would be the only appeal, except perhaps a cert process to go to the entire circuit if, in fact, there was some perceived inconsistency in commercial law. It would also make for a force of fungible judges. Those judges could sit on non-core matters.

I was a bankruptcy judge and for the most part, practitioners used that process of saying this is a non-core matter and it requires an Article III judge to sit on it. It's a ploy in most cases. If those panel judges, Bankruptcy Appellate Panel judges were available to say "we will hear that case", in most cases I think they would withdraw their objection to a bankruptcy judge hearing those matters. It would correct that kind -- they would be fungible judges to help in other areas.

Mr. Chairman, there were several other matters but I think for the most part, they've been

covered. If I can take only one minute?

The second matter is whether there's any rational way to divide without splitting California, and I don't think there is. I don't think any way except dividing California would adjust the workload. I've talked to you about the advantages of the big circuit.

Let me just conclude by saying that at the very least, circuit division based on arbitrary and I think, for the most part political considerations, should be put on hold until all of the ramifications of circuit divisions have been thoroughly explored with a view to present to the present and future contours of the federal judiciary. The Judicial Conference of the United States concluded in its long-range plan, "division of a particular circuit or realignment of circuit boundaries should occur only when compelling empirical evidence demonstrates the relevant courts inability to operate effectively as an adjudicative body."

Perhaps the time, as I indicated in my

paper, that the assumption that bigger is better is not really accurate and we ought to start to give serious consideration to the idea that perhaps bigger in some ways to a point, Judge Browning, might be better.

Thank you for your patience with us. Thank you.

CHAIRMAN WHITE: Well, it's a good thing your predecessor gave you some time.

JUDGE PATEL: Justice White and Members of the Commission, it is a pleasure to appear before you today. This is my city, the Northern District of California, where I sit as Chief Judge. This beautiful courthouse -- I'm sorry, Marilyn -- but we were able to replicate it here after the earthquake the last time. But maybe that's a good place to start.

This building is an extraordinary building and it's a historical building, but I think in time because of where we are in time, this building and many other courthouses across the country will be an anachronism. We seem to be, if

we're talking about dividing the 9th Circuit and possibly in the future other circuits, really moving against the historical tide. We've been on the threshold and walking through the head threshold for some time. There's some extraordinary technological changes and advances.

Other institutions are farther up that technological ladder than we are. What we're looking at is not merely national issues anymore, but global issues. Here we are, talking about much more parochial ones. I suggest to you that I think your mandate is such that you're not just looking at the 9th Circuit issue but at the configurations of courts of appeals, that what we have is an opportunity at this time, to look at where we are going in the future with the kinds of advances that we have; that make it possible already for the 9th Circuit to accomplish much of its mission despite its geographical size. But also, I think we speak to what the courthouse or the court of the future will be.

Many courts already -- for example, in

this state, appellate courts conduct oral argument by telephone. I don't know that that's a particularly good way to do it, but video conferencing certainly provides an opportunity to do that. Electronic filing is already being done in the federal courts and is coming up to speed in many of the districts. We have to be concerned also, I think, with pricing ourselves out of the market. I think the federal courts are losing a number of cases where we should be hearing cases because of the cost. Corporations and other entities are turning to ADR. That affects the development of the law, I believe, in many ways and leaves us with a very unbalanced kind of caseload. It doesn't really reflect what the federal courts have generally been about.

COMMISSION MEMBER: Are you headed toward endorsing the proposal for a single nationwide court of appeals, abolishing the circuit line?

JUDGE PATEL: I'm not sure I'm ready to go that far. I'm not sure where this would take us.

But I think that it is something that the Commission ought to look at, summing up the data that's necessary, take a look at what can be done in the future whether we're talking perhaps about fewer circuits rather than more circuits because of the ability to communicate in the extraordinary ways that we have achieved so far and that I think we see in the future as well. It may mean that we would have fewer circuits rather than one national circuit. I don't know the answer to that question, in all honesty.

COMMISSION MEMBER: Do you see much difference in the quality here in San Francisco in the adjudicatory process in the federal district courts and in the state trial courts?

JUDGE PATEL: Yes, thanks to the trilogy of cases, Cellutex, et cetera. The reason I say that is because federal judges are, as any of our state court judges will tell you, able to grant summary judgement with a greater likelihood of being affirmed by the court of appeals or being secure in doing that.

COMMISSION MEMBER: The difference is that you get more jury trials in the state court.

JUDGE PATEL: You get more jury trials in the state court. You also --

COMMISSION MEMBER: And that's about it.

JUDGE PATEL: -- the quality of lawyering, I have to say, sometimes is not as strong in the state court, but that is changing. That's changing rapidly. What I see happening with a proposal to split the circuit, really, is to make us more parochial.

You know, we have one circuit where I think there's one vacancy but there are six active judges. When I compare that -- not that they're not doing a great job, but when I compare that to the kind of cross-fertilization that we have in the 9th Circuit with the judges who have access to judges of other parts of the circuit and the opportunity to deliberate with them and learn from them, I think that it really suits where the litigants that we serve are going, at least the commercial entities, by having that picture.

I mean, when they have a Pacific REM Conference, they're talking about all of the states within this jurisdiction for the most part, with the exception, you know, of maybe a couple of the internal states, and the interests there are the same. I don't see that consistency is a problem in this jurisdiction. Ultimately, it's achieved. I think that the chief judges of this circuit have done an extraordinarily good job in trying to overcome some of those problems before one gets to the en bank situation. Those judges can tell you more what they're doing than what I've seen, but certainly, screening cases in advance so that cases involving the same or similar issues can be resolved by the same panel. A variety of techniques can certainly be used if consistency is a problem.

Also, I might note from looking at some of the data that size really has very little, if anything, to do with the time within which a disposition is achieved. I noted that one of the circuits which has a fairly large number of circuit judges, active circuit judges, has a median caseload

compared with all of the other circuits. Also, one of the lower per judge caseloads looking at the filings each year and yet, it has the longest time to disposition.

The 9th Circuit has managed to do very well once panels are empowered in terms of disposition time. It is because of the politicized nature of this whole inquiry and the fact that the vacancies haven't been filled in this circuit, and that it has been difficult to summon up panels so that those cases can be distributed more readily.

I know that your lunch was to start almost a half-hour ago so I will just close with this. Your job is to do something that's very rational. That is, to analyze the situation, look at the data statistics, come up with a report and recommendation with some rational responses. I'm not sure that it is possible to -- that that will carry its day in Congress because really, this whole issue stems --

CHAIRMAN WHITE: Tell us about it.

JUDGE PATEL: -- from the politics.

It's interesting because your politics --

COMMISSION MEMBER: No, it's not entirely politics. If you're talking about what the future of the courts of appeals should be, there are judges and lawyers who are genuinely concerned about it.

JUDGE PATEL: Oh, yes. No, but I'm talking about in terms of the split of the 9th Circuit. It's a very politicized issue. If they would forgive us our vacancies, I don't think we would really have any issue at all with respect to how long it takes to dispose of cases. I don't really think that's a serious problem once those vacancies are filled.

COMMISSION MEMBER: I don't think its current critics would go to sleep if you filled the vacancies.

JUDGE PATEL: Well, that's (indiscernible). What's interesting, however, is the ideological differences, not geographic differences. If one looks at the opinions of this circuit or another circuit, it really is ideological

differences which will occur and should occur in every court.

I will leave you with just one thought, and I wasn't totally facetious when I closed with it in my statement. If you make a recommendation for splitting the circuit, or that other circuits be created or anything that's going to involve the building of new courthouses or if Congress does so, then I strongly urge that any legislation that's passed include a provision that no new courthouse will be named -- and I apologize to you, Judge George, for what I'm about to say -- after a living person. That may take some of the initiative or the steam out of some of the proposals that I've seen.

Thank you very, very much.

CHAIRMAN WHITE: All right.

(Whereupon, off the record for a lunch recess, to reconvene later this same day.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

CHAIRMAN WHITE: Are we ready? They'd better be because we've got a long list, but I'm sure everyone will be interesting.

Daniel Kolkey, what do you do for the governor?

MR. KOLKEY: I'm the governor's legal affairs secretary.

CHAIRMAN WHITE: Oh, well, we'll be glad to hear you.

MR. KOLKEY: Thank you very much.

My name is Dan Kolkey. I'm Governor Wilson's legal affairs secretary and I'm honored to be here before the Commission on the Governor's behalf.

The Governor believes that there are two objectives that ought to guide the Commission's recommendations. One is that any recommendation made ought to promote reasonably timely appellate decisions; and secondly, the recommendations ought to promote decisions that are analytically consistent. Based on those guidelines and faced

with an increasing caseload, the Governor does not believe that the solution is a split of the 9th Circuit or of any other circuit. Indeed, a split will simply generate more inconsistencies between the two new circuits.

Instead, the Governor believes that the solution lies in addressing, in constraining the rate of increase in the caseload. Because unless the rate of increase in the caseload is addressed, in 30 years, there will be another commission that will be determining whether the 17th Circuit should be split. The steps that the Governor thinks could be taken as measured steps to help constrain the rate of increase are the following.

First, he believes that the settlement processes in the appellate courts could be completely revamped and made more effective through a mediation program that's held after the appellant's opening brief is filed, and I'll get to that in a moment. Secondly, he thinks that there could be some conservation of federal resources if the abstention doctrines were not only clarified but

codified and institutionalized in Rule 12 of the Federal Rules of Civil Procedure which would encourage more cases to be deferred to the state courts which not only will conserve resources, but also would promote federalism in commodity.

Third, he thinks that there ought to be some reconsideration of the amount in controversy for diversity cases, possibly an increase to $100,000. Fourth, while this is beyond the scope of my testimony, and perhaps this Commission's charge, clearly, an increasing rate of cases can be constrained by addressing the scope of standing for various federal programs.

If one has a circuit with more cases and perhaps more judges, it's also clear that there has to be a means of providing more analytically consistent decisions --

COMMISSION MEMBER: Could I ask you a question?

MR. KOLKEY: Yes.

COMMISSION MEMBER: The Governor is really suggesting in many ways that we give more

credence to the fact that we're a federalist structure and can rely on the states and the state courts to decide cases.

One of our colleagues on the bench, Judge Newman, has suggested along the same lines -- he was Chief Judge of the 2nd Circuit -- that a certain category of cases, particularly all diversity cases be included, but some other cases that rely heavily on state law -- for example, ERISA type cases -- have to be filed in the state court. If there is a diversity of citizenship or a federal question in the case, in this category of cases, you can seek a removal petition under some criteria that would allow the district judge to say "well, there is no likelihood of home cooking in a case like this. No real reason this needs to be in the federal court" and leave it in the state court.

As you know, diversity cases are 15 to 20 percent of the caseload. You could get a significant number of cases that are now in the federal courts back into the state courts under this kind of procedure. Now, is that along the lines

that the Governor is thinking?

MR. KOLKEY: Well, he hasn't gone so far as to go to that specific proposal, but I do think that he very much promotes a way of institutionalizing a deference to state courts. Certainly, a program that provided that certain cases would be filed in state courts with the right of removal would be a way of institutionalizing, a means of deferring to the state courts.

Indeed, while the scope of testimony is too short to give a number of examples, recent examples including the Arizonians for Official English versus Arizona, Supreme Court case suggests that a lot of federal resources, litigation in both the federal district court, courts of appeal and the Supreme Court, could have been avoided had there simply been a willingness to certify a question of novel state law to the state courts in Arizona. Which, when those state courts got the issue in Arizonians for Official English did, in fact, dispose of the case making, frankly, the nine years of litigation in the federal courts a nullity. But

that sort of concept is along the lines of finding a way to institutionalize it.

The Governor's thought in terms of institutionalizing deference to the state courts was to provide for a motion for abstention in Federal Rule 12 of the Federal Rules of Civil Procedure. So that, in essence, there was an acknowledgement that that is an appropriate motion to make at the beginning of a case, and an encouragement for the courts to consider that a legitimate motion. Because oftentimes courts --

COMMISSION MEMBER: Even when there's not a parallel state proceeding, in other words, you would invoke abstention and require a filing of the case in the state court if there's no parallel state proceeding going on?

MR. KOLKEY: Well, the fact is, there are extension doctrines where that would be appropriate, for instance in Pullman. You don't need a parallel state proceeding if there's an unsettled question of state law that would avoid or change the nature of the federal question being

considered. It's appropriate to abstain on the basis of Pullman even though there is not presently an ongoing state proceeding. Of course, the certification procedure that the majority of the states have are procedures where there's not an ongoing state proceeding, but through certification one lets the state courts decide the issue of state law. But to wind that point up, I think that one would be surprised if one looked at the number of cases where abstention was appropriate, where either it was denied but there's no reported opinion because it wasn't worth the parties taking the matter up on appeal after the conclusion of a trial, or where the matter was simply denied without further thought by the court or the parties.

And indeed, the Proposition 187 litigation in California, no one talked about that in terms of abstention but there was pending state court proceedings filed the very same day as the federal proceedings in Prop 187 litigation. The fact is there were several state proceedings as well as several federal proceedings. Abstention could

have been used. The fact is, it was invoked at the beginning of the case unsuccessfully, but could have been used again to defer some of the federal resources. In fact, you had parallel proceedings on parallel issues of law going on in the federal and state courts during that litigation as well.

Perhaps I could take a moment to just point out and summarize the reasons for the Governor's opposition to a split of the 9th Circuit and then go back to the issue of the mediation program that he has in mind. Just to summarize the Governor's position on the 9th Circuit, he believes that a split would be unwise because one, it wouldn't necessarily reduce the new circuit's caseload. The fact is, Congressional proposals for a split that, say, had Nevada and California in a single circuit resulted in a 50 percent increase in the workload. In fact, any circuit that has California, unless there is a significant increase in judges, is going to find itself with an increase in its workload.

Secondly, a split is going to -- and I

know you've heard this before -- result in inconsistent case law on the West Coast. A split will result in inter-circuit conflicts which wouldn't have otherwise existed where the circuit's en bank procedures could have resolved the matters. A split of California as part of a 9th Circuit split would not only have all of these problems, but also result in forum shopping between the northern and southern parts of the state, which from the state's perspective is a real problem because one can file a suit against the state anywhere in the state. If people start forum shopping as a result of a split of California, that's going to create real problems in terms of litigation against state agencies, of which there is much.

Yes?

CHAIRMAN WHITE: Mr. Kolkey, you have about a minute-and-a-half. Which do you want to clear up?

MR. KOLKEY: Let me go to the mediation program because I think this is somewhat new in terms of its approach.

If one had a mediation program for appeals where the mediation was held after the appellant's opening brief --

COMMISSION MEMBER: I think they've got that.

MR. KOLKEY: Okay.

COMMISSION MEMBER: In the 9th Circuit recently where the mediation program that you set up is after the briefs have been filed. Isn't that the way it works? I think they've got recently.

MR. KOLKEY: The thought would be is that if you had it after the appellant's opening brief was filed before the appellee's brief was filed, not only would that be the moment in time when the appellant is most familiar with the weaknesses and strengths of its case, but the appellee could save the time of completing a brief.

And there would be another benefit to this. If you have a mediation during the briefing, not only are the parties familiar with their weaknesses and strengths but if the matter doesn't settle, the court will get much more focused

arguments in the appellee's brief and reply brief as a result of that mediation. Thank you.

CHAIRMAN WHITE: All right, thank you.

Barry Portman?

MR. PORTMAN: Thank you, Mr. Justice.

My name is Barry Portman. I'm the Federal Defender for the Northern District of California. I have been a federal defender in the districts of California for the past 27 years.

All the federal defenders within the 9th Circuit have submitted a statement to the Commission. The essence of the statement is that we feel that the 9th Circuit as currently structured, is functioning efficiently, is delivering consistent law, and we oppose any suggestion that the 9th Circuit's current structure be changed. I would like today in the short time I have to devote my remarks to something I don't think that has been raised. It pertains particularly to California and to the federal criminal law in California.

I have looked at the proposed restructuring of the 9th Circuit and each one of the

proposals essentially tries to grapple with the 800 pound gorilla that arrived at breakfast, the state of California. We have 63 percent of the circuit's population and almost two-thirds of the case filings. There's the so-called "horse collar proposal" termed such by Judge Chambers many years ago which, I guess in conversations with his horse, Tom, seemed appropriate, and that's California alone.

Then there are what I call variations on that, fig leaf variations: California with the Pacific Islands, or California with Nevada, but it's still just California. Finally, there is the "Sever at the Tahattchapee Proposal" which is to split California in half. In one way it would be the new brown circuit: Southern California, Arizona, Nevada; and then the green circuit: Northern California and everything north of us. Then there are variations on this: the Troyka, the three circuits. But all of these proposals fail to deal with the problem in California. That is a problem occasioned by a proposition that was passed in 1982

by the voters of California called Proposition 8. That proposition was an initiative which took away and eliminated any independent state ground in the California courts to exclude evidence and made the California exclusionary rules -- not just the 4th, but the 5th and 6th amendment ones -- dependent on the federal court's interpretation of the constitution.

So that, if we had a California circuit, if we had one that's divided, we face the prospect of a different constitutional standard at the current county line. We have Interstate 5, our own California/Mississippi with commerce both legal and illegal flowing back and forth. But we would have police officers that might be looking at a different standard and different conduct as to what they could do with regard to motorists' arrests and car searches.

If we had a circuit for California as a whole, if it was not split, we would still have the problem of creating what I would call a "Super California Supreme Court." It would be a Federal

Super California Supreme Court, but the judges would all be from California. It seems to me that the public would not appreciate as lawyers might that these California judges are really propounding a national law, not a super California law. It seems to me that it would be much more difficult to have a California statute, perhaps, declared unconstitutional and be accepted by the public if it was done by three California federal judges as opposed to a judge from the state of Washington, and one from the state of Arizona and one from the state of Alaska.

So, my urging to the Commission is that you consider, if you may use a play on Winston Churchill's aphorism that the 9th Circuit as currently structured may be unwieldy, but not so unwieldy when you consider the alternatives.

CHAIRMAN WHITE: Thank you.

MR. PORTMAN: Thank you.

CHAIRMAN WHITE: Thank you.

Maria Stratton?

MS. STRATTON: Thank you, Your Honor. I

apologize for my lateness. My plane was delayed from Los Angeles.

CHAIRMAN WHITE: Oh, you were right on time.

MS. STRATTON: Well, then I guess you were late, huh?

My name is Maria Stratton and I am the Federal Public Defender for the Central District of California. I have practiced both civil and criminal law in this circuit for the last 17 years and have been the Federal Public Defender for the last five years. I hold the distinction or the curse, depending on where you come from -- but I think it's the distinction of running the largest Federal Public Defender office in the country with the largest capital habeas corpus practice in the country.

COMMISSION MEMBER: Could I ask you a factual question? What percent of your cases get appealed that you are defending to the 9th Circuit after a disposition at the trial level?

MS. STRATTON: Well, I would say, Your

Honor, of the 600 appellate cases that the 9th Circuit defenders file each year in the 9th Circuit, we probably file 225 of those each year. So, we have a large percentage. I would say with our annual caseload, closing is about 2,200 cases. So, that would be about ten percent of our cases end up coming to the appellate court.

COMMISSION MEMBER: In what way would your work, work at your office, be adversely affected by a division of the 9th Circuit?

MS. STRATTON: Your Honor, I want to talk about a couple of things that are maybe less statistically based and more subjective. Maybe this is fine since you're in California and it's more a touchy-feely type of environment, but I want to talk about the quality of the practice in the 9th Circuit.

Because when I was preparing for this presentation today, I did a survey, an informal survey, of the Federal Public and Community Defenders throughout the country. What I wanted to know was how many of you get real opinions out of

your appellate courts, opinions that tell you why your client's conviction is being affirmed which is generally the majority of what happens in our cases.

COMMISSION MEMBER: On the sentence?

MS. STRATTON: Yes.

What I got was a very surprising response when you compare it to the statistics that I saw regarding case filings in the circuit courts. That was that the defenders from the 5th and the 11th Circuits routinely reported that over a third of their criminal appeals are disposed of in one word dispositions, generally affirmed with nothing else. Not a paragraph of explanation, nothing. These are the two circuits that were once one.

COMMISSION MEMBER: Excuse me, Ms. Stratton. Are those cases, if you know, disposed of prior to the argument in the case?

MS. STRATTON: I don't know that, Your Honor. I asked generally for what percentage of their cases were disposed of --

COMMISSION MEMBER: What percentage of your cases get orally argued?

MS. STRATTON: I would say probably a third to a half of our cases get oral argument.

COMMISSION MEMBER: Do you ask for oral argument in every case on appeal?

MS. STRATTON: Well, in this circuit, we don't really have to ask. It's generally given to us unless the court tells us we're not going to get it.

COMMISSION MEMBER: You're not getting oral argument in half to two-thirds of your cases on appeal.

MS. STRATTON: That's correct. And we generally will make a determination of whether we think we really have something to add to the briefs.

CHAIRMAN WHITE: But you still are getting an explanation.

MS. STRATTON: But we're still getting an explanation and that's what I want to talk about today.

Because what other profession or occupation gets away with never giving an explanation? If you went to a doctor and your

doctor said to you, "you have cancer and you're going to die in six months" and stopped there. If you went to a plumber and your plumber comes to your house and says "you need to spend $500.00 on a new garbage disposal", or my personal favorite which is the car repairman who says "I'm sorry, your car has died. You need to buy a new car" with no other explanation. What consumer -- and I speak as a consumer here -- would let you get away with that?

That's my concern about the fact that in the 9th Circuit, we don't get that. We get an explanation. It's important because as a consumer, the public understands, gets to understand that the court is up there thinking about and taking the time to provide a public service and to give an explanation. It's important for the litigants, it's important for our clients to know and for us to be able to tell the clients what happened in their case and not just to kind of conjecture about what happened. And it's important for the development of the case law because that's really what the court of appeals is all about. It's not just about deciding

or processing cases. It's about giving --

CHAIRMAN WHITE: Are you suggesting that the opinions you get in a non-argument case are thorough enough to satisfy you and your client?

MS. STRATTON: Well, Your Honor, I guess it depends on the case. Sometimes I feel that way and sometimes I don't, but at least I'm able to go back to my client and say "this is what the court believes is going on here" and to give them an explanation instead of saying "I don't know. I have to guess. The court just said affirmed."

COMMISSION MEMBER: Even with reasons you might comment, they were all wet, I suppose?

MS. STRATTON: Absolutely, and at least I can tell the client that. But when you walk away with a decision that says affirmed or through the appellee reversed with nothing else, although that rarely happens, you're left with nothing to show for the public, to show for the development of the case law, for me as an individual lawyer representing an individual client to give to the client.

Now, is that because the judges of the

9th Circuit are better judges than the 5th and 11th Circuit? I don't think so. I'm not going to say that here, but I don't think so despite the number of 9th Circuit judges in the vicinity. But I think that what we would be able to say is that the quality of judging is better and why is that? I think it comes from the bigness of the circuit. The circuit has the resources to spread around and to be able to take advantage of the economy of scale that comes with bigness.

COMMISSION MEMBER: I think if you do a study, you'll find that there are three circuits that are doing this affirmed business, and the rest of them don't do it.

MS. STRATTON: That's right, Your Honor. The reason I think it's important to notice that it's the 5th and the 11th Circuit is because those are the two circuits that used to be together.

COMMISSION MEMBER: The 3rd Circuit does it and they have one of the largest caseloads in the country. So, you know, I don't know that there's a lot of rhyme or reason about it.

MS. STRATTON: Well, I would suggest that the 5th and 11th Circuits who used to be together and are now apart may not be getting to take advantage of the economies of scale that comes with a certain amount of bigness.

COMMISSION MEMBER: Well, are you suggesting that if the 9th Circuit were divided, this sort of practice that you like now would change for the worst?

MS. STRATTON: I am suggesting that it's a possibility because --

COMMISSION MEMBER: Well, why would that be?

MS. STRATTON: Because it would be smaller circuits with not necessarily the same amount of resources that they would be able to pool to get the advantage that you get when you have big resources that are spread out and used economically. I guess it comes from a bias of mine because I run a big office and I'm able to see in my office that we are able to use economies of scale in being more efficient in the way that we run the office.

The second point I just wanted to go to, and this goes along with the quality that I see in the 9th Circuit. And I have to tell you, I'm not a particular fan of the 9th Circuit's criminal juris prudence. So, this isn't just because of some kind of personal feeling about the way the cases come out or not come out. One of the things that the 9th Circuit has been able to do, in addition to doing the regular appellate job of deciding a case in controversy before it, is to get itself involved in the administration of justice.

I have been on the 9th Circuit's Capital Case Committee for the last three years. The Chief Judge put me on that, I think, because I was running the capital habeas unit which was a pilot project of this circuit to try to improve the quality of capital habeas representation in this circuit. I don't know of many other circuits who have taken such an interest in developing innovative ways --

COMMISSION MEMBER: You're handling the state capital habeas cases?

MS. STRATTON: We're taking 2254 cases.

We're representing inmates on death row who are now --

COMMISSION MEMBER: What percent of them?

MS. STRATTON: Well, there's to 500 on death row now. We have 23. But our project has been in existence about two years. Although the number may sound small in comparison with the number on death row, we actually run the biggest operation in the country with respect to those petitioners.

It is because the 9th Circuit took the lead in looking at the problem and trying to figure out a better way to provide quality representation that this project came into existence. I think that it, again, stems from the bigness. They have been able to take advantage of the diversity of the circuit and its just bigness to be able to use its resources very efficiently, and to take the time to involve itself in the administration of justice. It's something that I hope that we would continue to have.

Thank you, Your Honor.

THE CLERK: The panel at 2:00, please come forward.

CHAIRMAN WHITE: Joanne Garvey, you may proceed.

MS. GARVEY: Thank you, Mr. Justice White and Members of the Commission.

First, I'd like to convey the apologies of Jerry Shestack, the president of the American Bar Association who can not be here today. He has a schedule conflict and he asked me to appear since I'm a governor of the American Bar Association and also a San Francisco lawyer.

The American Bar Association has as one of its primary goals the promotion of improvement in the administration of justice, so it's no mystery or surprise that the ABA has looked at the issue of such things as the restructuring of the federal courts in the circuits a number of times over the last 25 years. The creation of this Commission by Congress really prompted the most recent efforts by the ABA, the formation of a very distinguished panel working group, to review the question of the

restructuring of the federal circuits.

The working group is composed of Charles Allen Wright, Professor Larry Fox, a prominent Philadelphia lawyer and past chair of the litigation section in the American Bar Association; John Frank whom I think is known to all of you over the years for his many contributions in this area, and President Shestack himself. Based upon the report of the working group --

COMMISSION MEMBER: Well, you've got one representative on the Commission itself.

MS. GARVEY: Pardon?

COMMISSION MEMBER: You've got the immediate past president on the Commission itself.

MS. GARVEY: Well, we try to do our political homework. We tried to cover both sides of the bench in this case.

CHAIRMAN WHITE: He didn't sign that statement.

MS. GARVEY: Yes, Mr. Cooper.

COMMISSION MEMBER: May I ask how this working group was constituted? That is, who

appointed (indiscernible)?

MS. GARVEY: The president of the American Bar Association. Okay.

Based upon the report of the working group, the American Bar Association Board of Governors adopted a resolution at its April meeting that I'll very briefly summarize. That the Association opposes the restructuring of the 9th Circuit in view of the absence of any compelling empirical evidence that demonstrates that the circuit is suffering from adjudicative or administrative dysfunction. Secondly, at this time, the Association opposes any restructuring of the balance of the circuits but yet, certainly supports and commends the efforts of the courts in their ongoing efforts to adopt and use modern technology and procedural innovations in an attempt to deal with the dispensing of justice.

JUDGE RYMER: What are we supposed to draw from that because the circuits obviously differ wildly in their structure?

MS. GARVEY: Exactly.

JUDGE RYMER: So, what the Bar Association is basically saying is "hey, everything is fine no matter how it's structured." What are we supposed to draw from that?

MS. GARVEY: Well, I think you can draw two things. One, based upon a review of empirical data exists in terms of the structure of the circuits as a whole and a lot of feedback from the practicing bar, for all their diversities, the circuits seem to be functioning effectively. The problem, I think, that the ABA recognizes is the number of vacancies which, when combined with rising caseload which I think is a natural growth unfortunately with population growth, makes it very difficult to try to address all the issues that have to come before the court.

But having looked at that, the circuits as a whole seem to be able to handle their function, and they seem to be working well. And they seem to be reaching out in ways to handle --

JUDGE RYMER: Well, is the ABA satisfied with the potential of having a federal court of

appeals, say, process 80 percent of its cases without oral argument on a judgement order basis?

MS. GARVEY: I can't really tell you how much detail the particular task force went into, but I can tell you where we have a problem.

JUDGE RYMER: I guess what I'm really trying to do is to ferret out --

MS. GARVEY: No, I understand.

JUDGE RYMER: -- you know, what it is that makes everything copacetic now.

MS. GARVEY: No, we're not saying it's copacetic. But what we're saying is that -- we're saying two things, I think. One, that if you're going to change structures and a restructuring of the circuits -- that has been proposed in all of its various forms with the 9th, at the moment, being the questionable circuit -- there ought to be evidence that it's not working. That somehow or other, justice is being denied to the individual litigants or that there is an inconsistency in the law of the circuit, or something is happening that it is not functioning.

JUDGE RYMER: See, I guess one of difficulties that I've got is that it seems across the country that people are sort of -- it's easy to say, "well, everything is working fine." But we're supposed to look ahead. If you make assumptions that caseload is going to continue to increase, something has to either give or alternative structures may have to be devised. It seems to me that that's sort of our charge, is what alternative structures might there be that would better serve the administration of justice in the federal appellate system?

MS. GARVEY: Yes. Part of the problem that we have is that the structures that are in existence seem to be functioning. Sometimes not well. As we understand it, the 2nd Circuit is having terrible problems right now.

JUDGE RYMER: See, but that's what I'm trying to get at.

MS. GARVEY: I understand.

What I'm simply saying is we would commend you for trying to look at alternative

structures. The ABA in the past has looked at alternative structures, some of them --

COMMISSION MEMBER: Isn't the fact of the matter here that the ABA at this moment, on this subject, has not really looked at anything other than sort of the question of whether you want to divide circuits or not? Isn't that the only thing this document addresses? It doesn't attempt to consider alternatives such as those that have been presented to the Commission in various hearings.

MS. GARVEY: No, I think that's correct. And certainly as part of its ongoing efforts to review and consider the administration of justice, as alternative structures are presented the ABA will certainly take a very hard look at them. But the structures that we have seen presented to date which are a split of the circuit in various configurations do not seem to address the particular problem, and seem to perhaps miss the problem.

COMMISSION MEMBER: One other clarifying question, if I may?

The House of Delegates has not acted on

this subject, has it?

MS. GARVEY: Oh, yes -- well, it has. I was going to explain that the resolution by the task force -- the report of the task force only went to the Board of Governors because the House has not met. The task force is using as its standard, the policy that was adopted in 1995 by the House. The House's standard is one, you should have enough judges to properly deal with the needs for appellate justice and continue to provide a high level of that. But more importantly, that there should be no restructuring unless there is evidence to demonstrate that the present arrangements are not working. They are dysfunctional.

So, that is the policy standard against which we're working. Perhaps that's part of the difficulty, Judge Rymer. In my particular brief, I can only tell you that's the standard against which we work. Now if there are alternative structures presented, I think the Bar would be very happy to look at them and continue to report and enter into a dialogue. But yes, we are following the policy as

adopted by the House.

COMMISSION MEMBER: Ms. Garvey, certainly you can't quarrel with the distinguished members of your working group, but as I read the ABA position, they really studied this or considered it for three or four months. Is that correct?

MS. GARVEY: Well, perhaps Mr. Frank who will be following me, another panelist, could address exactly how much time. But I believe that the Commission was appointed about that time. That is correct.

COMMISSION MEMBER: Well, the submission says that it was appointed earlier this year and rendered its report in April.

MS. GARVEY: Yes, but --

COMMISSION MEMBER: Do you know the extent to which they delved into these problems and delved into the questions Congress has posed to this Commission?

MS. GARVEY: They have reviewed the statistics. As I say, perhaps the question would be better directed at Mr. Frank who is a task force

member. He could give you chapter and verse.

But the American Bar Association is not exactly a virgin in this area and has been studying these issues for many, many years, and you know, comes up with their reports.

COMMISSION MEMBER: I don't mean to be critical of the American Bar Association.

MS. GARVEY: No, I understand.

COMMISSION MEMBER: God forbid I run afoul of them.

My question is, if you have this statement of principles from the House of Delegates, what does the working group add by re-annunciating those principles?

MS. GARVEY: Well, what the working group did was to review the evidence and the best you can do is look at statistics and clearly, you know, talk to people and try to get a sense of how things are working. In fact, just sitting in the hearings this morning was very eye opening and, you know, quite interesting.

Based on that, and you know, you can

look at the statistics, for example, and see what the level of the caseload is, how long to disposition, how cases are handled, how many cases go up and so on. So, based on that, they came to the conclusions but the standard is a difficult one. There has to be evidence of a need for change.

CHAIRMAN WHITE: All right, thank you.

COMMISSION MEMBER: Thank you.

MS. GARVEY: Thank you.

MR. KAWACHIKA: Justice White, Members of the Commission, good afternoon.

CHAIRMAN WHITE: Go to it.

MR. KAWACHIKA: My name is James Kawachika and I am the president of the Hawaii State Bar Association.

You heard earlier today from Chief Judge Alan Kay for the District of Hawaii in representing the united opposition of Hawaii's district court judges to a split of the 9th Circuit Court of Appeals. The Hawaii State Bar Association joins in that opposition. For the past eight years, the Bar Association has consistently and unanimously joined

with other bar associations and judges in opposing legislation to divide the 9th Circuit, and we do so again today.

Now, having sat through as many as six hearings in as many states, I am sure that you have heard all of the possible reasons that there may be against a split and I hope, therefore, not to belabor them. But let me be brief in making three points from Hawaii's perspective.

CHAIRMAN WHITE: But we've also heard some reasons for the contrary.

MR. KAWACHIKA: I understand.

CHAIRMAN WHITE: All right.

MR. KAWACHIKA: And I appreciate that.

First, the 9th Circuit has developed in our uniform and consistent body of law --

JUDGE RYMER: What difference, as a practical matter, would it make in the view of the Hawaii Bar Association if, for example, the circuit were configured with Arizona, California, Nevada and Hawaii? What difference would it make in your life?

MR. KAWACHIKA: Well, my third point

would have been that if it is the inclination and recommendation of this Commission to split the 9th Circuit that we would respectfully ask that Hawaii be aligned with the Pacific Northwest states. While we have an affinity --

JUDGE RYMER: Well, what difference would that make in your life then?

MR. KAWACHIKA: I think we would have -- I would think that we would have a better shot at getting an active sitting circuit court judge as opposed to being dominated by California as has been the case in the past.

JUDGE RYMER: So, you're interested in having a judge on the court as the primary reason for the circuit not to be split?

MR. KAWACHIKA: In addition to the fact that we would probably have greater consideration of Hawaii's needs before the court in a smaller circuit.

COMMISSION MEMBER: Well, wouldn't that argue for dividing the circuit from your standpoint?

MR. KAWACHIKA: I'm sorry?

COMMISSION MEMBER: Isn't that an argument from your standpoint for dividing the circuit?

MR. KAWACHIKA: No, it's not because I think on balance, we feel that there's been a consistent body of law developed that our lawyers are familiar with, have studied and relied upon.

For example, one of my points today and as we've made in our submittals to you, Hawaii sits at the crossroads of the Pacific in terms of trade and commerce. As such, we receive and send ships to ports in Alaska, Washington, Oregon and California. A division of the current circuit would raise the possibility of different rules of law applying to a maritime case involving sea voyage between Seattle and Hawaii than one which would apply on a voyage between, say, Oakland or Los Angeles and Hawaii. Indeed, a split of the circuit may cause the application of a different maritime law depending upon whether the lawsuit was, in fact, filed in Hawaii or in the state of another circuit.

For that and other reasons, getting back

to the consistency of the body of law that our lawyers are familiar with, our state courts also look for guidance to the 9th Circuit. Our state procedural laws are virtually identical to the Federal Rules of Civil Procedure. To the extent that the Hawaii Supreme Court has not ruled on a particular procedural law, our state courts have looked consistently first and foremost to Hawaii's federal counterpart of the 9th Circuit for guidance in interpreting that law. Our lawyers therefore, by necessity, have to become intimate with the 9th Circuit decisions. And so a split may do away with that established body of law and create in its place, perhaps inconsistent and differing interpretations.

So, for those reasons, we would respectfully ask that 9th Circuit not be split. We thank you for your time and consideration of our views.

CHAIRMAN WHITE: Thank you, sir.

Miriam Krinsky of Los Angeles County Bar Association.

MS. KRINSKY: Thank you, Justice White, Members of the Commission. My name is Miriam Krinsky. I am appearing today, and it's my pleasure to appear today, on behalf of the Los Angeles County Bar Association, and to join to the chorus that is building of both bar associations and judges who oppose the notion of either splitting this circuit or dramatically restructuring the courts of appeal.

The Los Angeles County Bar Association with its over 23,000 members -- we have even more members than there are judges in the 9th Circuit -- resoundingly oppose the notion that the 9th Circuit should be split. While I can not speak today on behalf of all of our members, I do represent the unanimous view of our ad hoc committee that was asked to study this issue, our executive committee, and our board of trustees. We seek to convey to you today the message that the users of the system, at least as they stand in the largest local bar association in the country, do not believe that this system is broken and do not believe that the disruption and turmoil that would be occasioned by

splitting the 9th Circuit is appropriate.

We accept as a premise, the starting point espoused by the Hruska Commission over 25 years ago that there need be a compelling reason before a circuit is split. We echo the sentiments of Chief Judge Hug that the burden should be on the proponents of this kind of dramatic change before change should be brought about.

COMMISSION MEMBER: Do you think, Ms. Krinsky, that that burden has been met at least in part by the commonly accepted prediction that we'll have 35 or 40 circuits in 20 years?

MS. KRINSKY: Well, I believe that, in fact, the predictions of what this system will look like in the year 2020 counsels strongly against the notion that a circuit should be split, or that we should engage in some type of temporary solution for whatever may be the perceived problems, we don't concede that they're legitimate problems at the 9th Circuit.

JUDGE BROWNING: Well, given the impact of growth on the efficiency of a circuit, if those

figures are correct, how would you feel about a one, unified national court of appeals operating and sitting in divisions as many intermediate state appellate courts do?

MS. KRINSKY: Well, I think in many ways, the devil is in the details and what one means by that. To the extent what we mean is a national court that has within it divisions that operate very much like the courts of appeal, the circuit courts today. I'm not sure that we've really changed the substance and perhaps we've simply --

JUDGE BROWNING: Well, they operate more in terms of the effect of panels within a circuit. In other words, they would be bound by other divisions' authority, be it en bank resolution procedures, something like that. Given the growth that I think this Commission is charged with looking at, how do you feel about that prospect?

MS. KRINSKY: Well, Judge Browning, I guess I have two concerns with that. The first would be, I do believe that there's value in a process where there are circuit courts of appeal

within which the law can percolate and develop. I think there's much to be said for the current system that allows differing courts of appeal around the country to examine the same issue of law and then gives our Supreme Court the benefit of that wisdom and perhaps even years of thinking about an issue and having an issue percolate in the courts of appeal.

PROFESSOR MEADOR: Let me ask you this. Given the growth that people talk about, it's not hard to imagine that the 9th Circuit Court of Appeals could have 30 or 40 judges in another 10, 15, 20 years or even more. Assuming that came to pass, what would you do about it, nothing? Just let it go on and on, all the number of judges they need with no change at all?

MS. KRINSKY: I think, Professor Meador, those numbers would continue to challenge a court such as the 9th to develop innovations and procedures to maximize the use of technology, to perhaps even change some of the ways in which it goes about doing business in a way that it can meet

that challenge.

The same question might well have been posed 10 or 20 years ago when the 9th Circuit was perhaps half the size it is today. One might have asked those involved in the process at the time, "how could you conceivably deal with the 28 judge active court of appeals?" Well, I think the answer you've heard from the users of the system and almost all of the judges in the system today is that it has dealt with that challenge. I think it can continue to deal with that challenge in the coming years.

You asked this morning, Professor Meador, when we were all much younger, "what is the magic number and how big is too big?" And I don't believe there is a magic number. I think that answer is a quantitative one, how big is too big, not a qualitative one. A circuit is too big when based on the technologies and the innovations and the attitudes that exist at the time, it can no longer operate effectively.

JUDGE RYMER: What is the definition of "operating effectively"?

MS. KRINSKY: Well, and I think this gets back, Judge Rymer, to your question of earlier today, "what is the yardstick that we use?" I think the yardstick is not how quickly does business get done? The speed with which justice is dispensed should be the last thing we look at. The fact that this court of appeals has rejected things that might speed up the process, summary dispositions, having files do a tag team approach from chambers to chambers is commendable.

Speed is not the yardstick. Nor should the yardstick be "how friendly are the judges on a social basis?", going back to Professor Meador's point of this morning. Collegiality may mean a lot of things, but I think that what we look for is a court that can operate in a thorough and reasoned fashion. I think what we look for then is a court that's been able to dispense justice in a way that's effective, in a way that does not have an intolerable amount of inconsistencies --

JUDGE RYMER: But it's coming back on yourself. I mean, we all want an effective system,

but how do you know when it is? Just because you see it, recognize it?

MS. KRINSKY: It may be part of we know it when we see it. I think it's more part of we know it's not when we see it. If there's an outcry from the users of the system, we perhaps know something is wrong. If opinions and decisions in cases are languishing as a run-of-the-mill, every day occurrence, we know something is wrong. If a court is issuing opinions that reflect not a well reasoned process and judge making, but instead reflect rash judgements and that's happening on an every day occurrence, we know the system is broken.

JUDGE MERRITT: Along that line, can I ask you this? Do you see a lot of difference in the quality of the appellate process at the 9th Circuit and at the state appellate level, state Supreme Court, state court of appeals? Is there a significant difference in quality there?

MS. KRINSKY: Well, I'm afraid, Judge Merritt, I'm uniquely unqualified to answer that, and that my practice is exclusively in the Federal

Court of Appeal.

JUDGE MERRITT: You practice only in the 9th Circuit?

MS. KRINSKY: I practice exclusively in the 9th Circuit.

JUDGE MERRITT: Well, the consensus you represent, 23,000 lawyers, and surely there is some discussion among lawyers generally about the difference, if any, in quality at the trial court level and at the appellate level in the federal courts.

MS. KRINSKY: I think there's certainly a view that the quality of lawyering may well be different as between the two systems. And I don't say that simply because I practice in the federal court. I don't know that I've heard an outcry that the quality of judging is markedly different in the federal court of appeal versus the 9th Circuit or the federal courts.

COMMISSION MEMBER: Well, what about the trial courts?

MS. KRINSKY: Again, it's hard for me to

answer that and it's not something that we consider the quality of trial court judging.

COMMISSION MEMBER: It goes to the question of jurisdiction. We've got a lot of jurisdiction recently that has come into the federal courts. There's a question about whether there's really that much difference in the quality of decision making as between the two systems.

MS. KRINSKY: Well, and perhaps where we're left is with simply, you know, the premise of a federal system which is one that seeks to apply some reasonably uniform interpretation of federal law. Certainly, that's an important objective for us continually to bear in mind.

I would like to go, if I may, and address one of the notions that has been raised both in the written testimony and during the hearing today, which is the question of regional divisions within the 9th Circuit. We agree with the proponents of that notion that if it's a choice between splitting the circuit or regional divisions, we would obviously favor the latter. But we don't

think that we are yet at the point where we have to engage in political gamesmanships.

I'm not sure what problem that would address. It certainly wouldn't address concerns about the volume of opinions, the speed of opinions, or even intra-circuit splits. At most, it addresses the notion of some type of regional perspective. We're not sure that we embrace the idea that a regional perspective is what a federal court of appeals should strive for.

JUDGE RYMER: Well, the divisional concept doesn't have to be purely geographic. It could float but you would have the same group of people sitting together all the time, all growing in the same direction.

MS. KRINSKY: Well, that assumes that a static group is always growing in the same direction. I've heard perspectives of former state court judges who sit on the 9th Circuit who have suggested that when there is a static group, if anything, positions may tend to harden and it may not lead to an improvement.

So, in conclusion, we would urge this body not to accept any easy solutions that might be thrown out that don't remedy any problem, and would urge this body to maintain the current system.

Thank you.

CHAIRMAN WHITE: Thank you.

MS. RAVEL: Good afternoon.

CHAIRMAN WHITE: Yes, you may proceed.

MS. RAVEL: Thank you very much.

I'm Ann Ravel. I'm vice president and also chair of the Committee of Legislation and Courts of the Board of Governors of the State Bar of California. The State Bar of California represents over 150,000 lawyers who are practicing in the state. The State Bar has consistently taken a stand opposing the previous proposals for the restructuring of the 9th Circuit as we have not seen -- and this is to echo the other bars that have spoken -- the compelling reason to do so. We also believe that the creation of new circuits should be presumptively dis-favored.

In the case of the 9th Circuit, the

State Bar position is that its size alone, at least thus far, has not been a detriment, but in fact, has been a benefit due to the consistency of legal opinions on the West Coast.

CHAIRMAN WHITE: Well, has the State Bar looked into the future and decided when there would have to be something done, if anything?

MS. RAVEL: No, sir, we have not looked into the future. In fact, this position does not oppose any changes in the future. It is the past changes that we've opposed. Just to say if there is a demonstrable reason why there's dysfunction in the circuits, at that time we believe that it would be appropriate to make a change.

COMMISSION MEMBER: There is a difference between the circuit and the court of appeals. Are you saying that the bar has opposed the division of the circuit? Has the bar specifically addressed the problems of the court of appeals in the 9th Circuit?

MS. RAVEL: The 9th Circuit court of appeals, yes. We have opposed the divisions that

have been proposed in the past, such as the splitting of the circuit in California.

COMMISSION MEMBER: Could I ask you the question I asked the last person? From the point of view of California lawyers, is there thought to be a big difference in the quality of justice that you get in the appellate system of California and in the federal appellate system, or in the trial courts of the two systems?

MS. RAVEL: Right. I too, as with the previous speaker, am probably uniquely unqualified as a practitioner to respond to that question. But from what I know from other lawyers, there's not perceived to be a difference. In fact, the 9th Circuit and also the districts are considered to be of very high quality in California.

COMMISSION MEMBER: I mean, if you take an ordinary bread and butter case, you'd just as soon have it in the state appellate court as in the federal appellate court? A reversed case from your point of view --

MS. RAVEL: Right.

COMMISSION MEMBER: -- is going to be as well decided in terms of quality --

MS. RAVEL: In the state court?

COMMISSION MEMBER: -- as the federal court?

MS. RAVEL: As in the federal court?

From my point of view, I think that they're probably equally well decided.

Yes?

CHAIRMAN WHITE: How about the criminal system?

MS. RAVEL: That is even further from my practice than --

CHAIRMAN WHITE: Even further, all right.

MS. RAVEL: -- opining about the previous question. I know you've had some testimony earlier about that and I couldn't really venture an opinion on that subject.

Let me just say though for myself, I am the representative of the Board of Governors from the Silicon Valley. I don't know if you've had any

speakers from the San Jose area, but we do believe that in the area of business in high tech, that it is appropriate to have uniform law throughout the state of California and the West Coast with regard to those issues. It is also a concern of the Board of Governors, and I believe it has been stated by previous speakers about forum shopping. We believe that splitting the circuits in this way will encourage that activity.

So, in conclusion, we oppose splitting, in particular, the circuit in California but we urge you to look carefully at any proposals.

CHAIRMAN WHITE: Thank you.

MS. RAVEL: Thank you.

CHAIRMAN WHITE: Thank you very much.

Mr. Federal Bar Association, Robert Mueller.

MR. MUELLER: Well, that's a compliment (indiscernible) in California. If I take it back to my colleagues on the Executive Committee, they may dispute that.

COMMISSION MEMBER: Mr. Mueller, you're

not from California. You can speak freely to the question of whether federal or state judges are better out here.

MR. MUELLER: The views that I've heard expressed by our membership and our leadership, Your Honor, is that the state court system works very well and they're happy with the state court representation. Federal court litigation belongs in federal court. State court litigation does not belong in federal court. Indeed, that's one of the things I'll mention at more length in just a few minutes.

One of the remedies, I think, is -- two remedies, actually, to your asking for looking into the future. It requires really no change at all. It really requires simply doing business at hand. One of those is to fill the judicial vacancies. It's irrational, absolutely irrational that the Congress should decide by statute that 28 judgeships are necessary to do the work of the 9th Circuit. Then to let that circuit languish and let the caseload of that circuit be borne by two-thirds of

that number for far too long, and then for some members of that body to lead the charge against the 9th Circuit by criticizing it for lack of productivity and for backlog -- those things simply don't go together. Fill the judicial vacancies. Let the judges do the work the Congress decided were necessary to do the work, and then measure such things as productivity and backlog.

I want to establish at the outset of the few minutes of my remarks where the Federal Bar Association is coming from in the presentation, my written presentation and the oral remarks. We want courts to work. Our 15,000 members nationwide practice -- a large majority of them practice in federal courts, many of them exclusively in federal courts. Our professional responsibility, our professional livelihood is getting our clients' cases resolved. We want to do that. The courts need to work.

We're not interested in pursuing. We're not motivated by pursuits of judicial philosophy. We're not motivated by pursuits of political

philosophies. We have no dogs in those hunts whatsoever. I respectfully suggest -- sincerely, respectfully suggest to the Commission, this Commission has no dogs in that hunt. The Commission's responsibility under the charge from Congress is to make the courts work, to examine where the courts are not working if, indeed, they're not, and to offer some suggestions for how they might work, looking at today and into the future.

COMMISSION MEMBER: Let me ask you a question.

MR. MUELLER: Judge (indiscernible), yes, sir.

COMMISSION MEMBER: We have a problem of foreseeability here and maybe you've got some view about it.

In 1960, the federal appellate courts handled about 4,000 or so cases, 4,500. Now, what is it, about 50,000, or 47,000. So, over the period of time, we've had an increase of, what's that, tenfold in the number of cases and we've had an increase in the number of judges of about threefold,

I think it is.

Do you think we can anticipate that the future holds what the past has held, or what do you think? Are we looking at a comparable period of time here of 35 years down the road of 120,000 or so appeals?

MR. MUELLER: Your Honor, I think the answer is not necessarily. I say not necessarily because I believe it's within the power of certain sources of power in this country to avoid that kind of inherent multiplication that we've experienced in the past.

We need to let some things play out. We need to let play out, for instance, a longer experience with various methods of alternative dispute resolution. We need to let play out what is going to be the impact from the enactment of recent litigation such as that affecting prison litigation. We need to let play out what's going to be at least the immediate evolution of technological processes. We've had incredible changes in the way courts do work as with every (indiscernible) society,

businesses as well as a result solely of technological evolution. What has been suggested to us is that we're just on the doorstep of that.

There are some other things that can be done besides filling judicial vacancies that don't require exactly earth shattering steps. One of them is for the Congress to implement for itself a policy that the Federal Bar Association adopted, recommended to Congress several years ago. That is to stop the unthinking proliferation of new federal criminal statutes and causes of action. See, I'm thinking, not in the context that there should be no further such statutes, but rather before Congress passes one more statute that has an impact like the kinds of things recently enacted by Congress on the federal courts, it should require of itself a judicial impact statement. They should ask of itself before the Congressmen in both houses raise their hands and say "aye" and impose these kinds of burdens on courts and on the litigations, what's going to be the impact on the courts? And what can we do as Congress before we impose that impact to

help the courts meet it?

The Congress instead has gone headlong into enacting new criminal statutes, civil causes of action, completely without regard to the impact on federal courts and --

CHAIRMAN WHITE: There's only been 202 of them.

MR. MUELLER: Yes, Your Honor, that's right.

COMMISSION MEMBER: But Mr. Mueller, I don't read our charter as Congress asking us how they should conduct their business.

MR. MUELLER: That's correct, Your Honor, and I don't mean to suggest the Commission's report should tell the Congress how it should do business. But I think it would be appropriate for the Commission to not buy off automatically on what might be the inherent message in Congress, the legislation that created the Commission. That is that there are problems that only the courts can solve and it's the court's responsibility to do it or the Congress do it by changing such as the

structure.

COMMISSION MEMBER: If in the state courts, as people have said, the quality is just about the same as the federal courts, I guess we could suggest that every time a new federal statute is created, it's not necessary to create federal court jurisdiction. I mean, you can have concurrent as in many statutes, concurrent stated jurisdiction with some preference for the action to be resolved in the state courts as it has been resolved before you create the statute. That's a possibility, isn't it?

MR. MUELLER: I think that's a possibility. That's an interesting one. That's one that could be litigated in front of the federal judge one day. That is whether this cause of action under some constitutional argument and on the concepts of federalism shouldn't be in this court at all.

COMMISSION MEMBER: Kind of an extension, as one of the witnesses testified, of the doctrine of abstention. If you have parallel state

and federal actions, we have a doctrine to take care of that, several doctrines. But where you don't have a parallel state action, unless it's a one mari-kind, you don't have any way of getting it in the state court.

MR. MUELLER: Yes.

The kinds of things I'm addressing, Your Honor -- and there's a full range of them but just to illustrate, I don't mean to address situations that Congress is filling a void; creating a cause of action or a criminal statute in an area that I believe needs addressing that's not otherwise being addressed. I'm talking about such circumstances as creating a federal crime of murder with a handgun, with a weapon. There are perfectly adequate state statutes that address that kind of context in every state of the Union. It's not necessary for the federal courts to be trying some of those kinds of criminal actions and causes of actions.

I wanted to briefly --

CHAIRMAN WHITE: The states don't have a whole lot of control over interstate commerce.

MR. MUELLER: Yes, that's correct, Your Honor.

CHAIRMAN WHITE: And the guns come mostly from somewhere else.

MR. MUELLER: Well, and that would (indiscernible) the crime that says possessing an unregistered weapon that came through interstate commerce might be something that a federal court and Congress might be interested in addressing. But does it really make a difference t the person who is dead? Or does it really make a difference to the criminal defendant or the families of either one that a murder victim was shot and killed by a gun that came through interstate commerce? There are murder statutes in every state in this Union that can handle that situation and punish it much more severely than the fact that the gun came through interstate commerce.

CHAIRMAN WHITE: Well, I have my doubts if the feds are any better at it than the states in connection with certain of these statutes. How do you like it? Do the feds do a better job beating up

wives? I doubt it.

MR. MUELLER: I doubt it.

CHAIRMAN WHITE: All right.

MR. MUELLER: I want to very briefly address --

Time is up, Your Honor? Thank you very much for the opportunity.

CLERK: (indiscernible) Booker T. Evans, John Frank, Rodney Lewis, and Alan Rabkin.

MR. EVANS: Your Honor?

CHAIRMAN WHITE: Carry on, sir.

MR. EVANS: My name is Booker T. Evans. I am just a practitioner who happens to practice in both Nevada and Arizona. I probably have a well divided practice, probably 60 percent in Arizona and another 40 percent in southern Nevada. I am opposed to the splits that I have read. Of course, I've operated as a lawyer representative and on many organizations in both jurisdictions. I can say that the lawyers that I work with are equally concerned about splitting the circuit.

In particular, in the situation that I

work in presently, the one proposal that would basically isolate Arizona geographically from the Northwestern states and create it as part of the 12th Circuit is something that I am very much opposed to, and the people that I've talked with in preparing for this hearing are very much opposed to it.

The 9th Circuit has seemed to me, in the 15, 20 years I've practiced in this area, to make adjustments, to make adjustments in areas necessary to get rid of the cases, to handle the cases, to hear the cases. I've personally not had the problems. Of course, there are particular instances, and anyone can point to them, whereby certain cases might languish in a court and that will happen in a state court and that will happen in a federal court. But I think that's dependent on the particular case.

On an overall basis, the 9th Circuit certainly holds its own. What I do like and my clients seem to like and understand is that they are likely to be heard in this circuit on appeal.

COMMISSION MEMBER: May I ask you a question, please?

I assume you'd like Arizona to stay with California in the circuit. What difference would it make to your practice, your work, if a circuit were created consisting of California, Nevada and Arizona? Everything you say good about the 9th Circuit, would it not continue? What would be the adverse effect of that change on your work?

MR. EVANS: I would hope it would. However, what I like about the circuit is that when you appear at the circuit, you do find judges that are from the Northwest who do give a different view. It gives you a broader perspective. It gives you more, I believe, opinions to deal with -- more things, more questions about what you're doing. I think the law that evolves in this circuit tends to have to consider the entirety of the circuit, the whole vastness of the circuit and its diversity, both in, I think, a race in geography.

As I was saying, I think the oral argument issue in terms of the clients that are

represented, every client wants to be heard. Clients believe that they will get an opportunity to be heard before the 9th Circuit Court of Appeals. It's well known, especially in the business community, that the 9th Circuit does hear many more oral arguments than perhaps other circuits across the country.

I think the politicizing of this issue is what bothers me most. I believe that, as I said in my written presentation, that I am here by virtue of the courage -- I was born in Hattiesburg, Mississippi. I am here by virtue of the courage from the federal courts to make decisions that didn't necessarily comport with the communities that I lived in. Put to a vote, I might still be going to a segregated school in Mississippi. Put to a vote, I might still not be able to ride a bus and do other things around this community. So, I honestly believe that the whole quality of justice and the whole perspective of judges being free and independent to make decisions are very important to all forms of growth in this community. I mean, in

our community and I call our community this circuit.

COMMISSION MEMBER: Do you find in your practice that prejudice against ethnic and racial minorities of which you speak about the past, continues to exist in state courts more than in federal courts?

MR. EVANS: An honest answer is yes, sir. I believe that. I believe that sincerely. I believe that the comfort level of the racial minority is greater if you can go to a federal court with an issue that has (indiscernible) and get that issue resolved.

One of the great concerns that I have about boxing Arizona into a circuit, into itself and isolating it, is the fact that you lose some of that. You lose the ability, you lose the input from judges from the Northwest. You lose the input from people from California, and I think that's been very important to the development and evolution of the law throughout the circuit.

CHAIRMAN WHITE: You're all right. You've got plenty of time.

MR. EVANS: Okay, I didn't want to rush.

CHAIRMAN WHITE: No, okay.

MR. EVANS: I think that, as I've said, the uniqueness of the circuit is, in part, in its geography. I think when you're hearing timber cases or when you're hearing admiralty cases, I think those kinds of things have to consider the entire coast line on the West Coast.

JUDGE RYMER: But what is the nature of your practice?

MR. EVANS: I'm a commercial lawyer. I do, actually, some white collar crime defense work. So, I've appeared criminally and civilly before the courts.

JUDGE RYMER: In either area, are you regarded as paying particular importance that the law be the same in Washington or Alaska as it is in Arizona?

MR. EVANS: I would think in the commercial areas, yes. I mean, Arizona is a state that's also developing high tech issues, high tech employment issues, all kinds --

JUDGE RYMER: I can understand. Are you including intellectual property in that category? I mean, I can understand why it's important for intellectual property, but in general commercial law isn't it primarily state law?

MR. EVANS: Primarily, but I would think that --

JUDGE RYMER: So, it doesn't really matter too much.

MR. EVANS: Yes. The IP for our firm, I think, is very important. For the firm that I work with it would be very important because we work very closely with California companies. Many of the companies are housed in California and other places across this district. Maybe even as far away as Seattle, Washington, from time to time when we do representation for those companies on issues that they have within our district, within Arizona, and within other parts of the 9th Circuit. Yes, ma'am.

All right, I'll pass and allow another speaker.

CHAIRMAN WHITE: Thank you, sir.

Mr. Frank?

MR. FRANK: Mr. Justice and Members of the Commission, my name is John P. Frank. I'm with the law firm of Lewis and Rocke in Phoenix, Arizona.

I have been active in probably pretty much frequently, along with Professor Meador, all matters relating to federal jurisdiction and procedure in the United States as a matter of professional interest for the last 40 years. I have been a principal opponent of circuit division since this project originally arose.

My background includes that of being a professional historian. I'm the author of a dozen books and numerous articles, and I work in the field particularly of American legal history. I had thought that today I would like to use my time to talk about the history of the matter which is before you. You're getting plenty of arguments on the pros and cons. I would like to talk to you about how we get here at all.

A veneer has been cast over this whole enterprise of inquiry as though it had something to

do with judicial administration, collegiality, case disposition and so on, which appear to be the object of objective analysis. The fact is that those matters may be of interest and concern to you as you conduct your deliberations, but they are totally irrelevant as to why this enterprise has been undertaken.

COMMISSION MEMBER: May I interrupt and ask my longtime friend, John Frank, a question?

MR. FRANK: Yes.

COMMISSION MEMBER: Two questions, actually.

You said that in your opening statement, the written statement you submitted to the Commission, and I was a little puzzled. You seem to be saying -- I'm not sure you intended this, but you seemed to be saying that considerations of judicial administration, collegiality and so on are irrelevant as though this Commission should not consider those in carrying out its statutory charge. Do you really mean that? What do you mean by saying they're "irrelevant"?

MR. FRANK: No. I am saying that I think, as you weigh these factors, that you may be interested in the historical background of how these matters come before you and why they are here.

COMMISSION MEMBER: That leads me to our next question. In your history -- you being the kind of historian you are -- you surely know that the question of dividing the 9th Circuit has been debated for some 60 years. We have a history within the judges of the court of appeals discussing it, debating it. You have the Hruska Commission recommendation. Yet, your history seems to start in the late 1980s.

MR. FRANK: Yes. I'll tell you about that because this (indiscernible) became active, as a matter of fact, at the time of a conference that I think we were both at Coronado with Maury Rosenberg a number of years ago. At that same time, Judge Schroeder who is here today and the Huffstetlers, whom you must all know, were also present. The four of us had breakfast and we entered into the Treaty of Coronado which was that we would do the best we

could to resist the division of this circuit.

The consequence is that I've paid close attention to it ever since the Treaty of Coronado and I have a fairly detailed record of all of the events which have occurred in the meantime. I've been involved in every Congressional hearing. There have been a great number of them and it is to that subject to which I would like to direct my remarks.

Let me begin with a story from the Medford, Oregon Mail Tribune of July 17, 1988 which notes that the environmental rulings of the circuit "have evoked the wrath of a Senator from Oregon who has publicly attacking the court in its decision."

JUDGE RYMER: If one assumed that it was --

MR. FRANK: Beg your pardon, Your Honor?

JUDGE RYMER: If one were to assume that it is an entirely inappropriate basis for deciding what a proper geographic configuration or alignment is the decisions of the court, whether you like them or whether you don't like them --

MR. FRANK: We are at one on that.

JUDGE RYMER: -- if you assume that that is an inappropriate basis, what bases do you think we should look at in order to make a decision about whether the present geographic alignment or the structure of the courts of appeals are okay or should be fixed?

MR. FRANK: My honest belief, and if I may I would like to develop it, is that this is simply an exercise in court pack. I believe that what the Commission ought to do is fold up and go home because under the standards of --

JUDGE RYMER: I would love to do that.

COMMISSION MEMBER: Are you suggesting the Commission should disobey an act of Congress?

MR. FRANK: I think that the Commission may legitimately be interested in the background of what brought them here. But I want to make clear that I also, in direct response -- so it is not what I want to develop because you're getting that from so many other witnesses -- I think that the line that the American Bar Association is giving you that you don't tinker with circuits unless there is some

overwhelmingly good reason to do so. There's got to be a lot of evil to be corrected to make an alteration in going concerns.

I have been acquainted with all of the testimony before this Commission. I've seen, I think, all of the statements that have been circulated at the various hearings and I do not believe that as yet, you have been shown any overwhelming evidence that tinkering with circuits is going to serve any very useful purpose, whether this or any of the others. (indiscernible) short, I think that the burden of proof which is put by the ABA's standard is not met.

Judge Browning?

JUDGE BROWNING: Excuse me. I'm sorry.

Your statement would seem to indicate that we're to look at this problem at a fixed point in time. What if we look and carry it out into the future as we've, indeed, been urged to do by Cliff Wallace and look ahead, in his words, 30, 50, 60 years down the road? You certainly have the foresight to see changes such as have occurred in

the past 20 or 30 years occurring in one form or another in the future. How should we look at those problems? How should we view our charge in light of those changes?

MR. FRANK: Judge Browning, my feeling is that it's mystic. I think some earlier witnesses here have made a point very well. This same question was raised when this circuit grew from 10 to 14, or whatever it was, and now we're at 28. The fact is that for me, these are unpredictable matters. We can not avoid the fact that the country is growing at a prodigious rate and that its litigation is growing even more, and that too many laws are being passed increasing federal jurisdiction.

What that course is going to be, I don't know. I don't have enough of a crystal ball to be able to make a sound plan, in my own mind, for 20 or 30 years. I think I'm acquainted with all the literature there is, and I don't believe there is a sound plan.

JUDGE BROWNING: Well, I want you to

understand, my question is not directed solely at the 9th Circuit.

MR. FRANK: No, of course not.

JUDGE BROWNING: It's directed at all the circuits throughout the country and at the concept of whether we're going to have bulkinization as has been predicted by many and feared, or whether we're gong to have one jumbo circuit or a group of jumbo circuits or whatever. But don't you think we have to consider that within the limitations any of us have in seeing into the future?

MR. FRANK: Yes, I think that the capacity to predict is pretty weak. I thought that the Federal Judicial Center study with its gigantic extrapolation of a prodigious number of cases, frankly, was foolishness. I don't know what to anticipate. All I can say is I'm glad it's your job instead of mine because I wouldn't know what to do with it.

COMMISSION MEMBER: On the circuit you're talking about, it may be that the question really is what harm is it going to do to split the

9th Circuit? I say that because it may be that what we should do is to tell the Congress, if it turns out to be our opinion, that it will do considerable amount of harm. My reading of the Senate is that they don't think it would do much harm and there's some good politics ideologically behind doing it, so why not do it?

Now, our charter may be to tell them that it is harmful and if it is -- you know, my attitude right now is it might not make any difference one way or another, really, over the course of the next 30 years, whether they split or they don't. You obviously think that it will make a difference.

MR. FRANK: Yes. Let me say, Judge Merritt, in answer to that, somebody used the phrase earlier which I have been using myself in dialogue on this subject, borrowing of the phrase from Winston Churchill that "democracy is a very poor form of government. Its only virtue is that it's better than all of the others."

I can not think of a rearrangement which

would not create more problems than it's worth. That's simply how it is. I've looked at every arrangement that has been proposed. The problem of having an elephant in our midst in this shape of California and the fact that it overweighs what else it is put with and that it's rather balanced in terms of numbers. I'm talking about decisional. Let's stay away from that. This business about a California philosophy which some persons object to is, I think, is pure senophobia.

But in terms of simply administration and of getting to the side where courthouses are to be built and where meetings are to be held and all the rest, I think it's a good thing to have the balance that we have. For that purpose, I think it has been profitable to have a good number of states with California.

CHAIRMAN WHITE: John, you've just about run out of gas.

MR. FRANK: Well, may I say in conclusion, that the statement that I was going to make here was a swell statement.

CHAIRMAN WHITE: Well, John, we have --

MR. FRANK: Had I ever gotten --

CHAIRMAN WHITE: -- all of the statements and we will study them very carefully.

MR. FRANK: Oh, and I just want you folks to go home.

CHAIRMAN WHITE: I've listened to you before.

MR. FRANK: And it didn't do you a bit of harm, Your Honor.

I will simply skip my entire statement and conclude by saying that the desire to cut more trees and to catch more fish and to limit more Indians is not a good enough reason to blow up the courthouse.

Thank you very much.

CHAIRMAN WHITE: Good. Good, John.

MR. LEWIS: Justice White, Members of the Commission, my name is Rodney B. Lewis and I am the general counsel for the (indiscernible) Indian community. I was the founding chairperson of the Indian Law Section of the State Bar of Arizona and

currently serve as a lawyer representative from Arizona to the 9th Circuit Judicial Conference.

I greatly appreciate being afforded this opportunity to offer my testimony regarding whether the 9th Circuit should be divided into separate circuits and split. In my view, it should not.

The state of Arizona is said to be the most Indian of all of the United States insomuch as 21 federally recognized Indian tribes are located within its boundaries. Indeed, the ten largest Indian reservations in the United States, five are located in Arizona and approximately 27 percent of the land within Arizona's exterior border boundaries is Indian land. Since Arizona is within the 9th Circuit's jurisdiction, the governmental and individual interest of a concentrated number of Indian communities stand to be directly affected by any structural modification made to the 9th Circuit Court of Appeals.

In my experience, the 9th Circuit Court of Appeals has well executed its responsibility for the disposition of matters of federal Indian law.

That is, the body of law treating the complex relationship between Indian tribes, the federal government and the states. Arguably, 9th Circuit decisions constitute leading authority among the decisions of all the federal appeals circuit. Thus, the 9th Circuit has contributed significantly to the federal court system's overall capacity to equitably and reasonably adjudicate matters arising from these often strange relationships. To break the circuit into separate forum might well disrupt the ongoing doctrinal legacy of the circuit, an outcome that would prove of great disservice to American Indian tribal governments across the United States.

Indian legal interests, being of their nature minority interests, are insured better protection by less provincial, more diverse circuit that approaches cases with a view toward interest on a national or at least a large regional scale rather than a smaller circuit that is more likely to be subject to the influence and persuasion of parochial interest. It is, after all, national law that the federal appeals circuit apply primarily.

As American Indian tribal governments continue to acquire the sophistication lacking when questions of Indian rights were first presented to United States courts, it is fair to speculate that contests between tribes and our legal adversaries will grow in complexity. Rendering even more critical if justice is to be served, the neutrality of an available forum. Above all considerations, a splitting of a circuit must not be based on political considerations, parochial interests, or interests of the state or region a new circuit is established to serve.

Indeed, any modification to the present 9th Circuit must be required to be justified on wholly neutral political grounds and should be considered only in terms of whether such a change would support improved efficiency and ultimate effectiveness of the federal court system. If the present 9th Circuit were failing to function because of its size, for example, then splitting the court might be necessary. But all available evidence supports the view that the circuit is doing its job,

doing it well, and is certain to serve even more efficiently once long standing vacancies on the bench are filled. Consistently in each of my experiences before the 9th Circuit, I found it to be highly efficient and productive. I would urge this panel to recommend against any split.

Thank you.

CHAIRMAN WHITE: Thank you, sir.

Mr. Rabkin?

MR. RABKIN: Yes, Mr. Justice White, Members of the Commission, my name is Alan Rabkin. I'm the general counsel of Sierra West Bank in the Nevada/California region. We're a medium-sized bank, 22 branches -- a small bank, basically, and we pride ourselves on being the first bank here in the West that actually used the Interstate Banking Act to expand across our borders into Nevada, adopt a single charter under a Congressional Act, and we're doing the same thing in our Oregon operations and throughout the West.

We relied heavily on the 9th Circuit in the sense that federal law predominates my area, the

corporate banking area. We are regulated by a single set of rules right now in the federal appellate district we are in. We pride ourselves on being very up-to-date and very well versed with those rules. In fact, we're quite glad that we don't have banking operations in certain other appellate districts because those rules vary.

COMMISSION MEMBER: Do I take it you have no sense that even these inconsistencies uneven this in 9th Circuit decisional law in your field?

MR. RABKIN: I think generally, the 9th Circuit is pretty constant in their interpretation of banking areas. They treat it very much like other regulated industries. It's slow to change. It tends to focus on what's best for the public benefit and also what's best for the corporate area. I think over the years you will see a very slow changing landscape in the banking area. That has allowed us to raise considerable capital at my bank.

COMMISSION MEMBER: Well, what I'm asking is, in reading the 9th Circuit opinion in your field, do you have any sense at all on

unevenness, inconsistency, any problems about predictability and so on?

MR. RABKIN: Generally, I don't. I don't.

COMMISSION MEMBER: Generally, but sometimes maybe?

MR. RABKIN: Sometimes, yes, and even diverse interpretations between state courts. When those issues go up to the federal court on diversity, there are differing interpretations in the banking area but generally, I'd say they're minor. And they're not as significant as the Barnett decision on insurance back East, things of that nature where the matters finally had to be adjudicated by the US Supreme Court.

I don't think you'll see a lot of those banking issues coming out of the 9th Circuit. We tend to be a stable circuit when it comes to banking. I think I could speak with authority to that because I participated in one of the decisions, the Plus Visa versus Valley Bank of Nevada decision that allowed banks to charge a surcharge. We might

be seen as a leader in that area or the devil incarnate in that area, but generally, that decision spread across the country and now all banks adopt the surcharge. Unless Congress gets into that fight --

COMMISSION MEMBER: Do you take appeals to the 9th Circuit of Appeals yourself?

MR. RABKIN: I don't. I use outside counsel to do that. However, I have participated in prior years in a POCS.

We look to a broad base of operations. Our loan offices extend from Seattle, Washington all the way down to San Diego, all the way over to Denver, Colorado. However, our operations are primarily centered in the current 9th Circuit. If we were forced to look at different regulatory schemes -- and maybe they would be identical, maybe they wouldn't be -- I think our cost of operating in different schemes or different scenarios would increase. But I can't say for a fact that that would occur, but I can't say it won't occur. That's why representing regulated industries, as hopefully

my bank is, we really have a concern about the effect and the cost and the complexity upon our operations by fractionalizing the circuit.

COMMISSION MEMBER: We have, as you know, in this country some banks with huge geographic scopes: NationsBank, Wicovia who span many states and circuits. Are you aware from any conversations you've had or connections with those people as to whether they have a problem because of having to operate in several different circuits?

MR. RABKIN: I could speak to my general information on that. My understanding is that most of the national banks are, in fact, chartered under the national statutes. We have a little bit different problem.

We are a state chartered organization. We are chartered under the laws of California and we relied heavily upon the Interstate Branching Act to be able to branch legally into other states without charters. The laws that impact Bank of America or NationsBank are set forth in the United States Code. The laws that impact us are set forth in the

California Financial Statutes, the Oregon Financial Statutes, et cetera. Sometimes it takes a very strong appellate district to allow a bank like ours to have an even-handed and common interpretation of those laws because the federal appellate circuit is often called upon to allow an activity of ours in one state into another state. If we don't have a real meaningful, broad based basis for that decision, it really does impede our operations.

COMMISSION MEMBER: What percentage of your cases that you monitor or control are federal question cases? Are most of them diversity cases?

MR. RABKIN: Most of them are diversity. Banks in trouble tend to have a lot more federal question type interest in the appellate courts. However, a good percentage of the banks in trouble scenario wind up in the federal appellate courts because normally, the government is on the other side. It might be the Federal Deposit Insurance Corporation, or the RTC seeking some action against my directors or my officers. There's a lot of shareholder litigation and improper disclosure

issues. Really, it's a panoply of different issues that wind up in federal court, especially since my entity is a public entity and it's widely traded.

COMMISSION MEMBER: I don't quite understand. If you're so heavily dependent on state law, what difference does it make to you whether Oregon is in another circuit or not since the decisions are going to be based on Oregon law?

MR. RABKIN: Because I have actually two regulators in every single thing I do. I have a federal regulator, even though I'm not a nationally chartered bank, who regulates me under similar United States Code sections as the national banks are regulated. But then unfortunately, since I'm a state chartered bank, I always have a second state regulator who is actually my primary regulator. That's why a lot of banks have gotten out of the state charter business because they don't like having two different regulators telling them what to do. But it would be very expensive for my bank to adopt a national charter and to move to that format. And so, we have always adopted a good working

relationship on the state level, but we always have our federal issues with our federal regulators, especially the FDIC.

So, I think we're in a uniquely regulated industry, but I think railroads, insurance and some of the other regulated industries have a similar concern. I'm certainly not an expert in problems they might face by a collapsing or smaller sized circuit, but I do know that we take great comfort in knowing that in all states of our operation, we have a common federal court interpretation for our operations.

We really have no interest here to have a big court, small court, whatever. I think in my prepared statement -- and I won't go through it -- we merely want to use the same efficiency that's being held to us by our shareholders as to the court. We don't quite understand from the corporate model where efficiency comes from fractionalizing core systems like this infrastructure. Because if we fractionalize this infrastructure, I think effectively, we create costs and we don't eliminate

costs.

From a corporate perspective, that's a wrong strategy, at least according to my Wall Street analysts and they would not appreciate my bank fractionalizing my core systems without a good reason. There are good reasons but we have to find them before we move to that. If it's more efficient, if it eliminates obstacles, et cetera -- I think those are all good reasons from a corporate model. I hope that before you'll find those in a judicial model, you'll sit down really try to understand what we the corporations who are the constituents of the court have had to deal with the past 10 or 15 years, and how bigness has not necessarily hurt us. In fact, as the Wall Street values have shown, it has actually been widely embraced by the public.

Thank you.

CHAIRMAN WHITE: Thank you, sir.

Yes, sir?

PROFESSOR CHOPER: That's a daunting request, Justice White.

CHAIRMAN WHITE: Well, yes, but I've had it before.

PROFESSOR CHOPER: Justice White, Members of the Commission, I'm Jesse Choper, just a modest academic if that's not an oxymoron representing, as I say in my statement, no organization and no constituency, and really, with no special expertise in judicial administration generally, of the 9th Circuit in particular, but as an observer of the administration of justice in the federal courts and one who is generally concerned both with the integrity and the efficiency of the federal courts.

So, I think I can be very brief. I simply want to highlight a few things that I submitted in my written statement and then I'd be happy to respond to any questions that you have. I want to say at the outset that this is not, as is true in most situations, a black and white situation. There are obviously fair points that can be made for dividing the 9th Circuit. But for three reasons, one of which I feel especially strongly

about, I think that the balance falls quite strongly in favor of preservation of the status quo.

The first is the very close to unanimous view of those most directly concerned, both on the circuit itself and the district judges, the bankruptcy judges, the magistrate judges, the organized bar associations that have spoken to this in the area, their overwhelming support for preserving the status quo. It seems to me that ought to put a pretty strong presumption in favor of that preservation.

Second is that despite the size and population coverage, acreage coverage of the states and territories involved, if I can relate a personal experience. For nearly 20 years now, I have been giving a talk to the Conference of Western Attorneys General at their annual meeting and have sort of hung around there both before and after my talk, and got to understand a number of common issues which they discuss each time -- almost the same ones each time -- with real seriousness and real collaboration. The Western Attorneys General

Conference is not totally congruent with the 9th Circuit but it's very close. Many of these issues involve land and land regulation, water issues, power, electric power, problems of Native Americans, Immigration. Therefore, it would seem to me that there is a pretty strong common subject matter interest that efficiently and effectiveness would indicate could be further --

COMMISSION MEMBER: May I ask a question?

PROFESSOR CHOPER: Yes.

COMMISSION MEMBER: We live in a democratic society where we say ultimately, the will of the people will prevail. Now, assume the situation is -- but it may or may not be. I'm not passing any judgment on that. Assuming in these five Northwestern states there were a strong desire for a separate circuit. Regardless of what the judges may think or anybody else, just a sort of popular political desire to have a region or court of their own. To what extent should that be given any weight?

PROFESSOR CHOPER: Well, I think that's certainly entitled to weight. But it really leads me to my third point. I want to respond -- if this is not wholly responsive, I welcome you following up on that.

It seems to me as a disinterested observer that a prominent motivation behind the split of the circuit is for ideological reasons. I would say that it's going to be very difficult to correlate some broad based view of those who are governed by the 9th Circuit, even in those Northwestern states, in contrast to the motivation for the split. The split has to do with the perceived ideological reasons -- as I put it in the notes that I submitted that the court has seen -- as dominated by liberal activist judges from California.

COMMISSION MEMBER: You wouldn't have said that about the Hruska Commission recommendation 25 years ago, would you?

PROFESSOR CHOPER: I'm not familiar with all the details of that.

COMMISSION MEMBER: But you have no reason to think that was politically motivated in the way you're saying it is now?

PROFESSOR CHOPER: I certainly have no reason to believe that because I haven't looked at that with any great care. But I think --

COMMISSION MEMBER: There have been times when the 9th Circuit Court of Appeals' judges themselves have favored a division of the circuit. I'm wondering where it gets us to say it's politically motivated. I mean, the subject has been under debate for a long time and various people have taken different positions and so on. How does this advance the Commission's job?

PROFESSOR CHOPER: Well, it seems to me as is true of any issue of economic, social or judicial policy, you have to look at the present circumstances. While there may well have been at the time of the Hruska Commission very good reasons, indeed, overwhelming reasons -- I don't know. I just want to hypothesize that -- those I do not think are the reasons today. I think most people,

indeed a very high percentage of those who are professionally involved with the work of the circuit as I understand it, are satisfied.

COMMISSION MEMBER: Let me ask a question on that. Judges outside of the 9th Circuit that one talks to, other court of appeals judges, district judges, there is -- at least the ones I've talked to -- overwhelming, the viewpoint, that the 9th Circuit is just too large. That they have asked for ten more judges. If they got up in the 30s, that's just too large a number of judges to operate effectively, not as an administrative unit but as a judicial unit.

I don't necessarily hold that opinion, but that is what you get among judges which doesn't have anything to do with ideology on all sides of the spectrum. Now, what do you say to that?

PROFESSOR CHOPER: Well, as I said at the outset, I think that there are fair points that can be advanced. It seems to me that the strongest argument would be one of collegiality. I don't mean cordiality, people polite to one another but getting

to know one another and one another's views and approaches and so forth. My own view is that that's a plus. But I think that it is very substantially outweighed by the overall effectiveness. You know, I mean, I don't think anyone would say that this is a perfect circuit or a perfect world for that matter.

COMMISSION MEMBER: Let me ask you, what harm would it do if the --

PROFESSOR CHOPER: I'll tell you, my --

COMMISSION MEMBER: -- United States just decided for good and sufficient ideological reasons to do?

PROFESSOR CHOPER: I'd offer three reasons. One is that if you assume or if you'll grant me that it is for ideological reasons, see, I think that's an evil in itself, although I don't have any doubt that Congress has the power for whatever partisan reasons to split the circuit. I don't think that's a good or an appropriate reason. But on a more practical basis, you do know what you've got, you don't know what you don't have.

What you've got is an effectively operating institution and organization.

This is the reason that I feel most strongly about. There's going to be an enormous cost, both financial and otherwise, to serve this particular end. It's not deciding that if the members of the Senate feel, or the President, that the ideological composition of the judges on the 9th Circuit is something that they're not in agreement with, I think they have the appropriate authority to change it that way. I think that the political branch's role under our, you know, system of separation of powers, checks and balances the role of the political branches in disrespect in respect to the independence to judiciary is to determine who goes on there and our history shows that.

COMMISSION MEMBER: The harm is that the motives are bad. I mean, your main argument here is that the motives of doing it, the purposes behind doing it in the Senate at least is a bad motive.

PROFESSOR CHOPER: They're bad motives and I don't see good ones, see? I mean, I do see

some good ones, but if you look at the effective operation of this organization called the 9th Circuit, I think it's in pretty good shape. I think it would be very costly to have it otherwise.

Thank you very much.

CHAIRMAN WHITE: Thank you.

PROFESSOR JOHNS: Mr. Justice White and Members of the Commission, my name is Margaret Johns. It's really a privilege to be before you today.

I hope that my experience in the 9th Circuit will be of some help to you as you study the federal courts. My experience is really in a number of capacities. I served as the chair of the 9th Circuit District Local Rules Review Committee which reviewed all the district court rules, civil, criminal and admiralty for all the 15 districts within the circuit. I serve currently as the coordinator --

COMMISSION MEMBER: You have reviewed Arizona's admiralty rules?

PROFESSOR JOHNS: Any district that had

them, we reviewed them. Actually, the admiralty rules were one of the more interesting ones because they're used in in-round procedures and drug forfeiture cases, so it was a pretty hot and controversial area. Admiralty was fun.

I currently serve as the coordinator for the 9th Circuit Pro Bono Project. They have a coordinator in each district and I serve as the district coordinator for the Eastern District of California. I have served in the past as a lawyer representative to the 9th Circuit Judicial Conference and I am currently the director of the King Hall Civil Rights Clinic which litigates civil rights cases by appointment both in the Eastern District of California and in the 9th Circuit. So, I have a fairly wide range of experience in the 9th Circuit.

But I'd like to focus my remarks today on two projects that I've been involved in which I think illustrate the innovative responses of the circuit to the challenges of the increasing jurisdiction and resulted increase in caseload that

is burdening the federal courts, including the 9th Circuit and as well as all the other circuits. Because I think these models show ways for other circuits to consider improving both the efficiency of their court administration as well as the quality of justice in the federal courts. The two that I wish to talk about are the Local Rules Review Project and the Pro Bono Project.

The Local Rules Review Project -- as you of course know, the Federal Rules of Civil Procedure were adopted in the '30s to establish a consistent, simple and uniform procedural framework for the entire United States. By the 1980s, there were more than 5,000 procedural initiatives in the district courts. By the 1990s, that had multiplied to an accountable number, at least an uncounted number.

Concerned about the lack of primacy of the federal rules and the increasing bulkanization of local procedures, Congress adopted the Judicial Improvements Act, and after that the Federal Rule of Civil Procedure of '83 was devised to have the circuit judicial councils review local procedural

rules for consistency with the federal rules and for duplication of the federal rules. Of course, when they did that they didn't appropriate any money for this project and as a result, very few circuits have really undertaken a comprehensive review of district local rules despite their statutory obligation.

The 9th Circuit, in an innovative approach and I think largely because of the circuit's concern with its federalizing function over a vast geographical area, was determined to, in fact, carry out this responsibility -- under Chief Justice Wallace it was started, and it was completed under Chief Judge Hug -- where they delegated it to the Conference of Chief District Judges and they delegated it to our committee which consisted of Chief Judge Quoile of the Eastern District of California, Chief Judge Hogan of the District of Oregon, Chief Judge Kay, who spoke to you earlier from Hawaii, Professor Carl Tobias from Montana, and a lawyer representative Tom McDermott, who is the chair of the lawyer representatives, at the time, to the 9th Circuit -- Tom McDermott in Los Angeles. I

was the chair.

We reviewed all the rules. After we reviewed the individual rules, we allowed the district courts to comment. The response was remarkable. Most district courts revised their rules to correct the duplication and the inconsistency. As a result, there has been a across this vast geographic region a great improvement in the efficiency of administration. I think that's important for two things for your consideration. On the Commission, I think it's important to remember that a circuit is responsible not just for processing appeals, but it has responsibility for the administration of justice in the district courts as well. I think the 9th Circuit, partly because of its size, has taken a more consistent approach to that and been very conscientious in discharging its function which could be a model for other circuits to follow.

COMMISSION MEMBER: May I interrupt just a moment --

PROFESSOR JOHNS: Sure.

COMMISSION MEMBER: -- as Judge Merritt raised earlier on, we've heard little or not complaints about the circuit. The problems focus on the court of appeals. Now, do you have any thoughts about what, if anything, needs to be done concerning the court of appeals looking ahead, down the years in the future, as appeals grow and judges grow?

PROFESSOR JOHNS: I certainly don't have all the answers, but my inclination in terms of what the proper remedies would be for the growing docket as appeals grow and as the population grows, is to try to develop more efficient ways to deal with it rather than simply continually adding more judges and then getting a court that's too big, and then splitting it up so you get fragmented into --

JUDGE RYMER: Like what, for example?

PROFESSOR JOHNS: Well, I think like what the 9th Circuit is doing. I think --

JUDGE RYMER: Yes, I mean, I agree with that, but the hypothesis is that as caseloads grow, judges grow. So, are you saying that continuing

what it's doing will still serve as efficiently?

PROFESSOR JOHNS: Well, I think they have to continue to develop new innovations to deal with the --

JUDGE RYMER: Okay, like what?

PROFESSOR JOHNS: Well, for example, I think the use of staff attorneys that they're doing. At least the area I'm familiar is with the pro se litigation. But I think that there is an increasing efficient use of staff attorneys to administer the cases, the use of the commissioner to handle motions that are not required to be resolved by a judge.

JUDGE RYMER: In other words, you believe it's consistent with the Congressional mandate to adhere to the notions of due process and fairness, to put more of the judicial workload on to non-judicial officers?

PROFESSOR JOHNS: I think if it is carefully done, I think that can in fact improve due process. Yes, I very much believe that. Because the cases that I'm appointed to represent --

I have two capacities that I'm

responding and I should clarify them. One is as a person who is appointed to represent pro se litigants in the federal courts. The other is as the coordinator of the pro bono project. My experience from both of those leads me to the same answer which is, without the staff attorneys' diligent review of the thousands of prisoners petitions that get filed, the needles in the haystack would be undiscovered. I just don't think the judicial officers can possibly wade through that mountain of filings without help.

COMMISSION MEMBER: Well, given that, Professor Johns, as the caseload grows and the workload grows -- and I don't mean this facetiously but I'm curious -- the judicial officers, Judge Rymer suggests, becomes now a judicial supervisor of other decision makers. Don't you see some inherent danger in that? Don't you see some constitutional infirmity in that process?

PROFESSOR JOHNS: I see a real danger if that's not handled very carefully. That's why I think the way the model that's worked in the pro

bono project is the one that I'd offer as a very careful and thoughtful one. Staff attorneys are not making the decisions on the merits of the cases. They're weighting the cases in terms of --

COMMISSION MEMBER: No, I'm not suggesting they are, but you're suggesting that in the future you might delegate more and more of that authority to meet mounting caseload, if I understood you.

PROFESSOR JOHNS: I probably didn't make myself clear. More and more sort of the preliminary sorting and more and more of the kind of triage that has to go in to -- in the 9th Circuit, historically it has been about 30 percent of the caseload has been in pro se. I think that having that be administered at the sorting level by staff attorneys with a view to identifying the serious and complex cases so that they get counsel is to serve due process and equal protection because then they actually have counsel.

I think if you don't do that, the alternative is these people never get counsel and

their cases, I don't think, are heard with the same seriousness which they are given now. The cases that are sorted out as being complex or meritorious cases are treated with as much dignity as the most serious anti-trust case because you have counsel appointed and because the judges on the 9th Circuit, in my experience -- well, in the district court, too. I don't mean to --

CHAIRMAN WHITE: You have about a minute, Professor.

PROFESSOR JOHNS: Thank you.

My point being that I think it serves both efficiency and equality of justice in having a system where the serious cases are identified and representation is provided. I think that can only happen by the staff attorneys doing the preliminary work.

Thank you.

CHAIRMAN WHITE: Thank you.

CLERK: Would the next panel come forward, please? Peter Benvenutti, Jerome Braun, Peter Davis, and Walter Johnson.

CHAIRMAN WHITE: Mr. Benvenutti.

MR. BENVENUTTI: Justice White, Members of the Commission, my name is Peter Benvenutti. It's a real pleasure for me to be here and an honor for you to give me this opportunity.

I'm going to try to highlight some personal views that I've put in my written testimony. Since I submitted that, I've also been asked to speak on behalf of the Bar Association of San Francisco. So, I'd like to save a couple of minutes at the end of my time to do that, if I may.

I come before you as a practicing bankruptcy lawyer. I am not an appellate specialist. I do not have daily experience in the courts of appeal so my perspective is that of one who deals, as I do, with the work product of the courts of appeals, and in particular the decisional authority. I've been practicing for about 25 years. My practice is a regional one. It is based in California but it extends to other parts of the western states as well. That's the perspective that I bring to bear.

From that perspective, I'd like to suggest that a very important product of the judicial system is predictability and uniformity of decisional authority. I suggest to you that the size of the 9th Circuit from that perspective is a great value, both in terms of the volume of decisional authority which a practitioner such as myself can look to, and because of the geographical coverage of the circuit which meshes with the scope of my practice and I think that of many other people who do the kind of work that I do.

That is consistent with, in my observation, the current nature of business and commercial affairs which tend increasingly to be regional, national or international in scope as opposed to heavily localized. I would suggest to you that a change in the current system which divides the 9th Circuit is inconsistent with the approach or the trend in modern business which, as I said, is I think to a more regional and international perspective.

COMMISSION MEMBER: What, if any,

changes do you think ought to be made in bankruptcy appeals?

MR. BENVENUTTI: The current structure of the Bankruptcy Appellate Panels works, I believe, reasonably well with one significant limitation and that limitation is the jurisdictional structure. I realize the jurisdictional structure is constitutionally imposed. I am generally, although not in detail, familiar with some of the proposals to do away with the BAP, to have appeals go directly from the bankruptcy courts to the circuit courts of appeals. I don't have a view as to how successfully that would work.

What I have observed in my practice though is that there is fairly widespread acceptance of the precedential authority, not as a matter of jurisprudence, but as a matter of practice of Bankruptcy Appellate Panel decisions within the 9th Circuit at the bankruptcy court level and among practitioners. I suggest to you that particularly in view of the jurisdictional limitations on the BAP structure that the principle users of that

decisional authority give credibility and weight to BAP decisions. It is a testament to the importance to practitioners such as myself and to trial courts of the availability of a uniform body of decision.

CHAIRMAN WHITE: If you practitioners are accepting the BAP decisions and relying on it, why did this Commission put so much emphasis on having a really binding notion about what the bankruptcy code is? Why weren't they just satisfied with what the appellate jurisdiction is?

MR. BENVENUTTI: Justice White, there is no question that the current jurisdictional structure offers a wild card to anyone who wishes to take advantage of it.

CHAIRMAN WHITE: Yes.

MR. BENVENUTTI: I've taken advantage of it myself from time-to-time where it seemed to serve the interests of my client to do so. That, I think, from a systems standpoint is not a good thing. I certainly don't fault those who grapple with ways to improve that situation, but I don't think there's any perfect solution to it.

CHAIRMAN WHITE: Yes, all right. Because of marathon and (indiscernible)?

MR. BENVENUTTI: Yes, Justice White.

CHAIRMAN WHITE: Over my dead body.

COMMISSION MEMBER: When are you better off appealing to the BAP than to the district court?

MR. BENVENUTTI: As an appellant my experience has been, although each case has to be evaluated separately -- but as a generalization, my experience has been that if it is a technical question of bankruptcy law one is better going to the BAP than one is to the district court because, again, as a generalization, my experience is that the district judges have some tendency to defer to the expertise of the bankruptcy court judge if it is a matter of technical bankruptcy law.

If it is a matter of trial practice or something else that doesn't fit within the rubric of technical bankruptcy law, then my experience is that the district court may be a better place, a more favorable forum for an appellant to go but not if it's in the technical area.

CHAIRMAN WHITE: Maybe you might go there if the problem is at the (indiscernible) state court law.

MR. BENVENUTTI: To the BAP?

CHAIRMAN WHITE: No, to the district court.

MR. BENVENUTTI: District court, yes, because again, that will be something that I think the district judge may be more willing to take an entirely fresh look at as opposed to having some implicit notion of deference to the technical expertise of the bankruptcy judge.

CHAIRMAN WHITE: All right. All right.

MR. BENVENUTTI: One other point I'd like to make about the desirability of having a large circuit such as the 9th, on occasion there has been, in my experience, the use of bankruptcy judges from other districts on temporary assignments. I think that's a good thing. It helps to balance out caseloads. I would suggest that if the circuits were smaller, if the 9th were divided in some fashion, it would be more difficult to do that. I

don't think that's a compelling reason but I think it is one that factors into the balance.

If I can, I'd like to speak briefly on behalf of the Bar Association of San Francisco, of which I am a member. This is a voluntary association with about 9,000 dues paying members. It's the second largest voluntary bar in California after the LA County Bar Association, and it's the second largest bar in the country for a single city after the New York Bar Association.

(indiscernible) the Bar Association of San Francisco has taken a formal position opposing the split of the 9th Circuit. It adopted a resolution last summer when the focus was whether there was a particular split that was to be adopted. The resolution focused upon the desirability of a procedural approach and the creation of this Commission as opposed to adoption of the approach that was then pending in the Senate. But I think the reasons bear repeating here, the reasons for the position which the bar association took.

First, if I may summarize them, it was

the desirability of the inclusion of all of the West Coast in a single circuit to provide a uniform and predictable body of jurisprudence for the Pacific rim region to avoid conflicts within or between states within that region which we believe have a common body of interests, business and the like.

CHAIRMAN WHITE: And to reduce their legal fees.

MR. BENVENUTTI: That was not explicitly a factor in the consideration.

CHAIRMAN WHITE: No, but it's a fine idea.

MR. BENVENUTTI: Well, I think any bar association would formally take the position that efficiency and economy are good things in the judicial system.

Then secondly, the point is when one has an institution which works in the main well as we believe the 9th Circuit does, the burden of persuasion both of the fact there should be change and of what is a better approach to the structure of the system should be on those who wish to make a

change rather than on those who support the existing institution which has functioned well.

My time is up. Thank you very much.

CHAIRMAN WHITE: Thank you, sir.

MR. BRAUN: Good afternoon, Justice White, Members of the Commission. My name is Jerome Braun. I'm a practicing attorney. Being 40th on the calendar is a dubious distinction. So that in the immortal words of Henry VIII, or was it Elizabeth Taylor, to their third and fifth spouses, "I won't keep you long."

I wear two hats here today.

CHAIRMAN WHITE: Good show.

MR. BRAUN: Thank you. I hope, however, I can do better.

I wear two hats here today. One, I bring you the position of the California Academy of Appellate Lawyers, a group of close to 100 appellate specialists in California who (indiscernible) two weeks ago this weekend, a discussion by Judge Hug, Sandy Smetkoff who testified in Seattle, I believe, and has filed a paper with this Commission, and me

discussing -- I don't say debating because it was a very civilized discussion amongst friends and colleagues. I report to you the position of the Academy by a substantial majority is to oppose any split of the 9th Circuit.

COMMISSION MEMBER: Did I understand you to say that three persons made presentations at this gathering?

MR. BRAUN: Yes, but there was considerable discussion, question and comment.

COMMISSION MEMBER: Was any one of the presenters a person arguing for the division of the circuit?

MR. BRAUN: No, but there were certainly views from the floor and questions from the floor asking, inquiring "what's wrong with it." If you bear with me, I'll be happy to --

COMMISSION MEMBER: It's like an appellate argument where the appellee wasn't present.

MR. BRAUN: Well, I wouldn't put it that way. The first amendment obtained and we didn't

round up a proponent of the split, but anyone who wanted to speak to that had the right to do so and did. They were outvoted significantly, Professor.

CHAIRMAN WHITE: Did Mr. Smetkoff belong to your group?

MR. BRAUN: I'm sorry -- yes, Mr. Smetkoff is a good friend of mine and a colleague.

CHAIRMAN WHITE: Yes, well, he testified that he would like to split the circuit.

MR. BRAUN: I don't believe that's his position, Your Honor.

COMMISSION MEMBER: I think he advocated organizing the court of appeals into divisions.

MR. BRAUN: Divisions, that's correct, along the priest (indiscernible) lines of the 5th Circuit.

COMMISSION MEMBER: Did your organization take any position on that proposal?

MR. BRAUN: Well, it was not adopted as a position of the Academy nor was it tabled. It simply was not --

COMMISSION MEMBER: Was it discussed?

MR. BRAUN: Yes, of course it was discussed. We discussed what's wrong with it and why it didn't work in the 5th and why it won't work here, and why it's --

JUDGE RYMER: Why wouldn't it work here?

MR. BRAUN: Well, because if the circuit is in such bad shape --

JUDGE RYMER: I didn't say the circuit, court of appeals.

MR. BRAUN: Court of appeals.

JUDGE RYMER: Why doesn't it work for the court of appeals --

MR. BRAUN: Court of appeals, court of appeals.

JUDGE RYMER: -- to (indiscernible) a division?

MR. BRAUN: There's several reasons, Judge Rymer, why it won't work because it doesn't meet the core problem here which is --

JUDGE RYMER: Which is?

MR. BRAUN: Which is the workload and the burden of the influx of cases.

JUDGE RYMER: Well, but it --

MR. BRAUN: The divisions will simply divide the number of judges and the number of cases with --

JUDGE RYMER: No, but it could be infinitely increased without affecting collegiality. You could have two divisions, you could have three, you could have five, you could have eight -- however many you needed in order to handle the caseload. So, it might be the best way to do that and yet still maintain collegiality.

MR. BRAUN: It seems to me that the workload problem remains the same unless the number of judges are increased.

JUDGE RYMER: I'm saying, they could be infinitely increased. The number of judges could be -- you could have two divisions of nine judges each, or you could have three divisions of nine judges each. You could have five divisions of nine judges each or eight divisions.

MR. BRAUN: Yes, you could have all that and as the Hruska Commission pointed out a long time

ago, one of the problems with that is simply those divisions, in effect, become circuits and ultimately will be constructed.

COMMISSION MEMBER: You haven't mentioned what some people identify as a major problem. As the court of appeals gets larger and larger and larger, the erosion of the kind of collegiality that many would argue you need in appellate court, and the increasing threat of incoherent decisions. Now, the divisional idea is designed to meet those twin problems.

MR. BRAUN: Well, let me say this --

COMMISSION MEMBER: You wanted to know what problems it cured. Those who argued for it, at least some of them say that the divisional idea would meet those problems.

MR. BRAUN: Two things, one of which I can speak about and the other collegiality is beyond my can, other than what I know from talking to judges on the court.

As far as consistency versus conflict, I respectfully suggest to this Commission that that is

not even anecdotal but apocryphal. There is little or no conflict in the decisions in this circuit. The most dramatic statistic that underlines that is in the last 17½ years since we've had an en bank court, there have been only 24 cases taken by the circuit court involving any ostensible possible conflict.

Now that is not a very significant number. What it tells me is that the notion that there's intra-circuit conflict is a red herring. It's an afterthought. It's a make-weight and without any real substance and at least speaking for a good number of practitioners with whom I am conversant, it is not an issue.

Yes, sir?

COMMISSION MEMBER: Do you handle a lot of appeals in the state court system?

MR. BRAUN: Over the years, I have handled a lot of appeals, yes, in state and federal court.

COMMISSION MEMBER: The state court appellate system, is that alike, equal quality or

similar quality to the federal appellate system from your point of view?

MR. BRAUN: Well, I'd better turn around and see who's here in the courtroom here.

Seriously, at the appellate level, I would say the quality is good. It varies from division to division which is a distinction that is important in the circuit court. In the state district courts of appeal, they sit by divisions which seldom, if ever, change. They change by retirement, by death, or some other extraordinary reason. So that, you're not getting the mix and match, so to speak, that we have in the circuit where we are getting the very kind of diversity that, at least from my point of view --

COMMISSION MEMBER: Is the law in those divisions fairly stable? The law in the state court divisions that you're talking about, is it fairly coherent and stable?

MR. BRAUN: Well, coherent is one thing; stable is another. I remember Justice Carl Anderson who was the Administrative Presiding Justice of the

1st Appellate District standing up at a luncheon and saying, "look, each division decides its cases the way it damn well pleases and let the Supreme Court do something about it." That's an accurate quote and Carl himself has repeated it on occasion. So, I think that's something of an answer to your question, Judge Merritt.

COMMISSION MEMBER: Take care of it in the Supreme Court.

MR. BRAUN: I'm sorry.

COMMISSION MEMBER: They figure the Supreme Court is stable to resolve any conflicts (indiscernible).

MR. BRAUN: Sooner or later, yes.

COMMISSION MEMBER: It sounds like Judge Anderson himself was consistent.

MR. BRAUN: I'm sorry?

CHAIRMAN WHITE: Mr. Smetkoff in his departmental, he divided California between the department. I had always thought that that would be a split.

MR. BRAUN: Well, sir, I fully

appreciate Your Honor's question, but Peter Davis is an expert on that subject and follows me. Perhaps he can address it better.

CHAIRMAN WHITE: All right.

MR. BRAUN: In the time I have left, and I know it can't be much, let me say that I have a proposal. I speak not as a representative of the California Academy but as a private citizen, a litigant who has spent a lot of time around these halls. That is a proposal that this Commission can take back -- Judge Rymer, along your line of questioning -- and say "well, here's something that can be done." It's within the purview of this Commission to make a recommendation without having to take the drastic step of dismantling an institution that's 100 years old in the opinion of a majority of us of the bench and the bar functions well.

That is, in order to meet the workload problem and the inundation, there's two things that can be done, one of which has been mentioned repeatedly. It's obvious and it is within Congress'

reach which is to fully staff the court, to fill the vacancies, and grant such new judges to the circuit court as is appropriate. That's so obvious that I'll say no more.

The other is having in mind the well established distinction now between error correction and law declaration. Functions now performed by the circuit court on both levels. There is no reason why the court has to spend as much time as it does on error correction. A startling statistic that no one has mentioned is that of the decisions of the 9th Circuit court of appeals, only 17 percent or so are published. That leaves well over 80 percent that are not. Those are category one cases and there are a lot of error correction cases that really do not require the attention of the circuit court.

I hasten to say, however, that those litigants are entitled in my opinion, and I think it's generally recognized -- they're entitled to one appeal as a matter of right by an Article III judge. Now that can be accomplished by a -- I won't say a

simple expedient, but an expedient that has been much discussed in the cases. I know Professor Meador, amongst others, is quite familiar with it, and that is the use of a district court appellate panel.

Now, for some reason that I don't know, but you folks may, there is a sense that there's more elasticity at the district court level in terms of adding new judges than there is in any circuit. Accordingly, I suggest to you that by establishing a district court appellate panel, a DCAP, that a very significant amount of judicial business involving error correction can be diverted to a district court appellate panel of Article III judges. Therefore, it will enable, facilitate maintaining this circuit as it is presently constituted and enable it to function further.

If I may conclude, Your Honor, Professor Meador asks, "what difference will it make to values whether this circuit is divided?" There is a value amongst the practicing bar and its clients that we need a uniform law in the Pacific rim. Not just in

the north, not just in the south, but a uniform law in the Pacific rim. The only way to get that and to have a national court of appeal with a federalizing influence is to maintain this circuit and at the same time, address the concerns of those who are concerned about its size and its numbers. I believe the DCAP is a way to do that.

Willy Nelson wrote a song called "how long is forever this time?" Well, I don't think we have to answer that today. What we have to do is say, "well, there's a way we can continue to function well on this circuit." I would hope and trust that this Commission would make such a recommendation to Congress. Thank you.

CHAIRMAN WHITE: Mr. Davis.

MR. DAVIS: Mr. Justice White and Commission, I promise to abide by my time limits.

The Commission has my statement. I would be happy to answer your questions in any direction you want. But absent your directing me otherwise, I'd like to address two points in particular that I think my particular experience as

an appellate lawyer for 25 years, both in the 9th Circuit and in some other circuits, but in the state appellate system might be useful to you. Those two issues are the pros and cons of divisions or smaller units of a court.

COMMISSION MEMBER: How many divisions are there in California of the intermediate appellate court?

MR. DAVIS: There are six districts. There are about 90-plus, almost 97 judges in the intermediate appellate court. They're in six districts. Three of those have divisions and three don't. So, in the first district, for example, which is San Francisco, there are five divisions and there's seven in Los Angeles and there's three in the 4th. The others don't have districts or divisions, sorry. But all of these units, there are none of them who are driven (indiscernible). The divisions are all four or three justices. The districts that don't have divisions are all less than 10. So, what you have here a little bit is a laboratory of a very large number of judges, all

divided into little tiny units, relatively small units, that are deciding the same law, the law of California. I think that's useful.

I'm also a member of the California Academy of Appellate Lawyers, although I missed that meeting. I've been a member for about 20 years and we've been debating the issue for as long as I can remember about whether larger courts or smaller courts are better in the context of the divisions of the California court. Should we have a bigger pool of justices more like the 9th Circuit? Or should we have a smaller pool and do it in divisions? I think it's fair to say that the majority feel -- and some of them feel quite strongly -- that the larger group is better than the smaller group. There are a number of reasons for that.

JUDGE RYMER: You're talking, if I remember it right, is a division would have three justices.

MR. DAVIS: Four -- yes, three or four, right.

JUDGE RYMER: Okay, no more than that?

MR. DAVIS: Right, right.

COMMISSION MEMBER: Also, does it have (indiscernible) an en bank procedure available like in California appellate courts? There's no en bank process available.

MR. DAVIS: That's correct. That's correct.

COMMISSION MEMBER: And each of these divisions and units handles the entire docket. There's no allocation of division by subject matter among them, isn't that right?

MR. DAVIS: That's also correct. That's also correct.

CHAIRMAN WHITE: But no appeal has the right to the Supreme Court?

MR. DAVIS: That's correct too. Discretionary review much like (indiscernible).

CHAIRMAN WHITE: Yes, and even on state constitutional questions?

MR. DAVIS: Death penalty -- the only exception is death penalty cases.

CHAIRMAN WHITE: Thank you.

MR. DAVIS: Yes. So, here you have a court with all of these little units working together. It's a very collegial court in the sense it has been defined here where they're working with the same three or four people or maybe six or seven or eight for years after years after years. They're all trying to apply the same law and there's no starry decisis role as to other intermediate appellate courts. There is, of course, as to the Supreme Court. They don't have to follow the law of another panel or even their own law that they decided elsewhere.

So, I think it's a useful analogy to say "all right, people say small courts are better. You get more" --

COMMISSION MEMBER: Mr. Davis, excuse me. I'm sorry. You're saying these panels that you're describing don't have to follow the law of their own panel previously announced?

MR. DAVIS: Right. They can change it.

PROFESSOR MEADOR: Well, you don't really have a fair comparison here, do you?

COMMISSION MEMBER: I suppose they can change it, but -- I'm sorry, Professor.

Do they have to change it or are they free to just -- like a district judge and decide cases differently.

CHAIRMAN WHITE: Well, they overrule it, don't they?

MR. DAVIS: They do both, just like every other court I've ever appeared in.

COMMISSION MEMBER: Well, then I agree with Professor Meador. It's not a fair analogy at least to what we've been told the circuits -- the 9th Circuit is doing.

MR. DAVIS: I believe it is in a couple of sense. One is, in that setting, what kind of consistency of decision making do you get? That's one of the issues you have. Well, here we've got the small collegial court and they don't have a rule like you do in the circuit that you have to follow another panel. So, do you get the splattering of law all over the place? Do you get stability and do you get consistency when even under those

conditions?

In 25 years of practice, my experience is that you get at least as much consistency in the 9th Circuit as you do in these little courts. I don't see a difference. In other words, small courts aren't the answer to making consistent decision making in large court settings.

COMMISSION MEMBER: I'm sorry to interrupt you but we're talking about something different. I have no quarrel with their ability to freely disagree with another panel and now it's a different law making function. What I understood you to say was they could disregard their own precedent, the precedent of their own panel.

MR. DAVIS: They can change the law as long as it is not governed by the Supreme Court.

COMMISSION MEMBER: I understand that. But then if there are inter-panel conflicts, the Supreme Court in its discretion, can review those and announce the law of California.

MR. DAVIS: Right.

COMMISSION MEMBER: But when a panel

changes its own law and it's under no command to obey the law that the panel has announced, its own law, you're telling me that's perfectly permissible without overruling precedent, for them to do that?

MR. DAVIS: If it would help, I'll give you an example of a case that a division in Los Angeles decided. The first time the case came up the court announced a rule and sent it back down in reverse. The same case came back and they decided they had it slightly wrong and changed the rule the second time the case came back. That's the kind of thing --

COMMISSION MEMBER: Acknowledging they were wrong?

MR. DAVIS: Acknowledging that they were wrong.

COMMISSION MEMBER: Well, that's different.

COMMISSION MEMBER: Isn't the situation basically what you have in California appellate court system something like the federal system nationwide? That is to say we have circuits, a

dozen territorial circuits. No one of them is bound to follow the decisions of another. That's what you have in these California districts, isn't it, that no one is bound to follow another? Except if you break it down even further than that, a division within the district isn't bound to follow another.

Is that essentially what you have?

MR. DAVIS: They're only bound to follow the precedent of the Supreme Court, much like the various circuits are, right. And in that context, I think you get about the same amount of judicial consistency.

COMMISSION MEMBER: You're saying the quality of the adjudicatory process there is more-or-less the same as the quality in the larger court like the 9th Circuit. That's what you're saying?

MR. DAVIS: My answer to that question always depends on whether I just won or lost.

COMMISSION MEMBER: Yes.

MR. DAVIS: But yes, in general, I think that in the sense, it is about the same quality. I think the quality of the judges is good, although

there's some variation in all appellate courts and California is no exception. In general, I think the quality of the justice you get is good, but with some exceptions. I found the 9th Circuit to be exceptionally open to looking at the process and changing the process and I have not found that in the California courts. Some of the small courts are very open to changing their process and some of them are extremely resistant.

Each one of these divisions has a presiding justice and that presiding justice has his or her own little system and they don't want to change it. I've found that you get more one judge opinions because as a small group sits together all the time, there's less scrutiny of the other judges' decisions. I found there's more inconsistency in quality because if you get a small group that isn't very good, you don't change that. So, you get a bad division that sits there year after year after year and you can get some good divisions. I found more discrepancies in the procedures.

Some of these divisions want to do their

own little rules. I found more discrepancies in delay. Some of the divisions are quite slow and I found that it's difficult to allocate the resources, the judicial resources of the state to where they're needed the most. In the first district, there are less judges now.

COMMISSION MEMBER: There's less peer pressure. That's what you're -- less peer pressure in the small court, a very small court that (indiscernible) than there would be with a larger court.

CHAIRMAN WHITE: That's called collegiality.

MR. DAVIS: I think the collegiality thing runs the gambit. In a smaller court if you have judges that don't get along -- and there's some infamous examples of that in California -- then you have a nightmare. Whereas, in a larger court, that's not so much of a problem. But the problem is that once you divide into small units, the population shifts, change the needs of the court. We're finding that right now in California. But you

can't change the judges around to meet that need very expressly. So, I believe that a larger group of judges is more flexible and better able to meet the needs of the state in terms of judicial resources than is a small group.

I can see I'm about to get the sign. I don't want to step down without asking you, pleading with you to get more judges. In the end, it's a very simple equation. You have the number of appeals and the number of judges. Something like what's going on in the 11th Circuit now where they're handling almost 800 decisions per year per judge is frightening. You have to petition the staff to get access to judges in many divisions and many circuits.

Ultimately, the 9th Circuit innovations are great, but they're never going to be enough. We're getting to the point where we don't have decisions by Article III judges and I think that's frightening. I think we need in the end to get more justices, more judges, and that's the only thing that's going to solve this problem.

Can I answer any further questions from the Commission?

CHAIRMAN WHITE: Thank you.

MR. DAVIS: Thank you.

MR. JOHNSON: Good afternoon, Justice White and Members of the Commission.

My name is Walter Johnson and I'm a member of the law firm of Lillick & Charles here in San Francisco, which has been serving maritime clients on the West Coast since the 1920s. After graduating from law school, I served one year as a clerk, a law clerk in the 9th Circuit. Since that time, I've been practicing maritime law here in San Francisco.

I'm not an appellate expert. I do know something about the 9th Circuit. I've appeared before the 9th Circuit on 10 or 12 different matters. But I'm speaking to the Commission today from the perspective of a practicing maritime attorney. It's late in the day on a Friday afternoon. I think what I have to say may be fairly obvious. I think it's worth saying nonetheless and

I will try to be brief.

Maritime lawyers and their Pacific rim clients are very, very fortunate in having a single appellate circuit that stretches all the way from San Diego and the Mexican Border in the South, up to the North Slope of Alaska, and includes Hawaii and some of the Pacific Islands.

CHAIRMAN WHITE: A better situation than on the East Coast.

MR. JOHNSON: I think it is a better situation than on the East Coast, yes.

So, when you think about it that way, the 9th Circuit is huge, but I think it's also a great benefit. It has always been assumed -- and I think it's true -- that uniformity in maritime law promotes maritime commerce. And that the promotion of maritime commerce in turn promotes commerce in general. It simply makes it easier and more attractive to do business when you only have one law to deal with rather than a multiplicity of laws.

That proposition may be common sense and it may be just article of faith because I have no

way to prove it to you. I don't think any empirical study has been done or can be done, but I feel it to be true. It's implicit in the constitutional grant of admiralty jurisdiction to the federal courts and the Supreme Court has repeated it over and over in decisions throughout the years.

Maritime commerce in the Pacific rim region tends to be not only interstate, but international in character, and to include not only California but also the Pacific Northwest. Some of the largest and most visible enterprises on the West Coast such as Matson Navigation, American President Lines, Carly Maritime --

COMMISSION MEMBER: Is maritime law nationally a problem insofar as conflicts among the circuits are a concern?

MR. JOHNSON: Well, just speaking from the perspective of somebody who practices on the West Coast, it's not as much of a problem here. But I think it is a problem in places like the Gulf Coast where you have two circuits.

COMMISSION MEMBER: Well, by that I mean

should there be a subject matter, national maritime court because there is a sufficient problem in maritime law, or should it be (indiscernible)? There was originally, before the federal court system was organized under the articles of confederation as I understand it, a maritime court. And we returned to that because there is sufficient problems existing with uniformity of maritime law to require it.

MR. JOHNSON: Well, I'm surprised and delighted to hear you say that. I wasn't going to mention anything about that because I didn't think that was likely to be taken up. But a number of maritime lawyers that I have spoken with in preparation for coming here and speaking to you today have said "why can't we have a national appellate circuit dealing with nothing but admiralty matters?" I've had others tell me "why can't we go back to the days" -- and they weren't so long ago. It was, I think, the early 1960s when we had admiralty courts. We had judges who sat in admiralty and some of them who did nothing but

admiralty law.

COMMISSION MEMBER: What do you think about centralized appellate review in maritime cases? What's your view of that proposal?

MR. JOHNSON: Well, from a maritime lawyer's point of view, the Supreme Court takes up far too few maritime cases and lets some rather large and long standing conflicts persist.

CHAIRMAN WHITE: That's on the East Coast.

COMMISSION MEMBER: Well, I mean, are you saying you favor that proposal or not?

MR. JOHNSON: I would definitely favor that proposal. Yes, I would.

CHAIRMAN WHITE: I think it would have to be a separate court to satisfy the maritime people, or maybe the federal circuit wouldn't like those cases.

MR. JOHNSON: Possibly not.

And there is a slippery slope if admiralty has its own specialty courts. There are other areas of law that would want their own

specialty courts as well, but this is something that historically goes back 200 years ago where we did have separate admiralty courts.

Another thing that has been proposed by a number of admiralty lawyers I've spoken with is an admiralty panel on the 9th Circuit. While there is a lot to be said for rotating judges into different panels for every month of hearings, at the same time, there would be, I think, a lot of efficiency to be gained in having a panel of three judges or possibly four or five on a rotating basis who decided admiralty appeals in the 9th Circuit.

COMMISSION MEMBER: How many admiralty appeals do they have each year? Do you know?

MR. JOHNSON: I do not know the answer to that one.

COMMISSION MEMBER: Has that proposal ever been put to the court of appeals?

MR. JOHNSON: I don't believe it has.

CHAIRMAN WHITE: Well, I know a man here in this room who will put almost any idea to (indiscernible).

MR. JOHNSON: I'm not going to turn around, Judge, but I think I know that man.

We have seen what's happened in the Gulf Coast which used to be all under the jurisdiction of the 5th Circuit and is now under the jurisdiction of the 5th Circuit and the 11th Circuit.

CHAIRMAN WHITE: Yes.

MR. JOHNSON: I won't say that that's been a disaster or that there have been any dramatic discrepancies between what's done in the 5th and the 11th Circuit, but there are differences. I'm sure if the 9th Circuit is split, there will be differences in admiralty law in the Pacific Coast and that will make it all the more difficult for us to explain not only to our US clients, but in particular to our overseas clients in Japan, in Korea, in China.

CHAIRMAN WHITE: In the 9th Circuit, do you have a judge like the 5th Circuit has?

MR. JOHNSON: John Brown?

CHAIRMAN WHITE: Yes.

MR. JOHNSON: I wish we did. I was

going to say that that's the great benefit. If anybody here knows who John Brown is, that's the great benefit of having appellate admiralty specialists in the appellate court. When John Brown issued an opinion, it commanded great respect not just within the 5th Circuit, but within the entire United States. It wasn't quite a Supreme Court opinion, but it was very close to it in the kind of respect it commanded.

That's also true -- I think there were some district court judges --

CHAIRMAN WHITE: I read a lot of his papers, but I don't think I ever really did much to them.

COMMISSION MEMBER: Maybe they need an admiralty lawyer on the Supreme Court too.

MR. JOHNSON: There you go. I'll volunteer for that.

I was going to say that there was a tradition back when we had admiralty courts and for some years after that, that there were admiralty specialists in the district court. That was also of

great benefit because there were judges who, like John Brown, commanded a great deal of respect. When they issued an opinion, even though it was a district court opinion, it had influence well beyond that district and even that circuit because so much respect was afforded to that particular judge. I think a lot is lost by dispersing the admiralty work to judges who see it very seldom.

CHAIRMAN WHITE: So, there hasn't been an admiralty lawyer nominated and confirmed in the 9th Circuit?

MR. JOHNSON: I can't answer that question. I don't know.

CHAIRMAN WHITE: Thank you very much.

MR. JOHNSON: Thank you.

CLERK: This panel is dismissed and we'll call our final panel today. Mr. Robert Palmer, Michael Traynor, and James Wagstaffe.

MR. PALMER: Good afternoon, Mr. Justice White, Members of the Commission. My name is Robert Palmer.

CHAIRMAN WHITE: Mr. Palmer, you may

proceed.

MR. PALMER: Fine.

I, perhaps, am one of the few people among the witnesses that are speaking as somebody who has experience in the court as a litigant rather than as a judge or an attorney. So, I sort of have a different aspect, you might say, more from a public view than most of the people who are here.

COMMISSION MEMBER: How many cases have you had?

MR. PALMER: I'm not an attorney. There was a misunderstanding.

COMMISSION MEMBER: I mean as a client.

MR. PALMER: I've been in the court for 20 years trying to sell this thing. I've been through the 9th Circuit --

COMMISSION MEMBER: One case?

MR. PALMER: -- the District of Columbia Circuit. I've been up to the Supreme Court in California and I haven't given up. Anyway, you've read my statements, so you know just where I stand.

I've given a specific example of

judicial crime. I believe that a bankruptcy judge acted illegally and without jurisdiction when he continued to administer a sham bankruptcy and as a result, creditors were swindled out of over $1 million. I was one of the people. I appealed to District Judge Marilyn Hall Patel. I complained to the US Attorney, Joseph Russenelli and filed a Section 327C, complaint of judicial misconduct, with the Chief Circuit Judge at that time, James Brown. The judges and the prosecutor both protected the dishonest judge.

For over 20 years I've been engaged in litigation as a result of this dishonest judge's rulings. Every judge who has reviewed the sham bankruptcy has affirmed the void orders of the bankruptcy judge. The members of this Commission, who are also judges, have a duty under the ethical codes to make certain my allegations are investigated by the Department of Justice to assure that dishonest judges are removed.

COMMISSION MEMBER: Excuse me. I don't mean to cut you short, but do you have some

recommendation --

MR. PALMER: Yes.

COMMISSION MEMBER: -- as to the structure of the courts --

MR. PALMER: Yes.

COMMISSION MEMBER: -- as to how we relieve that problem?

MR. PALMER: Yes. Yes.

Clearly, the first structural change to be recommended by this Commission should be the creation of a countervailing judicial authority and the abolishment of judicial immunity. Our judicial system is broken because there is a lack of judicial accountability. Judges at all levels are at little personal risk for any amount of bribery, cronyism, fraud or other malfeasance in office. Thus, most litigation is predetermined. The fated party relies on the judge while the naive party relies on the merit of his case. Dishonest judges do no follow the law and court orders that are not based on merit demand more litigation and appeals to right the wrongs committed by dishonest judges. Thus,

dishonest judges, by their decisions, create more and more litigation.

I believe a Department of Judicial Administration should be created in the Executive Branch. This agency, managed by non-lawyers, would monitor the courts to assure that all judges are honest, to reduce the need for appellate litigation, and to restore the courts to the people.

COMMISSION MEMBER: You know, the founding fathers provided for the very thing that you are talking about in the Constitution of the United States and that is impeachment of dishonest judges. There is a process by which that is accomplished. So, what's wrong with what the founding fathers had to say about it?

MR. PALMER: Well, let's look at it carefully. The Congress has delegated to the various judicial counsel and various circuits the right to judge judges. We have peer review. Peer review is absolutely no review whatsoever. You can not complain directly to Congress. You must go through the process. Now when you go through the

procedure, there was --

CHAIRMAN WHITE: How --

MR. PALMER: Pardon me?

You have to go through the court procedure. You have to make your complaint, Section 327C complaint through the chief circuit judge.

CHAIRMAN WHITE: You know, I don't think that Richard Nixon was dealt with by the --

MR. PALMER: He's a President, sir.

CHAIRMAN WHITE: What?

MR. PALMER: He's a President. I'm talking about judges. The President operates to exercise oversight of judges through the Department of Justice. The Department of Justice is entwined with the judiciary. We need a separate countervailing authority. My background happens to be political science, economics --

COMMISSION MEMBER: Are you saying the Congress won't consider impeachment of a --

MR. PALMER: I have been to Congress repeatedly and they will not even answer my letters. When you're a dishonest judge you're protected by

the system. I've spoken to lawyers. When they get into a situation where the judge predetermines the case and is committed to one favored party, they don't fight it. They just go on to another case. The one that is hurt is the litigant, the party to the action. The lawyer goes on to another case and that's the end of it.

Now, these judges had a duty to set aside the orders of the bankruptcy judge. He had no jurisdiction, no subject matter jurisdiction, no personal jurisdiction, and he acted in violation of the law. Now, I've written a book called Courts Without Justice. It's been (indiscernible) by a first amendment lawyer, a lawyer who specializes in first amendment practices, and it has been underwritten. So, it has been gone over about 60 times, I can tell you. It's right there.

The problem is, we have a lack of judicial accountability. We have shifting integrity of judges. There's a two track system. You may have an affluent party or a large law firm or whatever it may be, but routine cases are not dealt

with the same way that the cases of high priority or in the media.

COMMISSION MEMBER: Has your book been published?

MR. PALMER: Yes, sir, 1992.

COMMISSION MEMBER: Where?

MR. PALMER: I published it myself. The reason I published it myself is that I couldn't get somebody to publish it. There's tremendous censorship in the press and the media. Just speaking to the Chronicle itself, the court reporter one time said "newspapers have to go to court too. You can criticize lawyers all you want but we can't criticize a judge." Judges are above the law. In order to bring this into some kind of context, we have to do away with judicial immunity. Judges have to be responsible when they do things that are illegal.

This bankruptcy judge got off scott-free. It was a no asset estate. Creditors got nothing. The people that ran the bankruptcy, the sham bankruptcy, built a 54 unit housing project,

put up $2 million and sold it for $5 million, got off scott-free. When I went to the various commercial creditors, they refused to even intercede. They said "bankruptcy is corrupt. Forget it. We're not going to put any money into it. If you want to fight it, do it yourself." And that's what I did. I got a law degree. I properly raised the constitutional issue, a bankruptcy law is unconstitutional. Why should the district judge appoint the bankruptcy judge, then I appeal to the district court. To prevent embarrassment to the judge who had appointed the bankruptcy judge, I am ruled against. And the judge did not have jurisdiction.

So then, the circuit court also affirms. Now we have circuit judges appointing bankruptcy judges. That's denial of due process to anybody who is an opponent of a trustee. The trustee is appointed by the bankruptcy judge. That's an administrative act. In 1794 in United States v. Yale Todd, we had a ruling that judicial functions are confined to judging cases, to judicial actions.

Administrative functions are solely within the Executive. That was the first case when an act of Congress was invalidated by the Supreme Court, 1794. It's a note, in 1851 written by Justice Taney. I put that in my statement so you have the notation.

We also know that when Congress abolished -- well, you have my statement. I really don't want to go over the statement. You should be able to ask me some questions and let me respond. I really feel very, very keenly that across this country judges are of shifting integrity. They dispose of routine cases. They adjudicate the cases that are among the powerful, the affluent. So, there's a two track system in this country.

I'm really speaking to you most sincerely. I know there's a lot of people that are in the legal reform movement and I have spoken to them and they're just avid about, you know, the judges being corrupt. I try to be sort of tempering because I consider myself to be part of the system. I was a consultant to the US Senate. I'm the one that investigated the Federal Central Valley Project

that caused Congress to change the allocation of acreage to 900 acres which was affirmed by the 9th Circuit. That was a perfectly good thing that the 9th Circuit did. But on these things where you have individuals, you have a different concept of the kind of disposition of cases than on the higher level cases. My background is in hydrology as you could guess from saying I worked with the US Senate.

Yes?

CHAIRMAN WHITE: I think your time has run out.

MR. PALMER: Fine, that's all right.

Did you want to ask any questions further? I just hope that you will --

CHAIRMAN WHITE: I don't know what we could say.

MR. PALMER: I think here's what you could do. You could require the Department of Justice, the US Attorney, to investigate my charges of bankruptcy fraud and to remove dishonest judges.

CHAIRMAN WHITE: I don't think that's within our charge of this --

MR. PALMER: It would keep the 9th Circuit Court of Appeals working better if we had honest judges. Thank you.

CHAIRMAN WHITE: Mr. Michael Traynor?

MR. TRAYNOR: Justice White, Members of the Commission, Michael Traynor, San Francisco lawyer. I practice with the Cooley-Godwig firm. We have offices in San Francisco and Southern California.

My partner, Joseph Russennello and I submitted a written statement. He was a former United States attorney for the Northern District. Our focus was on two particularly unsatisfactory proposals for splitting the 9th Circuit. First, dividing California between two circuits and second, isolating California from other states. If California were divided between two circuits, conflicts could occur and additional uncertainty unquestionably would occur. Imagine different outcomes in two separate circuits in the Prop 209 litigation that challenged the constitutionality of an initiative that prohibited race and gender

preferences. For a statewide university or agency, such preferences would have been upheld in some parts of the state and struck down in others, a result that would destroy any attempt to achieve coherent system-wide planning. Our written statement develops a number of other illustrations.

If California can not be divided effectively, should it be isolated in a California only circuit. Doing so would tend to make it more a California court for the parochial outlook and less a federal court with a national outlook.

PROFESSOR MEADOR: If Congress were bent on dividing this circuit, what would you recommend to them that they do? How should it be divided if it's going to be divided?

MR. TRAYNOR: I don't think there's any satisfactory way to do that, Professor Meador. It gives me a chance to take a minute, if I may, in response to the question that you have raised several times in today's discussion, and to deal with that in the context of a point that Judge Merritt made about harm.

One of the great functions that this Commission could do, faced with the challenging task that it has, is to articulate the harm to the circuits, and particularly the 9th Circuit, that could occur from a split. But let me just use four examples as an illustration of that harm. The misfit might result from a split that would truncate the 9th Circuit into California, Nevada and Arizona. It would disrupt and dismantle the major innovative work in institutions that the 9th Circuit has created including, for example, case and issue tracking, mediation, the BAP, sharing judges.

PROFESSOR MEADOR: I don't understand how that would dismantle any of that. It would function as a smaller territory, yes, but it would still keep going, wouldn't it?

MR. TRAYNOR: Professor Meador, you have a system that's working now. It seems to me a substantial burden of persuasion that anybody has in Congress or in this Commission or elsewhere to take a system that's working and say "change is justified." Change in structure, is that going to

produce an improvement in function? Maybe some of these innovations could occur, but they would not occur at the level and with the sophistication that they have already in the 9th Circuit which is dealing with this in a very innovative way.

PROFESSOR MEADOR: No, maybe I misunderstood you. I thought you said that if the circuit were reconfigured into those three states, the various good developments you've mentioned would be dismantled.

MR. TRAYNOR: Well, they might be dismantled.

PROFESSOR MEADOR: I don't understand how they could be dismantled.

MR. TRAYNOR: Well, they exist currently in the 9th Circuit as a coherent unit in the 9th Circuit. We'd have to have a whole restructuring. You'd now have two different circuits trying to deal with these procedures, different judges looking at them with different ways. This proposal would also probably require more judges than would be presently existing in those three states.

It would occur -- and particularly importantly, this would occur without the unified support of the judges throughout the circuit, the lawyers as occurred in 1981 or so from the 5th Circuit split, as well with the concurrence of the Department of Justice. We would be shifting from the relatively known institution into one of some dubious predictability and without satisfying any burden of showing that this change would produce some good.

Such an effort would also give renewed hope that powerful politicians who think they can deal with decisions they don't like a deconstructing accord. It would prevent and disable an institution that now speaks with one voice on very important developing issues such as electronic commerce, intellectual property. It's critical in the Pacific rim to have a circuit that speaks with one voice, and it would affect daily practice on such issues as removal, forum selection clauses, 1404(a) transfers and the like.

There's no good reason to split the 9th

Circuit and no good way to do so. Given the obvious facts --

COMMISSION MEMBER: What is the least unsatisfactory way that Congress might go about dividing the circuit? You say there's no good way, no satisfactory way. Is there a least unsatisfactory way?

MR. TRAYNOR: The least unsatisfactory way would be to follow the concept of what is the least drastic alternative. One of the most drastic alternatives is a structural change of any kind. Before addressing a structural change of any kind, suggestions such as those that have been made here today and elsewhere about the jurisdiction of the federal courts, some specialized areas of cases such as maritime insurance, maritime law, that sort of thing.

But before any structural change is attempted, less drastic measures should be examined, I respectfully submit. I haven't seen a proposal yet that works. I've been involved in this problem since 1972 when as an officer of the Bar Association

of San Francisco, we opposed the split.

COMMISSION MEMBER: What about this proposal to have two or three units in the 9th Circuit of seven or eight or nine judges each that would be territorial units with a system of en bank review where any divergence from precedent or serious divergence could be reviewed and corrected, but without dividing the circuit itself?

MR. TRAYNOR: This is a kin, I think, to the Smetkoff Proposal. It's a kin to other proposals that have been made in testimony before you. I would react in two ways to that.

One, does it have the support within the court itself, the 9th Circuit judges particularly? Is it supported? Is it an institution? Is it an experiment that works? What's the empirical history of that idea where it has been tested before earlier in the 9th Circuit or in the old 5th Circuit? How, in fact, has it worked? Do the judges support it? How would they implement it from concept? As we all know, taking concept down to hard-working pragmatic alternatives, how would it work? If the judges

themselves looked at those alternatives, that would be one thing.

The second part of my response is, and probably the most important part of it, any outside tinkering with the 9th Circuit, particularly from Congress, any recommendations for tinkering is, in my view, only going to lead to more efforts to take political looks at the structure of our appellate courts. This Commission is here as a result of a six month battle that occurred over a rider to an appropriations bill that would have divided the 9th Circuit without a hearing.

COMMISSION MEMBER: Mr. Traynor, excuse me, but let's assume we adopt your position, and I appreciate the passion with which you endorse it. That is that the circuit should not be split, and if it's split there's no good way to split it. That's the second reason not to split it. Let's assume that this Commission adopts those recommendations and Congress is hell bent on splitting the circuit nonetheless, which is within their constitutional authority.

Don't you think we would be better off or the circuit, you practitioners, proposing the least offensive plan for a split if they are of the mind that it's going to be split regardless of what we say or you say? Shouldn't we suggest sort of a (indiscernible) approach, I guess, the best possible solution?

MR. TRAYNOR: There is, so far as I know, no good solution; no solution that works. It has been examined for the last 25 or 30 years.

What really is needed is more judges to fill the vacancies so that this court can get on with its job and do its job without the political strife that these proposals have entailed. If there was one thing this Commission could do that would be of great constructive benefit would be to pick up on the idea of harm and say this kind of tinkering, this kind of structural decision making causes harm.

Thank you.

CHAIRMAN WHITE: Thank you. Thank you very much.

Congratulations.

MR. WAGSTAFFE: Thank you. Thank you, Your Honor. I am James Wagstaffe and I am the loser of today's lottery, as is evident.

I am here to address a very narrow point, and briefly, the idea that there is purported inconsistency of decision within the circuit and that the circuit's decisions are out of sync with other circuits. Therefore, I am here today, as some of you who know me, in one capacity as a civil procedure nerd, no other capacity. Because in that capacity as a civil procedure nerd, co-authoring a national book on civil procedure with Justice Swarzer -- that was a Freudian slip -- Judge Swarzer and Judge Tishema.

I engage in the enviable position of reading the West Federal Digest, cover-to-cover each year on all decisions on civil procedure and federal practice. In that capacity, I have had not anecdotal evidence -- which I think supports those who criticize the size of the circuit as being the cause of the supposed problem of being out of step with other circuits and being out of step within

itself -- and look at those actual decisions. Each year when we update the book, we look specifically for intra-circuit inconsistencies and for inter-circuit conflicts.

In addition, I have the opportunity, pleasantly, each year to address most of the circuits in their annual workshops. I usually get them at 8:00 in the morning, not at the 5:15 hour. They figure that jurisdiction and procedure are best addressed at 8:00 in the morning. In that capacity I, therefore, have had the opportunity to study annually, cases in each circuit and see. Interestingly, and my view ironically, my experience has been that in the smaller circuits is where you have the greatest intra-circuit conflict. I don't know if I have an explanation for that other than maybe collegiality breeds contempt. I don't know if that's true, but I've noticed that is the case. Or maybe it's because the larger the circuit, the less people care. I don't know.

But I do know that in studying this, the 9th Circuit is remarkably free from intra-circuit

conflict --

COMMISSION MEMBER: There's more intra-circuit conflict in the 1st Circuit, which is the smallest circuit -- there's six judges -- than there is in the larger circuits, you're saying?

MR. WAGSTAFFE: Well, I can only say in the field I've studied. It's only the field I've studied which is federal practice and in particular, federal jurisdiction and procedure.

CHAIRMAN WHITE: Well, you've studied every circuit court?

MR. WAGSTAFFE: I have, Your Honor, because I speak to each circuit workshop virtually on an annual basis.

CHAIRMAN WHITE: Oh, I thought you had said you had read this (indiscernible) in every circuit.

MR. WAGSTAFFE: Well, no, I'm actually saying that if there's a problem, the 9th Circuit is certainly no different than others and therefore, that I think rejects the notion that size alone creates conflict. Second of all, I've noticed --

and I can only say this by having given the presentations -- there is intra-circuit conflicts of some kind on some issues. There's no question about that. They don't even know how to define the issues, but I've not noticed in the 9th Circuit at all.

COMMISSION MEMBER: Let me clarify what sources -- are you saying that you read annually the courts of appeals' opinions on procedural questions in every circuit?

MR. WAGSTAFFE: I do, sir.

COMMISSION MEMBER: Everything in every court of appeals on procedure (indiscernible).

MR. WAGSTAFFE: Every procedural opinion that appears to be something other than a repetitive case each year.

COMMISSION MEMBER: And you are finding some intra-circuit conflicts?

MR. WAGSTAFFE: I am finding some intra-circuit conflicts, yes.

COMMISSION MEMBER: On procedural questions?

COMMISSION MEMBER: In some circuits?

MR. WAGSTAFFE: Yes. I suppose it depends on how you define intra-circuit conflicts. Things that I would perceive to be inconsistent opinions from one to the other. I think I see that. In addition to being a practicing lawyer, I'm a professor. So, forgive me for the ability to be a provocateur. But I do see within circuits, opinions that seem to be somewhat at odds on issues of jurisdiction. Preemption is a good example. Preemption is an area where I think within circuits, there can be some differences of opinion and they rationalize them.

But in any event, in this capacity, I have seen at the 9th Circuit -- and I have illustrations in the statement that's being provided to you. But in diversity jurisdiction, the 9th Circuit, I think, has established consistent rules. They are not out of step with other circuits in arising under jurisdiction, in the questions of federal preemption which is very complex, in the ERISA preemption and LMRA preemption. I do not see

within the 9th Circuit these chards of decision making.

CHAIRMAN WHITE: I can see that you might call yourself a nerd if you study the ERISA.

COMMISSION MEMBER: Especially ERISA preemption.

MR. WAGSTAFFE: You're absolutely right, Your Honor.

They give me an hour-and-a-half on ERISA preemption and it's a fascinating hour. My wife says with this book we wrote that whenever she has trouble sleeping, she turns to the chapter on ERISA preemption and she says she can not get from the top of the page to the bottom of the page, and it is better than drugs.

CHAIRMAN WHITE: Where do you teach?

MR. WAGSTAFFE: I teach at Hastings College of the Law here in San Francisco.

CHAIRMAN WHITE: You aren't old enough for that.

MR. WAGSTAFFE: Thank you, Your Honor. I agree with you. Yes, that's absolutely correct.

So, let me say this. I think this holds true in person jurisdiction, summary judgment venue, these other areas we talked about.

Let me end by saying if it's not broke, I don't think it needs to be fixed and that's how I view this. Let me completely end by saying I've also been teaching speech at Stanford University for the last 22 years, public speaking.

CHAIRMAN WHITE: Oh, public speaking --

MR. WAGSTAFFE: Public speaking.

CHAIRMAN WHITE: At Stanford?

MR. WAGSTAFFE: At Stanford.

I want to end with two things. One is, the average attention span of an adult is seven minutes. And I appreciate that you've been here all day and you're paying attention to me. The other is the most important rule of public speaking that all public speakers should follow. It is to end before they expect you to end. That's all I have to say.

Thank you.

(Applause.)

CHAIRMAN WHITE: The show is over. The show is over. Thank you very much.

(Whereupon, the hearing was concluded.)