COMMISSION ON STRUCTURAL ALTERNATIVES

FOR THE FEDERAL COURTS OF APPEALS

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ATLANTA, GEORGIA

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

2 VICE CHAIR COOPER: The hearing will come
3 to order. This is the public hearing called by the
4 Commission on the Structural Alternatives for the
5 Federal Court of Appeals. This Commission was created
6 by Congress and is charged with various functions
7 which I will mention in a moment.

8 First, I would like to introduce, one of
9 the Commissioners on the five-person Commission is the
10 Honorable Pamela Ann Rymer, Judge of the 9th Circuit
11 Court of Appeals, it's nice to have her with us here
12 today in the south. As you can tell, I'm from the
13 south. And, we have Professor Emeritus from
14 University of Virginia Law School, Daniel Meador, who
15 is Executive Director.

16 I'm Lee Cooper of Birmingham, Alabama,
17 another Commissioner and Vice Chair of the Commission,
18 which is chaired by Retired Justice White.

19 The purpose of the act that Congress
20 created this Commission was to study the present
21 division of the United States into several judicial
22 circuits. We are also to study the structure and

1 alignment of the Federal Court of Appeals system, with
2 particular reference to the 9th Circuit Court of
3 Appeals, and we have an obligation to report to the
4 President of the United States and Congress our
5 recommendations for such changes in the circuit
6 boundaries or structure as may be appropriate for the
7 expeditious and effective disposition of case load of
8 the Federal Court of Appeals, consistent with the
9 fundamental concepts of fairness and due process.
10 This Commission really has a broad mandate
11 to examine the entire federal appellate system and
12 make recommendations to strengthen and improve it.
13 As was stated in the Announcement of Public
14 Hearings, the Commission is interested in obtaining
15 views on whether each federal appellate court renders
16 decisions that are reasonably timely, consistent among
17 the litigants appearing before it, and are nationally
18 uniform in their interpretation of federal law, and
19 that they are reached through the processes that
20 afford appeals adequate deliberative attention of
21 judges.
22 The Commission has much to do within a

1 relative short period of time. We have public
2 hearings also scheduled in Dallas, New York City, San
3 Francisco and Seattle. In undertaking this important
4 mission concerning the administration of appellate
5 judges in this country, we welcome the views of all
6 interested persons, either as witnesses at the hearing
7 or in writing.
8 We are pleased to call as our first witness
9 at today's hearing, and the first hearing we are
10 having for this Commission, is the Honorable Judge
11 Joseph Hatchett, Chief Judge of the United States
12 Court of Appeals for the 11th Circuit. Judge, we
13 appreciate you being with us today.
14 CHIEF JUDGE HATCHETT: Good morning, thank
15 you.
16 Let me welcome you to the 11th Circuit, to
17 Atlanta, and to this very historic building, the
18 Tuttle Federal Courthouse Building.
19 I have previously supplied a statement with
20 flow charts, and appendix and rules to the Commission,
21 and, basically, what I'm going to say to you this
22 morning has already been stated in that statement.

1 I was appointed to this court in 1979, and
2 as I stand here now I remember that I haven't stood
3 here since 1978, when I appeared before the President
4 Carter Nominating Commission for the 5th Circuit at
5 that time. I must have done well, because my name was
6 submitted to the President and I stand here as the
7 Chief Judge of the circuit today.
8 Let me start in and tell you where I'm
9 going to end, really. The 11th Circuit doesn't need
10 any splits. The 11th Circuit doesn't need any
11 additional territory. Florida, Georgia and Alabama is
12 just about right for this circuit.
13 Of course, as you recall, we started as
14 part of the 5th Circuit, but since 1981 it seems to
15 the court that our geography is just fine.
16 What I do want to talk to you about is what
17 Chief Justice Renquist discussed at some length in his
18 1997 end of the year report. He talked about
19 resources and the work load. We talked about how far
20 from the traditional appellate process can we go, and
21 still have a court of appeals that is doing well. How
22 much can we delegate to law clerks, and to staff

1 attorneys, and how much can we fail to have oral
2 arguments, and how many opinions cannot be written
3 before a circuit is not doing a good job?
4 And, as you read the charge of the
5 Commission, there's a special portion right at the end
6 that you read that said that you are to ensure that
7 the cases are receiving the deliberate attention of
8 judges, not law clerks, not staff attorneys, but
9 judges. That's what I'm here to talk to you about
10 today.
11 Let me say right away, the hardest working
12 judges in this country are in the 11th Circuit. We
13 have the largest case load per judge, we work harder,
14 and the numbers that I will give you here will prove
15 that this is the busiest Federal Appellate Court in
16 the country, and we've been struggling for years now
17 to keep up with this blossoming and exploding case
18 load, and much of what we've been able to do is
19 attributable to former Chief Judge Gerald Tjoflat, who
20 served as Chief of this court for the last seven
21 years, and who has made every change that can possibly
22 be made to keep the court abreast of the case load and

1 still do a good job.

2 I want to say, as I understand what the

3 Commission has to decide, the basic question, the

4 question at the end will be, can a large circuit court

5 of appeals work well? If the answer to that question

6 comes out yes, after all of your hearings and

7 considerations, then the appellate structure of the

8 courts are going to look about the same, maybe with a

9 few lines changed. But, if you answer that question

10 no, then there are going to be all kinds of changes.

11 Some of them that have been suggested are pretty

12 drastic. For example, it's been suggested if a large

13 circuit doesn't work well, have a single court of

14 appeals for the entire nation, or have six jumbo

15 circuits, or many, many small circuits, or even

16 divisions within the same circuit.

17 I'm talking about a large court, but from

18 all of the readings, especially from the readings and

19 the writings of Professor Elvin (phonetic), the 11th

20 Circuit is not now a large circuit. A large circuit,

21 in the literature that I've read, has been defined as

22 a circuit with more than 15 judges. This circuit now

1 has 12 active judges, and so it's not a large circuit
2 at all. We have 12 active judges, we have ten senior
3 judges, and six of those senior judges are working
4 almost as much as an active judge, and that's how
5 we've been able to keep up to this point with our case
6 load.
7 But, we have had the same number of judges
8 since 1981, when we split the 5th Circuit, and it was
9 simply by chance. Twelve judges lived east of the
10 Mississippi and 14 lived on the other side of the
11 Mississippi, and that's how this court ended up with
12 12 judges. At that time, we had 16 staff attorneys.
13 We still have the same 12 judges, and we have an
14 authorized strength of 47 staff attorneys.
15 Last year, 1997, 6,102 appeals filed,
16 that's a 30.5 percent increase since just 1991. It's
17 a 158 percent increase since 1981, and all of that is
18 reflected on Appendixes A and B attached to my
19 statement. We are first in the nation on appeals per
20 panel, 1,518 appeals per panel, that's 17.9 percent
21 higher than the 5th Circuit with its 17 judges, and
22 that's 600 more cases per panel than the 9th Circuit

1 with its 28 judges. We are first in terminations on
2 the merits per active judge, 792, 34 percent higher
3 than the 5th Circuit, which is the next highest
4 circuit, and 274 more than the 9th Circuit with its 28
5 judges. Written decisions, 25 percent per active
6 judge, 33 percent higher than the 5th Circuit, and you
7 have all of that in my statement and it's reflected in
8 the appendices attached to the statement.
9 If you were to apply the new judgeship
10 formula previously used by the administrative office,
11 and I know it's no longer used, but if you would apply
12 that formula this court would be entitled to 27
13 judges. That would be a 125 percent increase over its
14 current size, and I've already mentioned the 9th and
15 the 5th as the other very busy courts and how we stack
16 up with them.
17 What have we done to try and manage this
18 case load? Staff attorneys, as I said, authorized
19 strength 47, there are 43 on board today. They are
20 doing summaries of cases in some special categories,
21 Social Security cases, black lung cases, pro se cases,
22 (inaudible) guidelines cases.

1 We have used visiting judges, one year as
2 many as 21, but these judges come in and they stay one
3 week, they hear oral argument cases only, and about 20
4 cases per week, and then they fly back to their
5 stations. They do not help us at all in criminal
6 cases, capital cases. They don't help us in 70
7 percent of our cases, because 70 percent of our cases
8 are not heard in oral argument. They do not help us
9 with motions, nor with petitions for rehearing, and
10 they miss the very important en bloc discussions as
11 well as the actual sessions.
12 As to law clerks, once upon a time each
13 judge had three law clerks, two secretaries. Most of
14 the judges at this point in our court now have one
15 secretary, four law clerks, and many of them are
16 career law clerks. That's the pressure of trying to
17 keep up with this case load by giving more and more
18 duties to people who are not Article III judges.
19 What else happens when the case load goes
20 up and you don't have judgeship power? Well,
21 everything else is affected. For example, look at our
22 history on oral arguments in this court. 1986, 49

1 percent of the cases, that's about half of the cases
2 heard in oral argument. 1991, it had dropped to 44.4
3 percent. In 1997, we are down to 30 percent. This
4 means that 70 percent of the cases are not heard in
5 oral argument.
6 As judges are busier, and busier, and
7 busier, less time is afforded for published opinions.
8 The same history on published opinions, 1988 33
9 percent of the cases were published opinions, 1991 it
10 dropped to 28 percent, in 1997 it's down to 15
11 percent. There are only 20 signed opinions per active
12 judge, the national average is 50, that's the least in
13 the country, and that's reflected in J and K of my
14 attachments.
15 But, the most telling thing about all of
16 this, and what is happening here for the life of
17 judges, is our million disposition time. It's taking
18 14.1 months to dispose of a case from the Notice of
19 Appeal to final determination, that's the longest in
20 the Federal Circuit, and that's as to all cases,
21 criminal cases, as well as civil cases and prisoner
22 petitions, 14.1 months. Needless to say, that is not

1 in accord with the State Senate for Courts Standards,
2 it's not in accord with the ABA Standards for
3 Appellate Practice, that is simply too long a
4 disposition rate, and that's the kind of pressure, and
5 that's the result you get when there are not enough
6 judges to handle the work that is coming across their
7 desk.

8 So, the conclusion is, in this circuit now
9 we have little oral argument, many of the cases are
10 not conference, there are no published opinions, and
11 most of the opinions are unsigned and many time
12 unpublished. What am I saying to you? This circuit
13 needs more judges. We are not a large circuit, we
14 will not be a large circuit if we receive three more
15 judges. And, the horror story that I've just
16 described to you, in terms of the traditional process,
17 will be wiped out.

18 Well, what's the answer to all of these
19 problems? Well, one thing, we can limit jurisdiction.
20 Well, that's not likely, that's been around for a
21 long, long time, and even after the court's long-range
22 plan has been filed, developed and studied by the

1 Congress and everyone else, the Congress felt it
2 necessary to appoint this Commission. And, I recall
3 in a hearing that I attended, along with Judge
4 Tjoflat, when we were testifying and one of the judges
5 at that hearing suggested that Congress should take
6 away some of the jurisdiction.
7 Senator Durbin (phonetic), of that
8 committee, said hold on one minute, Judge, it's our
9 job to decide about jurisdiction. Tell us what
10 resources you need to handle what we assign to you.
11 And, I think that's going to continue to be the answer
12 that Congress gives, and if that is true then we have
13 to find other ways to take care of the problem that's
14 facing us.
15 The importance of circuit expansion make
16 two or three arguments that I want to comment on.
17 Number one, increasing the number of judges leads to
18 instability in the law, inter-circuit splits, and a
19 higher appeal rate, that's one charge. The second,
20 more choices destroys collegiality. Third, more
21 judges deteriorates the quality of the bench. And,
22 fourth, it's too costly to add judges.

1 I want to go through those one at a time.
2 Instability and inter-circuit splits, there's simply
3 no evidence to support that proposition that adding
4 more judges will cause instability and inter-circuit
5 splits, or confusion in the circuit's law. If that
6 were true, then every court over 12 would have a court
7 that is rendering instability in the law, and instable
8 decisions, and we know that's not true.
9 On the other hand, if more judges, more
10 appellate judges, create more cases, there should be
11 a relationship between the number of judges and the
12 rate of the appeals. There is no correlation, there
13 is no relationship between the number of judges on a
14 court and the rate of appeals. The rate of appeals
15 are about the same, whether you are talking about the
16 9th Circuit, or the 2nd Circuit, or the 5th Circuit.
17 We know there's a large number of criminal cases being
18 appealed from all of the circuits. It has nothing to
19 do with the number of judges, it has to do with the
20 manner that most of our circuits require court-
21 appointed lawyers to stay in the cases and to file the
22 Notice of Appeal. It has nothing to do with the

1 number of judges.

2 Collegiality, that's mostly a myth. The
3 judges of this court and the judges of most courts get
4 together at en bloc sessions, in this circuit en bloc
5 sessions are held three times a year for about three
6 days each time. We are scattered all over these three
7 states. We don't see each other as often as you might
8 think, especially since we have at least one visiting
9 judge on every oral argument panel, and surely then if
10 visiting judges do not destroy collegiality then
11 adding three more permanent judges, who would take
12 part in all of the court's work, including its
13 meetings, its committees, its conferences, we would
14 have a much better, and a better collegiality among
15 our judges.

16 It deteriorates the quality of the bench,
17 is one of the things that is said. Well, the 80,000
18 lawyers practicing law in Florida, Georgia and
19 Alabama, 50,000 in Florida alone, and surely you don't
20 deteriorate the bench by selecting three lawyers from
21 such a large number of law professors, senior
22 partners, federal trial judges, state appellate

1 judges, and so I can't -- I'm sure you can't believe
2 that that's a serious assertion that we can't find
3 people that can do this job.
4 It's too costly is another statement made.
5 Let's assume that it's $475,000.00 to $600,000.00 per
6 year for salaries, benefits and chamber support. I
7 say that's a good bargain for what the American people
8 get. After all, the Federal Judiciary's budget is two
9 tenths of one percent. The people that we bring in as
10 law clerks are at the top of their classes. The
11 judges who are selected to this court would be senior
12 partners making far more money in any law firm. The
13 staff people that we hire are above and beyond what
14 you would find in the private sector in most areas.
15 So, if we are spending $600,000.00 per year for
16 chamber support, for salaries and for benefits, then
17 it's a good deal and that should not stand in our way.
18 I am prepared at this time to answer any
19 questions that you may have or to respond to any
20 comments that you want to make, but, basically, I have
21 two things to leave with the Commission. The 11th
22 Circuit is not yet a large circuit, three more judges

1 will not render it a large circuit. The circuit needs
2 help, and I think the figures that I have just given
3 to you prove that point. And, the other is, the cost
4 should not make any difference, and we are happy that
5 you are here, and welcome you, and I welcome your
6 questions or comments.
7 VICE CHAIR COOPER: Judge, thank you so
8 much. You honor us with your presence.
9 Judge Rymer, do you have any questions?
10 JUDGE RYMER: Yes. Picking up on your last
11 and, indeed, your first comment, Chief, you say that
12 with the addition of three judges, which would come to
13 a total of 15, does not yet make your circuit a large
14 circuit, whatever that means.
15 But, if the rate of appeals continues to
16 increase at the same rate that it has been, that's a
17 drop in the bucket of what the need is or will be
18 soon.
19 CHIEF JUDGE HATCHETT: Yes.
20 JUDGE RYMER: That being the case, you
21 know, what would you suggest is the next step, because
22 the need will go beyond 15 quickly.

1 CHIEF JUDGE HATCHETT: Yes.
2 JUDGE RYMER: If it isn't already.
3 CHIEF JUDGE HATCHETT: Right.
4 Well, yes, I quite agree that at some point
5 three would not be enough. As I said, the formula
6 would say 27, but I don't want us to jump to that
7 number right away. I went on the 5th Circuit as one
8 of those 12 that ran the number of to 26, and 12 of us
9 came on at one time and it was a little chaotic, I
10 have to admit. So, it seems to me that we should go
11 in increments of maybe three at this time.
12 JUDGE RYMER: Yes, but what structures do
13 you see as being required in order to accommodate the
14 increasing number of judges which I think you are
15 recognizing as kind of inevitable?
16 CHIEF JUDGE HATCHETT: Well, I think once
17 you get to a large court, then there are some things
18 that you can do, and I understand that one of them is
19 being done in your circuit, that is, you can have --
20 issue analyses, where someone, or a staff of people,
21 go in to the clerk's office and identify the cases
22 with the very same issues, and then report to all of

1 the panels with cases with that issue, the fact that
2 other panels had them, and that they should discuss
3 the issue or at least be aware that another panel has
4 the issue. That keeps down instability, and I
5 understand that that's working well in the 9th
6 Circuit.
7 The other is also from your circuit, the
8 stop clock method, whereby one panel who reads an
9 opinion that seems to be in conflict with circuit
10 authority, simply tells the other panel, I think you
11 are making an error before ever talking about any en
12 bloc, and I don't know all of the details of stop
13 clock as used in that circuit, but we have never tried
14 that in this circuit. But, it seems to me that that
15 would work, if this court ever became a large court.
16 Of course, the less than full complement en
17 bloc court also works, I'm told, in the 9th Circuit,
18 but I have not thought through all of these
19 propositions because I'm not looking to make the 11th
20 Circuit now a large circuit. Three now, maybe five
21 years from now three or four more.
22 As I said at the beginning, from the case

1 law from the time that Judge Tjoflat became Chief, we
2 probably could have gone up to 21 judges on just the
3 case load, but we've been struggling all of these
4 years to keep that number down and still do the good
5 job. It's simply my point that at this point we need
6 to move forward because we are getting to the point
7 where we can't do the good job anymore with just 12.
8 But, yes, this court sooner or later is
9 going to be a large court, and I would hope that it
10 would grow in increments of three or four, rather than
11 12 or 13.
12 JUDGE RYMER: You, obviously, are concerned
13 about the number of cases that do not get oral
14 argument, since you mentioned it.
15 CHIEF JUDGE HATCHETT: Yes, I am.
16 JUDGE RYMER: If I understand it correctly,
17 for example, about three quarters of the criminal
18 cases decided on the merits do not get oral argument
19 in the 11th Circuit.
20 CHIEF JUDGE HATCHETT: That is correct.
21 JUDGE RYMER: And, there are also a very
22 high percentage of unargued cases that are disposed of

1 without any reasoning, I mean, without a reason and
2 disposition.
3 Are you concerned that the quality of
4 justice being administered is adversely affected by
5 those two things, and what thoughts would you have
6 about redressing it if you are?
7 CHIEF JUDGE HATCHETT: Yes, I'm concerned
8 about both of those.
9 First, as to oral argument, we have been
10 using a round robin system of sending a file to an
11 initiating judge, who writes an opinion, sends it to
12 the second judge, that judge either signs on or sends
13 the case to oral argument, then to the third judge who
14 either signs on that opinion or sends the case to oral
15 argument. So, every case, really, has the opportunity
16 of going to oral argument.
17 But, 70 percent of our cases are not going
18 to oral argument, and I believe that oral argument is
19 a superior way, it's the only way to decide if a case
20 if, if everything is perfect. It's not perfect, so we
21 have to do something less than that, but there's
22 nothing more important than letting the lawyers state

1 their cases to the judges face to face, and the judges
2 having the opportunity to inquire about what happened
3 at the trial, as to what law applies, why the law fits
4 these particular facts. You simply can't get that by
5 sending a file from one office to the other.
6 Now, I admit that there are some cases that
7 surely should not go to oral argument, but when it
8 gets up to about 70 percent I start to worry that
9 there must be some issues there that needed to be
10 fleshed out completely and were not.
11 And, that's my same point as to published
12 opinions. The lawyers in this circuit, and the
13 lawyers everywhere, depend upon the court of appeals
14 to state the law. This is probably the last place
15 that any rule of law is going to be made for the
16 average case, and if we simply say or affirm the
17 (inaudible) rule it doesn't tell the lawyer anything
18 about the theory that was advanced, it doesn't tell
19 the client why the client lost, it leaves everyone in
20 a fog, even judges on the same court. Because if I
21 get an opinion that says affirmed from a panel, the
22 only way I know what the issues are is to sit and get

1 the file and go through those issues.

2 It seems to me that the more we can tell

3 lawyers, and clients, and even other judges, while we

4 are deciding a case a certain way the better, and at

5 some point you are not doing enough of telling the

6 world what the law of the circuit is.

7 VICE CHAIR COOPER: Judge, let me ask you

8 a question. One of the possibilities is the fact

9 that, not limiting jurisdiction, but maybe coming up

10 with a procedure where you might have three district

11 judges being an intermediate appellate court to ease

12 the work load for the Court of Appeals, or

13 alternatively appellate commissioners which would be

14 akin to magistrate judges at the district level. Has

15 anybody talked about that in this circuit?

16 CHIEF JUDGE HATCHETT: Yes. It's been

17 discussed, let me talk about having three district

18 judges review a colleague's work. That will not work.

19 That doesn't even work on a Court of Appeals.

20 For example, we need visiting judges. One

21 way of getting a visiting judge is to reach down and

22 get a senior district court judge, but what happens,

1 you have to move all of your cases from that district
2 on to another panel, and if you have a district judge
3 on that panel you have to move them again. In other
4 words, a judge from the middle district of Florida
5 doesn't want to sit on judges' work out of that
6 district. And so, it simply won't work to go into a
7 district and have three judges out of a five judge
8 district and say, why don't you tell us whether your
9 colleague next door decided this case correctly.
10 We have tried that in this court, and it
11 causes more confusion than anything else, because
12 these judges simply don't want to sit and judge their
13 colleagues, many of the times when they've sat at
14 lunch and discussed the cases while they were under
15 trial, not knowing that there would be any appeal at
16 all.
17 Your other was about a commissioner. No,
18 I think we need judges, not non-Article III personnel
19 doing most of this work, and we can continue to bring
20 in more and more paralegals, and more and more staff
21 attorneys, and law clerks, and commissioners, but the
22 people of this country, I believe, want Article III

1 judges making their decisions.
2 VICE CHAIR COOPER: You only asked for
3 three additional judges, when under the old formula,
4 which we know no one is using, but that's the good
5 benchmark, you would be entitled to 27. Tell me why
6 only three out of 27 you would be entitled to under
7 various work loads.
8 CHIEF JUDGE HATCHETT: Well, three now. I
9 agree with Judge Rymer that, yes, this court is going
10 to keep growing, but I, as I said, my experience was
11 going on the 5th Circuit with 11 other judges, and it
12 didn't work very well, and we split within two years.
13 We didn't know each other at all, never did get to
14 know each other. The court had split before I had
15 ever really -- well, I never sat with all of the
16 judges from the western part of the district.
17 So, what I'd like to see is, let's have
18 three judges now, let's see what we can do to keep up
19 with the case load. The case load may level off. In
20 fact, this year it has leveled off at 6,000 cases,
21 rather than going on up to 7,000. But, yes, at some
22 point we are probably going to need more, but let's

1 just ease along, let's not go to 12 and 13 judges on
2 a court at one time.
3 VICE CHAIR COOPER: Having had, I guess,
4 two years you've served on the 5th Circuit, how many
5 judges is too many on a circuit?
6 CHIEF JUDGE HATCHETT: Well, I don't know
7 how many are too many. Under the circumstances that
8 prevailed in the 5th Circuit, when it got to an
9 authorized strength of 26 with 24 on board, that was
10 too much, in the absence, in the absence of some other
11 changes.
12 No one ever thought at that time about
13 having an en bloc court of less than the full
14 complement, for example. Had we put that into the
15 mix, perhaps it would have worked, but the en bloc
16 function, the way we did it at that time, simply did
17 not work.
18 The stop clock that I mentioned, that may
19 work. We've learned a lot from the 9th Circuit, and
20 from the other circuits who have grown large since we
21 split the 5th Circuit, but, yes, 26 was too many the
22 way we tried to operate the court at that time.

1 PROFESSOR MEADOR: Judge, let me pick up on
2 a point that Mr. Cooper raised about the idea of some
3 reviewing activity at the district level. What you
4 described, as I understand it, is a situation in this
5 Court of Appeals where there's a lack of appellate
6 capacity.
7 Now, the suggestion he brought up is one
8 that's been made, one way to increase appellate
9 capacity in the system is to install a district level
10 review.
11 Now, there are a lot of ways that can be
12 configured. Suppose instead of having district judges
13 from the district under review, you had two district
14 judges from another district sitting with one circuit
15 judge, and they would offer a first level of review
16 for some categories of cases, if not the whole docket,
17 at least some significant categories of cases would go
18 there in the first instance, and take the pressure of
19 the Court of Appeals, what would be your reaction to
20 that idea?
21 CHIEF JUDGE HATCHETT: Well, that's better
22 than simply what Mr. Cooper suggested, but the problem

1 there is, you are going to have your district judges
2 recusing, being disqualified because they have the
3 same issues pending in their court, or pending on
4 their own dockets, and so you have that problem to
5 worry about, recusals because of the same issues, even
6 from judges outside the district that's under
7 consideration.
8 JUDGE RYMER: But, if the review were
9 limited to say trial errors, and not to issues of law,
10 functional equivalence of motions for new trial.
11 CHIEF JUDGE HATCHETT: That probably would
12 work, yes, if it's nothing but trial error correction,
13 but if it's law declaring then it would not work.
14 But, yes, if you limit it to errors, that would
15 probably work, and would be educational for the
16 district judges, I think.
17 PROFESSOR MEADOR: Let me ask a question
18 about oral argument, is there some level -- is there
19 a way you can know, or this Commission can know, where
20 the right level of oral argument is? At one time you
21 said the court here had about 50 percent of cases
22 argued orally, now you are down to 30, where is -- is

1 there some optimum level of oral argument that an
2 appellate court ought to achieve?
3 CHIEF JUDGE HATCHETT: Well, I don't think
4 you can set an exact number, it will vary from
5 district to district, and according to the kind of
6 litigation that -- I'm sorry, from circuit to circuit,
7 according to the types of cases.
8 But, surely, constitutional issues, for
9 example, you want to hear an oral argument. Large
10 cases on personal rights, discrimination cases, for
11 example, oral argument is very, very helpful there.
12 PROFESSOR MEADOR: You say you are uneasy
13 at 30 percent, is that -- did I understand you
14 correctly, 30 percent is too low in your view?
15 CHIEF JUDGE HATCHETT: Yes, it is.
16 PROFESSOR MEADOR: What would make you
17 comfortable, what is the percentage at which you would
18 feel comfortable?
19 CHIEF JUDGE HATCHETT: I can't tell you an
20 exact figure. I would guess that it would fall
21 somewhere close to 50 percent. I just believe that
22 there are not -- there are a large number of frivolous

1 cases in the system. There are a large number of easy
2 cases, but I don't think that three fourths of them
3 fall into those categories.
4 VICE CHAIR COOPER: Judge, thank you very
5 much. We appreciate you taking the time to be with
6 us, and your thoughts have been very helpful to the
7 Commission.
8 CHIEF JUDGE HATCHETT: Thank you, sir.
9 VICE CHAIR COOPER: Thank you.
10 We have as our next witness the Honorable
11 Gerald B. Tjoflat, who is a former Chief Judge of the
12 Court of Appeals of the 11th Circuit, and it's nice to
13 have you with us, and appreciate you being with us
14 here this morning, Judge.
15 JUDGE TJOFLAT: Thank you, Mr. Chairman.
16 I haven't been in the well of this court in
17 30 years, and it's an awesome sight, especially when
18 you have judges down both sides as we used to have in
19 the 5th Circuit when we had 26.
20 VICE CHAIR COOPER: It's very difficult for
21 a practicing lawyer to sit up here, I can assure you.
22 JUDGE TJOFLAT: Well, I hope you are

1 enjoying yourself up there.
2 I'm grateful for the opportunity to appear
3 before this Commission. Let me say as a matter of
4 preface that I think your coming is long overdue, that
5 this Commission is needed, and I applaud its task, and
6 how it is going about it.
7 I didn't come here prepared, although I am,
8 to discuss the 11th Circuit as if we were appearing
9 before the Commission for some relief for the 11th
10 Circuit, and we are not concerned that much about the
11 rest of the country.
12 Judge Hatchett and I have both testified
13 before the Senate Subcommittee on the Oversight
14 Hearing on the 5th and the 11th Circuits, touching on
15 many of the questions and issues that he raised, and
16 I hope you ask me some of the questions that you asked
17 him, and that record is fully developed, so to some
18 extent, with leave of the Commission, I'll submit some
19 documentations that will touch on the question of
20 percentages of oral argument and things of that sort,
21 why the oral argument percentages have dropped from,
22 say, ten years ago.

1 Putting that aside for the moment, I begin
2 with the notion that the Article III Judiciary is a
3 scarce dispute resolution resource. It is scarce
4 under the present framework in which everybody who is
5 a litigant in an Article III court has an appeal as a
6 matter of right, because its size is constrained by
7 the size of the courts of appeals.
8 So, given that there is a limit to which a
9 court of appeals may grow in size, there is
10 necessarily a limit to the number of cases under the
11 present format of litigating cases that can be brought
12 into the system.
13 I've been in this system since 1970. I was
14 a state judge for two years and then went on the
15 district court in 1970, and sat in the middle district
16 of Florida and went on the 5th Circuit in 1975, and so
17 I've seen a lot of water go over the dam as it were.
18 In the early days, the Federal Judiciary
19 would -- to confront the rising case load, would
20 simply tell the Congress that we need more bodies to
21 throw at the problem, more Article III judges, more
22 staff, more this, more that. And, we would create

1 more judgeships, and more judgeships didn't solve the
2 problem.
3 The courts of appeals, with the exception
4 of the old 5th and the 9th, which when I was sitting
5 on the old 5th at 15 they had 13, were the two large
6 courts. We had, in the old 5th, about almost a
7 quarter of the nation's business. I don't recall the
8 percentage of the nation's business that the 9th had,
9 but it wasn't far behind. The other circuits, I sat
10 as a district judge in 1972 in Boston, and if I
11 recollect at that time the 1st Circuit had three
12 judges so they were always sitting en bloc. Bailey
13 Aldridge, Judge Aldridge, was a senior judge then, and
14 once in a while they had senior district judge
15 sitting, but life was extremely simple there. And so,
16 it was in some of the other circuits which were
17 relatively small.
18 About five years ago, to my recollection,
19 the Judicial Conference formed a long-range planning
20 committee, and I remember meeting at the supreme court
21 with the other members of the conference and committee
22 chairs, as we undertook studying what can we do with

1 this branch of government. And, I remember Abner
2 Mickla (phonetic), who was then either Chief Judge of
3 the D.C. Circuit or he was chair of a committee, but,
4 at any rate, we were all gathered in one of the big
5 rooms up there at the supreme court, and this was the
6 opening session, and he made the remark that I just
7 made, so I got it from him, and that is that the --
8 this is coming from a former Congressman now -- that
9 the Judicial Branch has been speaking out of one side
10 of its mouth so long that all we need are more judges,
11 that you'd have a hard sell to educate the Congress as
12 to the problems of the Federal Judiciary, and that
13 some things have to be done, the very sorts of things
14 that you are going to explore during the life of your
15 existence on this Commission to change things, because
16 more bodies simply aren't going to solve the problem,
17 they just make it worse.
18 Now, we judges on the court of appeals have
19 two functions. One is correcting trial court error,
20 and the other is making law. And, the more clear and
21 the more stable the rule of law is, and the more
22 capable the rules of pleading are of defining issues

1 narrowly, the greater the percentage of cases that
2 will be decided, not in terms of making law by the
3 court of appeals, but rather did the trial judge
4 commit reversible error in admitting or excluding
5 evidence or in some such fashion, or in conducting the
6 trial.
7 I highlight this point by observing that in
8 our circuit, for example, and this is historic, this
9 is nothing new, and I believe it's probably the case
10 in other circuits, about 95 percent of criminal
11 appeals, in terms of the trial, I'm putting sentence
12 aside, are affirmed, 95 percent, just around that
13 number, 94 to 96, it floats in the mid-'90s, that's a
14 historical fact.
15 Nobody has been able to tell me how it is
16 that a district judge who is reversing on five percent
17 of the criminal cases that he or she tries, some of
18 which last months, some of which multiple defendants,
19 some of which are loaded with complex allegations like
20 rico (phonetic) charges, can try an error-free, not
21 reversible error-free trial, 95 percent of the time,
22 and given in addition that the standard of review in

1 criminal case is tougher than it is in civil cases,
2 that we'd find plain error in some criminal cases, and
3 yet the same judge can't try half of the civil cases
4 that come to trial before him or her without
5 committing reversible error.
6 Now, our task -- the reason for that is
7 that criminal cases are pleaded, basically, under what
8 we used to call common law or code pleading, wherein
9 everybody knows what is required to be stated in an
10 indictment to make out an offense, and the issues are
11 well joined by a not guilty plea, that's a two-word
12 plea, and everybody knows what the jury instructions
13 are to be, we have pattern in jury instructions in
14 this circuit which piecemeal receive the imprimatur of
15 the court of appeals, and so about all we review in
16 most criminal cases is how the judge tried the case.
17 And, by and large, it really has to do with
18 did the lawyers get out of hand, that's many of the
19 cases in which we hear oral argument. But, assuming
20 that you have an ethically tried case, then you are
21 reviewing evidentiary errors, order of proof errors,
22 and the records in the pretrial hearings, which are

1 little mini bench trials determining motions to
2 suppress, or physical evidence seized on a search, or
3 motions to suppress statements, but those are simple
4 proceedings. The trial is a simple matter, and that
5 is why 95 percent of the criminal cases are affirmed
6 on appeal, and that is why we hear oral argument in
7 far less criminal cases than we do, say, in civil
8 cases.
9 The civil side of the docket, in which the
10 cases are framed by what I call notice pleading, under
11 the rules occupy the great percentage of the cases
12 that are brought to oral argument, and that is because
13 through our screening process the judges have a
14 difficult time sometimes discerning precisely what it
15 was that was tried.
16 By engaging in these comments, I am
17 suggesting that one of the things that this Commission
18 ought to do, and one of the things that should have
19 been done a long time ago, is a reexamination of the
20 whole body of rules pursuant to which we litigate
21 civil cases. We have been amending civil rules in a
22 piecemeal fashion, sort of an aspirin type relief for

1 a cancer, by tinkering with this rule or that rule,
2 and all we do is produce, like with rule 11, satellite
3 litigation.
4 In any event, so half of our -- one of our
5 tasks is determining error in the litigation of a
6 case, and I say that when the law is settled, and the
7 pleadings well define the issues, that is a relatively
8 simple task.
9 The other part of our function is
10 lawmaking, and putting aside the notion, the
11 acknowledgement that we do some lawmaking, even in
12 those what I call cases that are framed in a clear
13 way, mainly lawmaking in a procedural area, and that's
14 another reason why a lot of these cases don't need to
15 be published because we are simply looking -- the
16 opinions -- we are simply looking to see whether or
17 not there's trial court error. We publish far too
18 many opinions as a whole, I'm talking about the system
19 does, as it is, which complicates matters for citizens
20 and for lawyers trying to discern what the rule of law
21 is in the circuit.
22 So, now we are on the lawmaking function,

1 and in that regard size of a court is extremely
2 important because the greater the number of judges you
3 have the greater the potential that one panel's
4 decision is going to conflict with another, and the
5 greater --
6 (Whereupon, tape change.)
7 JUDGE TJOFLAT: -- referred to in the
8 statement, not written by myself and by others. The
9 more time that I've got to spend, and that's was the
10 problem in the old 5th Circuit, you spent three
11 quarters of a day reading slip opinions coming down by
12 other judges, and trying to pay allegiance to the rule
13 of law, and we did it not by having a mini en bloc
14 court, but by having everybody sit en bloc, so it
15 became a serious proposition, that's a painful thing
16 for having 26 judges sitting around a conference table
17 trying to decide cases, much less hear oral argument.
18 So, I conclude from having sat in en bloc
19 courts with as little as six judges on our court when
20 we only had nine judges, because we had three
21 vacancies, and we had three disqualifications, we sat
22 with six, I sat with six, every number between six and

1 26, and I can tell you that the problems of coming --
2 lawmaking increase exponentially as you increase the
3 size of the judges. Maybe one more judge from six to
4 seven, you can tell the difference, you can tell the
5 difference when you jump from seven to ten, and from
6 there on you can really tell the difference as you
7 keep adding people to the court.
8 Now, so what should be done? Well, I think
9 that there's no question that we have to consider
10 seriously realigning the circuits if we are going to
11 bring them into some kind of a manageable size. The
12 four objectives of the Commission, dispositions of
13 cases must be timely, smaller courts of appeals are
14 going to produce, assuming that the judges are
15 discharging their responsibility to read their
16 colleague's work and to maintain a clear rule of law,
17 disposition will be more timely. Outcomes will be
18 more consistent among litigants, no question.
19 Decisions should be uniform among circuits, and the
20 question, though, when you have more circuits, let's
21 suppose that the realignment produces more circuits,
22 I suggest that by having smaller courts you are going

1 to cut down probably on inter-circuit conflict because
2 there will be more time for deliberate decision-
3 making. And, the fourth objective, verbative
4 attention, appropriate attention is the word I think,
5 to each appeal.
6 The question is, what to do with the 9th
7 Circuit. I had the thankless responsibility of
8 answering that question when the Full Senate Judiciary
9 committee entertained the 9th Circuit split bill about
10 27 or 28 months ago, October, '95, I think it was, and
11 one of the senators asked me what to do about the 9th
12 Circuit, I was invited up there to testify by the
13 committee, simply because I was the last active judge
14 of the old 5th Circuit still kicking around, and we
15 had wrestled with the 26 judge problem, and I said
16 that was a parochial problem, I was from the
17 southeast, and that was a West Coast problem, and they
18 said, no, you've got to answer it.
19 The answer in my judgment is to cut
20 California in half. Of course, the objection to that
21 is, what about state law? Well, in our circuit we
22 have -- each state can receive, the supreme court can

1 receive certified questions from the court of appeals,
2 and that's how we follow state law in this circuit, if
3 there's an undecided question, and it's a case -- just
4 not an off-the-wall case that will never repeat itself
5 -- but some case in which we don't want to get out of
6 step with the state high court, we simply certify the
7 question. The California law problem, in my judgment,
8 would be resolved if the two circuits could certify
9 California questions to the California supreme court.
10 Now, there are other things that need to be
11 explored. One has to be, and some of these are
12 exclusively congressional prerogatives, it's Congress'
13 responsibility to decide what kinds of cases we
14 entertain. I don't think the Judiciary and the
15 Judicial Conference has done its best over the years
16 to stay away from calling that shot, whether we should
17 have Social Security cases, or FELA cases, or this
18 case or that case, that's a congressional prerogative
19 that we tell Congress we can't take all the cases you
20 are giving us, then Congress has got to prioritize.
21 Now, Congress has acted in two respects in
22 this area, not so much whether we'll take the case or

1 not, but how we'll take it, and that's the Prisoner
2 Litigation Reform Act, which the acronym is PLRA,
3 which is having an effect, and I suggest that the
4 effect will really be realized, assessed at any rate,
5 probably in this coming year, and the reason I say in
6 the coming year is because it's taking the district
7 courts some time to settle out how they are going to
8 do the gatekeeping function and taking these prisoner
9 suits, civil rights suits.
10 The other thing that Congress has done, and
11 this has to do with collateral proceedings in both
12 federal and state criminal cases, is the Anti-
13 Terrorism and Effective Death Penalty Act, where you
14 have to petition for a successive petition, seek leave
15 to proceed from the court of appeals, that's another
16 thing that doesn't cut out the right, the access of
17 the court by the litigant, but it does act like leave
18 to appeal, or (inaudible) or something of that sort.
19 So, I think the whole idea of, perhaps, in
20 some cases limiting access to the court of appeals by
21 leave to appeal, for example, ought to be studied,
22 perhaps, in a pilot sort of a way, if that can be done

1 without violence to equal protection principles across
2 the country, treating different litigants differently
3 in different circuits.
4 We also ought to consider cost shifting
5 measures. Now, in a way the PLRA is a cost shifting
6 measure, by making prisoners before they bring suit
7 against those responsible for the conditions of
8 confinement, have to pay costs, even incrementally out
9 of their prison accounts, that's, in a way, a cost
10 shifting device, although other litigants have to pay
11 those costs anyway. So, that needs to be explored.
12 I don't know whether we should go as far as
13 the English system, but I think it needs to be
14 explored.
15 Then finally, Congress has got to decide
16 what other kind of resources we ought to have in
17 addition to just more parajudicial personnel. We were
18 a long time coming in the Federal Judiciary to achieve
19 the amount of automation that the private sector, for
20 example, has, and some of the other things that could
21 make our way of operation far more efficient.
22 But, I'll sum up my remarks by saying that

1 we are a scarce resource in the critical areas in the
2 lawmaking function, and we cannot, the courts of
3 appeals are constrained in terms of size especially in
4 that area.
5 I've thought about the idea of having
6 appellate courts of appeals dealing in criminal cases,
7 some in civil cases, dividing that up. I'm a strong
8 believer in the notion that we need more generalists
9 deciding appellate matters, rather than to have
10 specialists deciding these things. Some things we
11 have given to the federal circuit because they ought
12 to be there, patent appeals and things of that nature,
13 but I do believe strongly, and I think this would add
14 in the recruitment of the kind of people that ought to
15 be sitting on the courts, if you don't narrowly
16 confine them to one kind of -- to a subject matter,
17 such as criminal cases or something.
18 I'm open to questions, including why we
19 have less oral arguments than we used to have, and
20 things of that sort.
21 VICE CHAIR COOPER: Well, the question I
22 would like to have is, you said that you were put in

1 a position of having to answer what to do with the 9th
2 Circuit, and you said you were going to put the two
3 districts, I guess, the two northern districts in one
4 circuit, and the two southern districts in another,
5 did you also have to state what states went with
6 which?
7 JUDGE TJOFLAT: No. My understanding is,
8 California generates about 65 percent of the business
9 of the circuit, something like that, and I think that
10 one, state circuits are out, there's too much
11 parochialism if you have too few states, in my
12 judgment, in a circuit. It's good to have the
13 leavening effect of people from other cultures and
14 other ways of life.
15 So, California and Nevada would just be a
16 California circuit. So, I don't know how you would
17 divide it, but I think once you divided California,
18 then you can negotiate out where the lines ought to be
19 drawn.
20 VICE CHAIR COOPER: Let me ask you
21 something. Do you disagree, if I understand you, with
22 Judge Hatchett, that more bodies are not going to

1 solve the problems, that the 11th Circuit doesn't need
2 more bodies?
3 JUDGE TJOFLAT: I don't think the 11th
4 Circuit needs more bodies. I will submit some data
5 that will show the following, for example, last year
6 we ended the year with less pending appeals than we
7 did the year before. Given -- there are projections
8 where over about the next four years we'll cut the
9 pending appeals at the end of the year in more than
10 half.
11 The reason that we don't need more bodies
12 right now, in addition to the fact that three more
13 judges are not going to increase the total output of
14 the court by one third, by one quarter, if you go from
15 12 to 15 that's 25 percent increase, because it's
16 going to take more time for the three judges and
17 everybody else to assimilate the work being done by
18 those judges. So, you don't get three new judges, you
19 get less than three new judges.
20 The second reason is, is that because --
21 the reason we've been able to handle the business of
22 this circuit with the number of judges we had is, we

1 have a very stable rule of law in this circuit, in
2 most areas.
3 We account for less oral argument over the
4 years for two reasons. One is a stable rule of law,
5 and the second is the case mix. About 60 percent, 60
6 to 65 percent of our appeals are either direct
7 criminal appeals from district courts, federal
8 criminal prosecution, or they are 2255 cases, federal
9 habeas cases, collateral tax, or they are state habeas
10 corpus cases, or they are suits by prisoners against
11 their wardens and others in the institution,
12 challenging under the 8th Amendment conditions of
13 confinement. That's swallowing up almost two thirds
14 of our docket, it's even greater in the 5th Circuit.
15 And, why is that? It's because the prison
16 populations in our states, these three states, and the
17 new 5th Circuit states, keep burgeoning, and so as the
18 prison population burgeons we get more and more
19 prisoner cases.
20 Now, the pleadings, because of devices
21 we've employed in this circuit, in prisoner cases, for
22 example, are narrow issues, in effect, departing from

1 the rules of procedure altogether, with the exception
2 of rule 56, giving notice and such, has accounted for
3 the need of argument in those cases, very few of those
4 cases, notwithstanding the counselor appointed in
5 every case in which argument is given receive oral
6 argument.
7 Now, when you add to that body the
8 increasing number of employment discrimination cases,
9 again, in an area in which the law is more and more
10 settled, with the exception of the Americans With
11 Disability Act cases, the law in that area nationwide
12 is bouncing around, but sex discrimination, race
13 discrimination, ethnic discrimination, things of that
14 sort, those cases, the lawyers and judges are fairly
15 tuned in now to precisely how to, number one, plead
16 those cases, so there isn't any question, notice
17 pleading notwithstanding, in those kinds of cases
18 everybody knows you've got a race discrimination case
19 and it's a quid pro quo, or a case, for example, I was
20 going to say a sex discrimination case, or a pervasive
21 hostile environment case, the fact of the matter is,
22 less of those cases, as the law settled, as the issues

1 are sharpened, receive oral argument.

2 That accounts, these two bodies of cases,
3 the overall prisoner cases, plus employment
4 discrimination cases, account for the drop in the
5 percentage of cases going to oral argument, because
6 they are increasingly a greater percentage of the
7 docket.

8 VICE CHAIR COOPER: What do you think the
9 optimum judge size per circuit and --

10 JUDGE TJOFLAT: Around 12.

11 VICE CHAIR COOPER: -- and would you think
12 it would be a good idea to split every circuit that
13 got over 12?

14 JUDGE TJOFLAT: No, there's another thing
15 you can do about those, for example, the 4th Circuit
16 has two vacancies as I recollect. I also testified in
17 a hearing last February, oversight hearing, at the
18 invitation of the committee on the 4th Circuit, and
19 Chief Judge Wilkinson made the case, supported by
20 almost all of his colleagues, that they did not want
21 two judgeship filled.

22 They acquired three or four judgeships back

1 in the days when we just were throwing bodies at
2 numbers, and a Judicial Conference bill came out and
3 in they threw three or four judgeships, and they don't
4 need them, according to those judges. So, some
5 circuits, a look could be taken at whether or not
6 vacancies ought to be filled, in other words, the
7 position turn into a temporary position.
8 VICE CHAIR COOPER: Judge Rymer, do you
9 have any questions?
10 JUDGE RYMER: If the case load continues to
11 go up, what alternative is there to the effective
12 administration of justice but to increase the size of
13 the Judiciary, without cutting more corners, like
14 eliminating oral argument and not giving reasoned
15 dispositions?
16 JUDGE TJOFLAT: Well, one is jurisdiction.
17 Congress has got -- we've got to tell the Congress
18 that we're a scarce resource. We simply have to tell
19 the Congress that. We have to tell the Congress,
20 acknowledge that we told you in years past that we
21 just needed more judges, and it's like the little kid
22 who thought he liked ice cream, and he went to the ice

1 cream store and there was a five gallon can of ice
2 cream and so he said, daddy, buy me the five gallon
3 can of ice cream, and he didn't realize how sick he
4 was going to get until he ate the whole five gallon
5 can. His experience had been with one ice cream cone,
6 maybe with a double dip, or even a triple, but not the
7 whole five gallon can.
8 And, I think judges will tell you across
9 the country, appellate judges, we didn't realize what
10 was going to happen internally on our court until we
11 got extra judges, so we've got to change the tune that
12 send to the Congress.
13 Congress has got to decide what -- for
14 example, whether we should, because there's more money
15 in the federal government, we ought to prosecute every
16 state criminal offense. Congress has to decide that.
17 It's an economic issue.
18 Florida, for example, hasn't got any money
19 to build more prisons, but the federal government has
20 unlimited resources, and we have a tougher sentencing
21 law, because Florida moderates the population, for
22 example, by when it gets too crowded they just open

1 the spigot. And so -- and the people scream about a
2 murdered coming out in three, or four, or five, or
3 six, or seven years, so we put them in the federal
4 system. So, Congress, maybe they ought to give the
5 money to the states for more institutions, whatever
6 the case may be.
7 JUDGE RYMER: But, if that doesn't happen --
8 JUDGE TJOFLAT: If it doesn't happen?
9 JUDGE RYMER: -- if it doesn't happen, then
10 what's your suggestion?
11 JUDGE TJOFLAT: Well, if it doesn't happen,
12 and we can't change any of our rules under which we
13 operate, we've got to stay exactly the way that we
14 are, then I think that what ought to happen is we let
15 a crisis develop. We just stand pat and say to the
16 Congress, we can't function.
17 We either can make the law so garbled that
18 our citizens don't know what rights they have anymore,
19 that litigants file suit, somebody brings a contract
20 action, just some simple case, worth a lot of money to
21 the federal court, and can't be heard for some reason
22 or another, which is the case now in many respects,

1 and so they water down their rights, or the defendant
2 gets sued and has absolute bar to the suit.
3 So, if the law is not clear, there is no
4 way in the world citizens can anticipate their
5 conduct, their investments, or anything else. And,
6 there isn't any way in the world that I can spend all
7 day long reading my colleagues' opinions in an effort
8 to maintain clarity of the rule of law in the 11th
9 Circuit, which is what we all do, because when we sit
10 en bloc we all sit in bank, and somebody who
11 overwrites in a case faces an unpleasant experience in
12 a collegial, cordial way, when we sit around the table
13 and the case goes down 11 to one or some such thing,
14 so we monitor our opinions. And, the more judges we
15 have, and the more I've got to read, that means the
16 less time I have on my own opinions.
17 There isn't any way that a judge of our
18 court, we get 25, 30 judges, under that old number I
19 guess one time we were entitled to 29, somebody
20 moderated the number down to 27, why that would be a
21 nightmare, we wouldn't get anything done.
22 I don't think there's any question that a

1 court of appeals can get so large that if you add one
2 more judge you decrease the total number of cases
3 decided by the court, unless the rule of law goes to
4 blazes and you unpublish opinions when you want to
5 skirt around precedents, you just unpublish them, or
6 you just do a little gloss over here, and you do a
7 little gloss over there, and that creates disrespect
8 for the rule of law.
9 VICE CHAIR COOPER: Professor Meador?
10 PROFESSOR MEADOR: Back at the beginning of
11 the 11th Circuit, you had 12 judges, and as I
12 understand 16 central staff attorneys. You now still
13 have 12 judges, but 43 central staff attorneys, which
14 suggests they are doing a lot of things now they
15 didn't do back then. I suppose you have a diminution
16 in oral argument down from nearly half down to 30
17 percent, you've got a drop in published reasoned
18 opinions, put all these things together, do you see in
19 any or all of that, do you have any apprehensions over
20 whether overall the quality of the appellate process
21 has deteriorated in the court, that is, the cases are
22 getting less judge attention than they should, or that

1 the quality of appellate justice is not what it used
2 to be, is there anything to that at all?
3 JUDGE TJOFLAT: I don't think so one wit.
4 I think we hear argument in cases in which argument
5 would be helpful, and they are basically in cases in
6 which we are uncertain about exactly what happened in
7 the trial court. And the lion's share of those cases
8 are civil cases.
9 When we formed this circuit, we didn't have
10 standardized ways, for example, of processing pro se
11 prisoner litigation. We didn't have nearly as much
12 pro se prisoner litigation as we do now, in which
13 staff counsel don't decide the cases in my judgement,
14 staff counsel are extracting a record for this, or
15 that, or the other thing and putting something in a
16 manageable way for judges, so that the judge can make
17 a reasoned judgment.
18 When I went on the district court, in
19 prisoner cases we received prisoner petitions on
20 letter paper, on brown paper bag paper, all sorts of
21 ways, and I personally read every one of those, and
22 then what you would do is, you'd get ten or 15 pages

1 from a prisoner, you'd read it and then we had worked
2 out with the Attorney General of Florida, we'd enter
3 an order saying the prisoner has these nine claims,
4 one of them has merit, the other eight don't for a
5 couple of sentence reasons. And, we order the Attorney
6 General to file an answer.
7 Now we have pro se counsel, who, first of
8 all, we have forms so that the prisoner can sort of
9 channel this litigation, we know whether the prisoner
10 has -- why is the prisoner there, what was the
11 conviction, et cetera, et cetera, et cetera, has it
12 been on appeal, all those kinds of things, which make
13 it easier, for example, in the district courts to
14 process prisoner litigation. We use staff counsel,
15 being better for the same reason that we did on the
16 district court, so the staff attorneys' increase in
17 size is directly related to the increase in the volume
18 of pro se prisoner litigation, amongst other things.
19 VICE CHAIR COOPER: Judge, thank you very
20 much. We appreciate your time and your insight into
21 this problem.
22 JUDGE TJOFLAT: Thank you very much for

1 inviting me to appear, and I'll submit some additional
2 information as regards to the 11th Circuit in
3 particular.
4 VICE CHAIR COOPER: Thank you.
5 The next witness we have is Emmet J.
6 Bondurant, a lawyer from Atlanta, Georgia.
7 Emmet, thank you for being here today,
8 appreciate it.
9 MR. BONDURANT: Thank you, Mr. Chairman.
10 Let me begin with a disclaimer, which is I
11 am appearing as a practicing lawyer, I do not have the
12 perspective of a judge. Judges Tjoflat and Hatchett
13 are far better qualified than I to speak from the
14 judicial side of some of these issues, but I do feel
15 that I can address them from the point of view of
16 those who appear on this side of the bench, and I
17 think I can also address the issues from the
18 perspective of the people whom we represent, who,
19 after all, are the people for whom this system really
20 exists, not for the judges, not for the lawyers, not
21 for the Congress, but for the litigants who put their
22 faith, their freedom and their fortunes in the hands

1 of the federal courts.

2 Before addressing the specific questions,

3 I would like to address, perhaps, presumptuously, the

4 broad charge of the Commission. Congress has created

5 the Commission to "study the structure and alignment

6 of the federal appellate system with particular

7 reference to the 9th Circuit," and to make, "any

8 recommendations for changes in the circuit boundaries

9 or structures consistent with fairness and due

10 process."

11 As one who is far from the 9th Circuit, but

12 nevertheless reads many of its opinions, and the

13 newspapers as well, it seems to me that this issue has

14 very little to do with improving the quality of

15 fairness of the judicial process or the administration

16 of justice and everything to do with politics.

17 The proposals, at least in my view, appear

18 to be a thinly veiled attempt by members of Congress,

19 and most especially those from congressional districts

20 in the 9th Circuit, to influence the decisions of the

21 courts of appeals with which they disagree. They want

22 to reapportion the circuits so that they will have

1 their own circuits controlled by judges of their own
2 political selection, and there is a political
3 selection of judges, with views similar to their own.
4 In the view of many in the Bar, and myself
5 included, the process for nominating and confirming
6 federal judges has already become far too political.
7 Partisan accusations that nominees are judicial
8 activists have tended to undermine public confidence
9 in the Federal Judiciary as a whole. My fear is that
10 in the present political climate, if Congress starts
11 redrawing circuit boundaries, the process will be as
12 principled as the process that we observe every ten
13 years when our legislatures and congressional
14 districts are reapportioned.
15 Any major restructuring of the federal
16 circuits in the current atmosphere is likely to be
17 highly divisive and undermine even further public
18 confidence in the Federal Judiciary.
19 The creation of smaller and smaller
20 circuits seems also undesirable from a purely policy
21 standpoint. Federal statutes and rules of federal
22 procedure are supposed to be uniform nationwide.

1 There should not be discernable differences in the way
2 cases are decided if they are brought in a district
3 court here in Atlanta, or in Chicago, or Boise, or San
4 Francisco. If we look to the model of the 50 states,
5 the 50 states have been free to adopt their own laws,
6 they clearly have their own state court systems, but
7 the clear trend over the last century ha been strongly
8 in the direction to greater and greater uniformity,
9 both of state procedure and state substantive law.
10 The creation of additional circuits may be
11 attractive from the standpoint of collegiality and
12 internal judicial administration. Increase in the
13 number of circuits, however, will inevitably lead to
14 a greater number of conflicts as between circuits. I
15 believe that to be unavoidable.
16 States like California are bigger than
17 multi-circuits at the present time. If you start
18 cutting circuits down, you soon are going to have as
19 many circuits as you have states or something
20 approximating that. That seems to me to point in the
21 very opposite direction in which the structure of the
22 federal courts has gone in the last century or should

1 go in the next.

2 Let me now turn to the questions that are
3 more specifically put by the Commission. As a general
4 proposition, I think the 11th Circuit is performing
5 well, given its heavy case load, and the fact that
6 only recently has the 11th Circuit had a full
7 complement of active judges.

8 The most common criticism of the 11th
9 Circuit among lawyers and clients is that there are
10 long delays of a year or more between oral argument
11 and decisions in some cases. The problem is not that
12 the judges are not working hard, because they are, the
13 problem is that the 11th Circuit does not have enough
14 judges to handle its heavy case load.

15 As a consequence, the 11th Circuit has been
16 forced to rely on visiting judges on almost every
17 panel. In my experience, and my experience extends
18 over a 30 plus year period now, in recent years you
19 never see a three-judge panel in the 11th Circuit that
20 does not have at least one visiting judge, either a
21 senior district judge from this circuit, sometimes an
22 active district judge from this circuit, but equally

1 frequently a senior appellate judge from another
2 circuit.
3 One solution, and I believe the best
4 solution, is to decide on some principle basis what
5 case load is optimal per circuit judge, and then to
6 ask Congress to provide that degree of judicial
7 manpower to enable the circuits to handle their case
8 loads. It simply is unrealistic, I believe, to
9 believe that you can on any sensible basis confine the
10 appellate courts to any particular size. The
11 population of the United States has grown almost 100
12 million since I began practicing law in 1960. The
13 number of federal statutes passed since 1960 must
14 exceed 100 million, or at least seemingly so.
15 We are becoming a more urbanized society,
16 as a result we are becoming a more litigious society,
17 that is a fact of urbanization, I believe. It is
18 simply not realistic, I believe, that the same number
19 of judges can handle the increasing case load, or any
20 fixed number of judges can handle it, particularly,
21 when you increase the number of federal district
22 judges, the federal bankruptcy judges, the federal

1 magistrates, all of whom are producing a judicial
2 output that sooner or later will arrive in the court
3 of appeals.
4 There are, as you have heard today, strong
5 differences of view, not only in this circuit, but
6 other circuits, on the benefits of adding additional
7 judges. Those arguing, and Judge Tjoflat is among
8 them, who believes that any increase in the size of
9 the circuit will result in a loss of collegiality
10 among the existing judges of the circuit.
11 While I have great affection for Judge
12 Tjoflat, and great respect for him and have appeared
13 before him on many occasions, I have to say that I
14 disagree. Almost every three judge panel in the 11th
15 Circuit, since the mind of man runneth not to the
16 contrary, has had a visiting judge.
17 If collegiality were as important as its
18 advocate suggest, it would seem that the goal of
19 collegiality would be better served by filling in with
20 permanent judges the positions which are now being
21 occupied on these panels by visiting judges. It seems
22 to me that is inevitably the case, how close a

1 colleague can one be who transfers in for a week of
2 sitting from the 8th Circuit one week, and a different
3 judge from the 6th Circuit the next, or from the 8th
4 Circuit the following week and so forth.
5 I also believe that the price of
6 maintaining a smaller court in the interest of
7 collegiality has been a very high one. In the 11th
8 Circuit, there are strict limits imposed on the
9 lengths of the brief, while there are exceptions,
10 those exceptions are rare, almost without regard
11 either for the number of parties to the case, the
12 complexity of the case, or the length of the records
13 per load.
14 The 11th Circuit has strictly limited oral
15 argument to a point where as an advocate I think one
16 can legitimately question whether there is sufficient
17 opportunity for more than a superficial exploration of
18 the issues or a meaningful dialogue, either for the
19 point of view of the court or the lawyer.
20 I have heard many appellate judges say they
21 have never heard an oral argument that influenced the
22 decision, that it has never changed -- they have never

1 changed their mind, and that may be the case, but I'm
2 not sure whether that is a comment on oral argument or
3 a comment on the judge and the process.
4 The vast majority of cases in this circuit,
5 as you have heard, are now decided without oral
6 argument, the vast majority of cases are decided
7 without published opinions. I do not agree that
8 unpublished opinions should -- are a good idea.
9 Precedent is precedent, how this circuit -- how judges
10 of this circuit view the law, even the law of
11 contracts, is important guidance to counselors and
12 litigants in future cases.
13 I can cite a case from my own experience,
14 only in the last week, in which there is now pending
15 in four federal district courts in the United States
16 litigation between a major automobile manufacturer and
17 a would-be purchaser of dealer franchises. There are
18 four other cases pending in the state courts,
19 involving the same parties and the same issues.
20 There was, early in this month, a decision
21 out of the 11th Circuit unpublished involving some of
22 the rights under the very formed contract which is at

1 issue in at least eight different jurisdictions. That
2 decision is unpublished, we could not find it on line,
3 I would not have known about it except for the pure
4 coincidence that I happened to have run across a
5 lawyer who happened to be involved in one side of that
6 case. That precedent will be cited by both sides one
7 time or another, that case should be published, it
8 should be on line, it should be available for
9 guidance, and there are many others just like it.
10 In short, I believe the efforts to
11 streamline and make the appellate process more
12 efficient has had an adverse effect, both on the
13 quality and, perhaps, more importantly on the
14 acceptability of decisions in the 11th Circuit and
15 other courts of appeals.
16 Those who are involved in the judicial
17 process on a day-to-day basis, lawyers and judges,
18 tend to become jaded. We view the process from our
19 own little corner of the world as if that process, and
20 our participation in it, was an end in itself. I
21 think in these processes we have lost sight of the
22 fact that these cases are more than statistics, they

1 involve issues that directly impact the lives of real
2 people who look to the federal courts, not only for
3 justice, but for protection as well.
4 Let me digress and say, for example, that
5 in some of the efforts about which the federal courts
6 complain so bitterly are the prisoner cases, those
7 prisoner cases, some of them have genuine merit that
8 involve fundamental constitutional issues. In the
9 state courts in this state, and in many others, you do
10 not have adequate counsel in state criminal trials,
11 including death penalty cases.
12 In state habeas corpus proceedings in this
13 state, there is no state mechanism for providing
14 counsel for death row inmates. There is, in this
15 state, a case winding its way to the state supreme
16 court in which a prisoner with a 70 IQ on his first
17 habeas petition attacking his death sentence was
18 forced by a state judge to go through a state habeas
19 petition with no counsel in which the Attorney
20 General's office was represented.
21 Whether you comply with the Anti-Terrorism
22 bill or not, those issues ultimately belong in the

1 federal courts, if they are not going to be dealt with
2 in the state courts, and while many of those cases are
3 meritless, the federal judicial system, the federal
4 habeas corpus power which is, after all,
5 constitutional, was put in the Constitution for
6 historic reasons that still apply, require that the
7 federal courts be open, and whether that is
8 convenient, whether it is within the case loads,
9 whether it is within the judicial manpower of the
10 courts or not, those are cases for which the federal
11 courts exist as an imperative matter.
12 When we speak of unpublished opinions, and
13 decisions without oral argument, we lose sight of the
14 fact of acceptability for the litigants. It is the
15 responsibility, I believe, of the federal courts to
16 ensure that their processes convey, especially to the
17 litigants, but to the public as well, a sense of
18 confidence that the issues, whatever they were, were
19 considered seriously and carefully, and were not given
20 short shrift by the judges of the appellate court
21 because of case load reasons or for other reasons.
22 The winners, of course, will always be

1 happy with a process that results in a decision in
2 their favor. A flip of the coin would be looked on as
3 being a wise and learned judicial process if it comes
4 out in favor of my client. For a losing party to have
5 confidence in the decision, however, you must be able
6 to see from the opinion of the courts that his
7 arguments were fairly addressed by the appellate
8 court. He must also be able to understand the reasons
9 for the rejection of his arguments, even if he does
10 not agree with those reasons.
11 I believe, and this is based on an
12 experience of appearing regularly in appellate courts,
13 that our efforts to speed up the appellate process and
14 make it more efficient has caused us to lose sight of
15 the fact that the process is, by its very nature, a
16 deliberative process. The courts are deciding
17 individual cases, they are not engaged in the mass
18 production of a consumer product, and, therefore,
19 statistical measures and shortcuts have a real price.
20 This requires, in my judgment, an increase
21 in the number of federal appellate judges. There
22 simply are, in my view, no panaceas and no other

1 shortcuts.

2 Finally, there have been questions of
3 delay. I have a couple of modest suggestions to make.
4 One addressing the question of appellate delay, I
5 would suggest that the circuits consider, not by
6 congressional legislation but by circuit rule, the
7 adoption of a rule requiring that all cases be decided
8 within X number of months after docketing oral
9 argument or submission, in the absence of exceptional
10 circumstances.

11 Georgia has had, in its state constitution
12 since 1877, such a provision. The Georgia Supreme
13 Court and the Georgia Court of Appeals, whose case
14 loads are far heavier than any federal circuit, have
15 a provision that requires that every case be decided
16 within two terms of court. That means, roughly,
17 within eight months of submission. Any case that is
18 not so decided is automatically affirmed by operation
19 of law.

20 Since that provision has been in the
21 Georgia constitution from 1877, no case has ever been
22 decided because the appellate courts failed to meet

1 the deadline. I don't suggest that the case loads are
2 comparable in complexity, and that one can do a
3 statistical analysis and easily translate that
4 experience to the federal courts, I do suggest,
5 however, that a rule that established an expectation
6 that a standard within a circuit would be one in which
7 members of a circuit would be very loathe to violate,
8 and would in most cases, if not in all, adhere to.
9 I would not suggest even the draconian
10 remedy of automatic affirments. Merely having a rule
11 with no stated penalty would state the expectation
12 which I think many would meet.
13 The Supreme Court of the United States,
14 whose case load, of course, does not compare to any
15 single circuit, has a tradition at least of clearing
16 up its docket within the court year. I see no reason
17 why the circuits could not do the same, whatever that
18 length is as established, and certainly subject to
19 exceptions.
20 Finally, I certainly share the view with
21 Judge Tjoflat and others that Congress is in part
22 responsible for the major problems facing the federal

1 courts. Congress has tribulized the federal courts by
2 imposing jurisdiction over matters that do not require
3 a federal court solution.
4 To pick only two conspicuous examples, the
5 Honest Services Amendment to the Mail Fraud Statute
6 overruling McNally v. United States, has brought to
7 the federal courts as federal criminal cases conflicts
8 of interest involving local officials, for which there
9 were a plethora of state criminal statutes that would
10 have served us well to prosecute those individuals,
11 and where there is no evidence of a federal interest,
12 and no indication, as in some civil rights cases, of
13 a reluctance on the part of local officials to
14 prosecute similar crimes, 18 USC Section 666 is a
15 similar statute, making bribery of any city official,
16 or county official, or water district official that
17 gets in any respect any money from the federal
18 government capable of prosecution in the federal
19 courts as a federal offense. That makes no sense.
20 The federal courts ought to be confined in their
21 jurisdiction to those things that require a federal
22 solution and those things which the Constitution

1 requires, such as habeas corpus, that the federal
2 courts be open to enforce the Constitution.
3 The question of intra-circuit conflicts
4 that Judge Tjoflat raises from the larger court, I
5 would at least suggest that there is a solution. It
6 may not be a perfect solution, but it is one that I
7 have seen work. The 4th Circuit has had a tradition,
8 at least for 40 years, and I'm sure it extends well
9 beyond that, of circulating draft opinions to the
10 entire court before they are issued. At least when I
11 was there, and I confess that is almost 40 years ago,
12 it was the practice of those not on the panel to read
13 those cases and frequently comment on them in order to
14 assure before, and not after, an opinion was issued,
15 uniformity of approach within the circuit and to bring
16 to the attention of the panel other issues which may
17 not have been fully presented by the parties. That
18 seemed to me a sound practice, and it is one that I
19 would commend to the 11th Circuit as well.
20 I'll be happy to answer questions.
21 (Whereupon, tape change.)
22 MR. BONDURANT: My practice is principally

1 as a trial lawyer, it is overwhelmingly civil, it is
2 overwhelmingly civil in complex cases, though I have
3 done a great deal of other kinds of litigation,
4 including reapportionment litigation. I have done
5 prisoner death penalty cases. I have both a
6 plaintiffs practice and a defendants practice, though
7 my practice currently is predominantly on the defense
8 side.
9 When asked that question, I generally say
10 I am unprincipled, I will represent whoever will hire
11 us.
12 VICE CHAIR COOPER: Well, I would
13 (inaudible) to being unprincipled, Mr. Bondurant.
14 Dan, do you have any questions?
15 PROFESSOR MEADOR: Have you, in your
16 experience in the 11th Circuit Court of Appeals, had
17 cases in this court in which oral argument was denied?
18 MR. BONDURANT: I personally have not.
19 PROFESSOR MEADOR: Have you known other
20 lawyers who have?
21 MR. BONDURANT: Yes, those within my office
22 have in some cases, although they are rare. I will

1 mention one example of one in which a young lawyer in
2 my office was appointed in a criminal case in the 11th
3 Circuit. I don't frankly remember whether it is was
4 a 2255 or a direct appeal, in which the case was
5 decided without oral argument, and at least he
6 believes, without addressing directly conflicting
7 decisions from other circuits.

8 PROFESSOR MEADOR: Did he get a reasoned
9 opinion or just a short one-line order?

10 MR. BONDURANT: Candidly, Professor Meador,
11 I have not read the opinion, so I don't know, this is
12 conversational rather than my looking at it, and he
13 plans to move for rehearing in bank, I think based on
14 my experience there those chances are between poor and
15 slim, to quote Frank Howard, the former football coach
16 from Clemson, but since there are about five
17 rehearings or six rehearings a year.

18 But, I sit through a great number of
19 appellate arguments. There are many arguments through
20 which I have sat in which I had genuine sympathy for
21 the judge for having to keep awake during those
22 arguments, and I recognize that many are poorly done

1 and do not help the process.

2 However, I think the process of oral

3 argument is important in a case that has some

4 substance in it, and that 15 minutes per side, which

5 is what you have in the 11th Circuit, even when you

6 have multi-party cases, is simply not adequate to make

7 a meaningful contribution for either side, either the

8 bench or the bar, in those cases.

9 VICE CHAIR COOPER: Mr. Bondurant, thank

10 you so much. We appreciate your time and your

11 thoughtful presentation.

12 MR. BONDURANT: Thank you.

13 VICE CHAIR COOPER: The next witness is

14 Charles Carpenter, Jr., from Columbia, South Carolina.

15 Mr. Carpenter, thank you for traveling to

16 be with us today.

17 MR. CARPENTER: Thank you for allowing me

18 to be here. I concur in much of what I've just heard

19 by my colleague at the Bar.

20 It seems to me that what we have done in

21 the past in response to the increase in volume since

22 the 1960s has primarily been to take concerns about

1 the productivity of the judges and the efficiency of
2 that and rationing the resources that we have, and
3 allowing those to drive the structures that we come up
4 with to accommodate that volume. In my view, we've
5 reached and sometimes past the limits of what that can
6 do and still give us the quality that we want.
7 I believe that we need to add more judges,
8 that we need to add a lot more of them, and I also
9 believe that at the same time we need to reduce
10 staffing ratios that support those chambers, and with
11 that combination allow that to drive the structure,
12 instead of letting productivity and efficiency drive
13 the structure as we have.
14 There are a lot of sources of the volume of
15 the increase and the loads that the appellate courts
16 bear. We've heard some of them. The stress that goes
17 on in the trial courts I think is one of those
18 sources, new legislation, new causes of action being
19 recognized. I think more education and more
20 prosperity does it as well as population, and we've
21 heard about criminal rights, I think we all know, too,
22 that some of the dispute resolution mechanisms that we

1 used to have, families, churches and neighborhoods,
2 don't resolve disputes, and sooner or later that adds
3 to the business of the appellate courts in the
4 country.
5 The past responses to this structurally to
6 try to deal with this volume increase, have been
7 administrative, they've dealt with productivity
8 concerns, they've dealt with efficiency concerns, and
9 they include things like adding layers of courts,
10 adding law clerks and radically converting their
11 function, adding staff attorneys, adding conference
12 attorneys, and the effort has been to screen, to
13 manage, and to dismiss cases.
14 Another response has been rationing, we
15 ration oral arguments, we ration briefs, we ration the
16 attention given to briefs, we ration the conferencing
17 that the judges do, and we ration the opinions that
18 they write.
19 Some of the results that come from that are
20 described by a lot of people as assistant judges or
21 what we now have with law clerks. We get
22 administrative agencies with large staff attorney

1 situations. We get delegated decision-making, we get
2 filtered input, and we lose in large part the value of
3 the adversarial system, and we lose the legitimacy
4 that we have had in the eyes of those who consume
5 justice.
6 The model that we were taught, and the
7 model that we try to tell clients when they say,
8 what's going to happen with this appeal, I mean, if we
9 do this and spend this money what happens, and we try
10 to describe for them the judges, and we try to
11 describe for them the process that it will go through,
12 and when we describe the judges we say that, as you
13 would expect, we hope that they will be impartial,
14 that they will be interested in the case, scholars in
15 the law, independent thinkers, but open-minded, known
16 to the Bar, we know who they are, and particularly
17 important, experienced in life.
18 And, what's the process that this appeal
19 will go through? We will take full advantage of an
20 adversarial system, that's how we get to an answer in
21 this country. Each side presents whatever it wants to
22 present, and the decision-maker takes that to make the

1 decision. It's not inquisitorial, it's adversarial.
2 And, what the judges will do is read the
3 briefs carefully, listen to the oral argument, not
4 conduct it, consider, confer, decide the case and
5 explain to us what they decided. That's the model we
6 tell the clients.
7 But, what really goes on and what do we
8 tell ourselves, and what do our friends on the bench
9 tell us when we are able to have a cup of coffee and
10 be more informal? Well, it doesn't really work like
11 that We often don't get oral argument, and when we do
12 get one it's often very abbreviated, and the format of
13 it is very inquisitorial. It is often done by people
14 who have already made their minds up, and it's a
15 lobbying exercise, and if we were to tell that to a
16 client, that they are not going to be heard, or that
17 they are going to be heard in such a perfunctory way
18 that sometimes happens, the people that I represent I
19 think most of the time would say to me, well, I'm
20 sorry to know that Congress will not give us enough
21 money and that resources are stretched that thin that
22 the time and the value of the judges is so dear that

1 we can't have oral argument, that I'll tell you what,
2 I have spent so much money on this case on more
3 mundane aspects of it than the oral argument, that if
4 somebody will tell me what the hourly rate is for a
5 circuit court judge, you tell me we normally get about
6 30 minutes to argue our case, I'll be happy to
7 reimburse the government for the time of three judges
8 at whatever that rate is, because it is very important
9 to me that I know my case gets presented to those
10 judges, and that I get some of their personal
11 attention. And, the only way that I really know that
12 I get any personal attention from a member of the
13 United States Court of Appeals is during that oral
14 argument, that's the only way I know. And, I'd be
15 glad to pay for that.
16 Now, I appreciate the fact that there may
17 be some situations where that's not necessary and
18 would like to have the chance maybe to waive that, but
19 I'd like to have the choice. It's an important case
20 to me personally.
21 And, if the arguments aren't going to be
22 heard, when you tell me in your office that

1 conferences between partners can reduce time and get
2 you to an answer quicker, I wonder what happens to the
3 brief.
4 Well, if we are straight with them a couple
5 of things happen. One of those things that might
6 happen is that there may be a staff memo designed to
7 present the case uncolored by advocacy. Well, I'm not
8 sure that's something that's good. Another thing that
9 may happen in connection both with oral argument, if
10 there is one, or reading the brief, is a bench
11 memorandum. The client says, well, what's that?
12 Well, there are some very bright, very talented people
13 who finished law school last year who work for the
14 judges, and they prepare a memorandum and it includes
15 several things. One of those is the procedural
16 history and posture of the case, another is a
17 statement of the issues, and another is a summary of
18 the facts, and another is a summary of the arguments.
19 And, the client will say to me, well, you
20 sent me a copy of the other side's brief, and you sent
21 me a copy of your brief, aren't all those things in
22 the front of those documents already, isn't that a

1 little redundant?

2 So, we might say to the client, well,

3 there's more in that bench memorandum than that.

4 There is the law clerk's analysis of the law and the

5 facts. There is the law clerk's recommendation of the

6 disposition. There is the law clerk's draft of an

7 opinion, and the law clerk's recommendation about

8 whether there should be an oral argument.

9 And, after thinking that through the

10 response is, I don't want the law clerks doing those

11 things. That's not only unnecessary, it's

12 undesirable.

13 Well, there's something else that's in

14 them, there are suggestions to the judge about

15 questions and issues to consider at oral argument.

16 That sounds very valuable and very helpful to the

17 decision-maker.

18 What goes on with all of this is two

19 things, in my view, one of them is that the case gets

20 so filtered before it gets to a member of the court

21 that I have grave concerns about that, because from

22 everything I hear, and it is from inside the court as

1 well as outside, what happens is, we recast the facts,
2 someone does, we don't know who they are, recast the
3 questions presented, and recast the arguments of
4 counsel.
5 Now, most of the people that I know that
6 spend their time in appellate practice would love to
7 have the opportunity to do that for the case, and then
8 we delegate, the recommended decision is done, there's
9 a draft opinion, certainly the judge makes the
10 decision ultimately, but that is a lot of control and
11 a lot of delegation over the decisions.
12 The symptoms that we are told that would
13 bring about more judges, or a need for more judges,
14 are denials and abbreviations of oral arguments,
15 reducing conference time, reducing deliberation time,
16 adding law clerks, adding staff attorneys, and
17 reducing the amount of explanation of the decisions.
18 I think we are hearing those symptoms loud
19 and clear this morning from the court. And, what I
20 believe should happen is, we need to add more judges,
21 first and foremost, and whatever that does to
22 structure I would be willing to live with the

1 disruption. I don't have any panacea, and I don't
2 think anybody else does, but I think number one is, we
3 need more judges, and we don't need more
4 administrative machinery to try to increase the
5 productivity of those judges that we have. I think we
6 push them too much already.
7 One of the things that we can do is to
8 streamline the support staff, and I think that is a
9 desirable thing aside from the cost, but if cost is a
10 factor, and it always is, that can be the source of
11 some of the resources to do it. That not only saves
12 money, but it will reduce the amount of filtering that
13 goes on, and it will reduce the amount of delegation
14 that goes on.
15 I would keep one law clerk per judge. I
16 would keep the conference attorneys that are doing
17 mediations. Most of my practice is in the 4th
18 Circuit, that is new and seems to be successful. I
19 have had that experience in the state system with a
20 different format some years ago and it was not very
21 successful, but I don't think it got nearly the
22 resources and the attention, nor the mediation

1 experience, that we have now.

2 And, I would add judges, and whatever
3 unwieldiness comes from that, I would deal with it,
4 but I think we need to give the judges the time to be
5 judges. We don't need more rationing, and we don't
6 need more efficiency. We do need more judges.

7 One thing that -- and I'm about concluded
8 -- but one thing that I heard this morning, that
9 illustrated my idea, and I'd like to spend just a
10 moment on it because I was not aware of these figures,
11 and it, I think, bolsters what I'm saying even more
12 than I expected, when I heard the numbers about the
13 11th Circuit, I've only appeared before this circuit
14 once, as I say, most of my practice is in the 4th
15 Circuit, 12 members of the court, ten senior judges,
16 22, a visiting judge on every panel, that's not a 12
17 judge court, it's about a 30 judge court already.
18 Four law clerks per judge, now I don't know if that
19 includes senior judges, but if there are ten permanent
20 members and ten senior members that's 22 judges,
21 that's 88 law clerks. Authorized to have 47 staff
22 attorneys, that's 135 lawyers that are not judges, and

1 if we add visiting judges that's about ten more,
2 that's 145. That's an awful lot of machinery that are
3 not Article III judges deciding these cases.
4 If we kept about half of that and used it
5 for judges and law clerks, I think it would save a
6 tremendous amount of cost, and it would give us judges
7 who probably can go through cases faster than that
8 staff, who certainly can do it with the experience of
9 life and the wisdom that we expect them to bring to
10 the case.
11 I'm not sure what's the most efficient way
12 to deal with the kinds of cases that we all
13 intuitively feel like are clogging things up a little
14 bit. I would have thought that that would best go to
15 some of the staff machinery that we seem to have. I
16 know at least one member of one of the federal circuit
17 courts who does it the other way around, and does not
18 allow law clerks to screen the prisoner in pro se
19 cases, because that judge thinks they are too slow,
20 don't have the experience, and the judge can go
21 through those much more rapidly. I'm not recommending
22 that. What I am saying is, an experienced federal

1 judge can certainly move much faster than somebody who
2 is new who is on a staff, and those people are
3 expensive.
4 If, instead of adding more and more staff,
5 we reduce some of that, and to relieve the burden that
6 the judges we already have too much of, I think the
7 answer is more judges, and based on the numbers I've
8 heard here with the 11th Circuit, I don't know what
9 the number ought to be, but I'm not thinking in terms
10 of three, I'm thinking in terms of 20 to 25.
11 I think more than half of that number is
12 already there by substitution, by bringing in visiting
13 judges, by using senior judges. I think we need
14 enough so that we can go back to something that
15 roughly approximates that model, and we get oral
16 argument, and we get some of the personal time with
17 the members of the bench, and we get, not somebody who
18 is 25 years old, but somebody who has got that much of
19 life's experience looking at the case to give us a
20 wise decision.
21 From the standpoint of the consumers of
22 justice, I think that instability within the circuit

1 and some of those concerns is a little over rated, and
2 what is under rated is deliberate, wise decision-
3 making by the appropriate people for the disputes the
4 citizens have.
5 I appreciate the opportunity the
6 opportunity to be here.
7 VICE CHAIR COOPER: Mr. Carpenter, thank
8 you for being here.
9 Judge Rymer, do you have any questions?
10 JUDGE RYMER: Yes, I have a couple.
11 I'd appreciate again just a very brief
12 description of the nature of your practice.
13 MR. CARPENTER: My practice is almost
14 exclusively appeals, unless somebody drags me in to
15 something else. Probably two thirds in the state
16 court, we have an intermediate appellate court, we
17 have had since 1983 in South Carolina, and a state
18 supreme court, and the 4th Circuit is most of the rest
19 of that practice.
20 JUDGE RYMER: Most of your concern centers
21 on the lack, I think, of oral argument and the
22 exchange, the visibility of the judge being part of

1 the decision-making process. You said the 4th Circuit
2 has a very high percentage of -- 89 percent of its
3 dispositions are unpublished, although reasoned. Does
4 that cause you any concern, or are you satisfied with
5 the unpublished reasoned disposition if you've had an
6 opportunity for oral argument?
7 MR. CARPENTER: Well, the oral argument
8 situation in the 4th Circuit is in pretty good shape,
9 much better than what we see in the state court system
10 and what I understand prevails elsewhere.
11 The unpublished opinions raise a whole
12 other concern, and I have been asked in another forum
13 to participate in that in a few months. My own view
14 of it is that, given the advantages and disadvantages
15 of each side of that, I don't like unpublished
16 opinions because I don't think they really exist that
17 way. They are sort of semi-published, and there is
18 certain access, as Mr. Bondurant described. I see
19 rules against citations that people cite, judges cite
20 unpublished opinions, lawyers cite unpublished
21 opinions. If you have other good law then nobody
22 wants to be fooling around with that, but usually when

1 you are reaching for them you don't have anything
2 better to use. And, if that's the case, it ought to
3 be published.
4 I think the down side is the inundation of
5 information, and I know there's concern from the bench
6 about the care that ought to go with crafting those,
7 but I think the final answer I have to give is one Mr.
8 Bondurant gave, that is the common law, what the facts
9 were, and what the court did is something that the
10 rest of us will want and need to know.
11 And, I would say my concern is not just
12 with oral argument, it is with the briefs and the
13 amount of filtering that happens to those before they
14 get who knows where. There is sometimes the
15 perception that you mail your case off to some big
16 black box somewhere and you get an answer back, and
17 you don't really know if anybody other than this very
18 bright, capable staff ever saw the thing. And, if
19 they did, did they see what the advocates set forth or
20 did they see somebody else's interpretation and
21 summarizing and changing the question presented and
22 that sort of thing.

1 VICE CHAIR COOPER: Dan?
2 PROFESSOR MEADOR: On your point about
3 adding judges, is there some point where you think a
4 court of appeals is too large so you could not add
5 more judges?
6 MR. CARPENTER: I think 11 is a good
7 number, that's, you know, I think once you get past
8 that, then you start running into, well, how far do we
9 go before it's time to do something to divide that up,
10 because I think you don't want to divide at that
11 point, but I think that starts to stretch what can
12 happen in an in bank consideration.
13 PROFESSOR MEADOR: But then, what would you
14 do after that point, restructure the circuits, create
15 smaller circuits?
16 MR. CARPENTER: I'm not sure I have a
17 preference. I think that except for what one of our
18 judicial speakers pointed out as the leavening and
19 cross pollinization effect, small circuits I think
20 would be fine. I'm afraid of that in some other ways,
21 perhaps, districts within the circuit is better.
22 PROFESSOR MEADOR: Were you here earlier

1 when there was some discussion about creating a
2 reviewing entity at the district level as a way of
3 relieving pressure on the court of appeals, and,
4 therefore, not having to add judges at the appellate
5 level. What would be your reaction to that idea, a
6 district level reviewing entity of some sort. I mean,
7 there are various ways it might be constituted.
8 MR. CARPENTER: I was here when that
9 question was asked and responded to, and I think that
10 I agree with the judge on that.
11 District court judges sitting on district
12 court judges' cases, I don't think gives the same
13 scrutiny of review that you get when it happens at the
14 appellate court level. That's my biggest concern with
15 it.
16 VICE CHAIR COOPER: All right, thank you,
17 Mr. Carpenter.
18 We are going to take a break and be back at
19 ten after 11:00. We'll reconvene at ten after 11:00.
20 The hearing is adjourned.
21 (Whereupon, a recess until 11:10 a.m.)
22 VICE CHAIR COOPER: -- say earlier, but

1 everyone needs to be aware of the fact that these
2 proceedings today will be made available to the other
3 three Commissioners. It's a five member Commission.
4 And now, we are pleased to hear from
5 Deborah Barrow, a lawyer in Atlanta, Georgia.
6 MS. BARROW: Honorable members of the
7 Commission, I am Deborah Barrow. I am here by
8 invitation and appreciate the opportunity to share
9 with you some of my past judicial research efforts on
10 judicial reform and institutional change in the
11 federal courts.
12 Currently, I'm an associate with the law
13 firm of McKee & Barge (phonetic), however, I am a
14 brand new attorney so I must issue the disclaimer
15 that, not only do I not have judicial experience, I
16 have very little legal experience at this point.
17 However, I was a Professor of Political
18 Science for 13 years prior to joining this profession,
19 and during that career I co-authored a couple of
20 books, and I assume that's why in large part I was
21 invited today.
22 The first of these books is called or

1 entitled, "A Court Divided," it's the politics of
2 judicial reform dealing with the division of the 5th
3 Circuit Court of Appeals. It chronicles their
4 immediate political and administrative problems during
5 the 20 year debate, nearly 20 year debate on whether
6 and how to divide the 5th Circuit.
7 More recently, though, I co-authored a book
8 entitled, "The Federal Judiciary and Institutional
9 Change." This work was funded by the National Science
10 Foundation, it took eight years from beginning to end,
11 and in many respects this research or the findings in
12 it speak more directly to some of the issues that we
13 are discussing today, and provide, in my humble
14 opinion, a good backdrop against which to evaluate
15 some of these alternatives.
16 First, let me say at the outset that both
17 books, or the research in both of those books,
18 counsels against the continued increase in additional
19 judgeships. The addition of the judgeship positions,
20 according to these studies, has been used as a
21 politically expedient tool by many in each of the
22 branches. It has been used to patch over structural

1 and administrative needs, where compromise on solution
2 cannot be reached, namely, the expansion of the old
3 5th Circuit Court of Appeals. It has been employed by
4 Congress and the Executive Branch, where only
5 compromise drives the effort to dole out political
6 patronage regardless of the necessity or timing
7 required for creating the positions.
8 I would like to present a statistical
9 backdrop for this position. In the book, "The Federal
10 Judiciary and Institutional Change," we looked at how
11 the federal bench had evolved since 1869. The most
12 striking change was the growth of the institution, not
13 only in sheer numbers, but the rate of bench
14 expansion. That stood out as well.
15 For example, just anecdotal, the southern
16 district of New York now, as you might expect, is
17 almost the size of the entire Federal Judiciary in
18 1868. The growth is striking, though, even when you
19 compare it to other institutions. A judiciary that
20 was 21 percent the size of Congress in 1868 is now 50
21 percent larger or almost double the size of the U.S.
22 Congress.

1 Historically, nearly one out of every three
2 appointments is made to fill new seats. The
3 proportion of appointments going to new seats has
4 climbed steadily to 33.8 percent. This is only part
5 of the picture, though. The data show an institution
6 that has doubled in size every 30 years, this from an
7 institution already approaching 900 members.
8 This picture of bench expansion is so
9 pronounced that we referred to it in these studies as
10 a steady-step level increase. A view of the figures
11 in our book, and I have attached that as an appendix
12 to my statement, take on this stairstep image.
13 The politics of bench expansion is, and has
14 been, so popular with members of Congress, that some
15 members have referred to the ominous judgeship bills
16 as Christmas trees adorned with judicial positions, or
17 flat out, judicial pork barrel.
18 The rate of expansion is high, and much of
19 the infusion of new seats comes in jolts from these
20 kinds of bills. Such infusions of new members in any
21 institution begins to take its toll on the existing
22 membership's ability to acculturate that many new

1 members in that kind of expansion.

2 There are considerable administrative
3 costs, as well as fiscal outlay in this kind of
4 expansion, and in assimilating new members. These
5 administrative demands in turn divert the much needed
6 attention required of a deliberative collegial
7 decision-making body.

8 The phenomenal growth in the federal bench
9 is exacerbated by its twin condition, that of an ever-
10 increasing rate of retirement. Judges now leave the
11 bench in greater numbers at earlier ages and with less
12 time spent in active service than ever before in
13 history.

14 For example, the number of judges that
15 voluntarily left the bench through either resignation
16 or retirement from 1969 to 1992 exceeded the total for
17 the previous 180 years. Only 12 percent of the
18 judiciary have died while in office since 1969,
19 compared to 31 percent in the previous 30-year period.

20 In the post-1969 period that we studied,
21 the mean age of judges leaving the bench dropped from
22 72 to 67 years of age, and average years of service

1 dropped from 18 to 15 years.
2 These are large decreases for mean figures.
3 This leaving pattern not only creates
4 problems from rapid turnover, but the politics of
5 filling vacancies, which as of late has been quite
6 pronounced. For example, it is at least inefficient
7 government, in my opinion, to leave open ten percent
8 of the institution's positions, but it seems nearly
9 unconscionable that any circuit would be left with
10 barely more than one half of its complement of
11 authorized judgeships because of the politics of
12 divided government.
13 The delay in filling vacancies, coupled
14 with the record number of judges leaving the bench, is
15 a signal that some procedures, especially with respect
16 to timing, similar to those imposed in the federal
17 budgetary process, may need to be considered for the
18 confirmation process.
19 The rate of bench expansion has its cost
20 for the decision-making process itself. Collegial
21 decision-making is not the art of making legislation
22 where a word here or there can be hammered out and

1 compromise language than can prevail. Deliberative
2 decision-making in a collegial setting requires a
3 degree of interaction that is more suited to small and
4 medium-sized groups. It is consensus building among
5 equals, very similar to the faculty meetings that I
6 sat through for years.
7 Generally, without a consensus no decision
8 is made, and if one is made without a solid consensus
9 the ensuing outcome is a fragmented and splintered
10 one.
11 In the court context, a larger number of
12 judges translates into a greater propensity to dissent
13 and concur. When judges and scholars warn of a lack
14 of clarity of opinions, it is not just a muddled
15 opinion that is at stake, although those, too, appear,
16 they are more likely warning that a multiplicity of
17 issues, sub-issues and viewpoints may become an
18 institutional pattern of decision-making.
19 On the latter point, I heard from judge
20 after judge on the old 5th Circuit about the
21 nightmarish decision-making process that besieged the
22 court in its final expanded size of 26. Almost

1 everyone with whom I spoke was very unsatisfied with
2 the large group deliberation.
3 At the risk of not taking too much time, I
4 would like to just read one excerpt from what happened
5 after the first full in bank of 26 judges. "The oral
6 argument session in open court went reasonably well.
7 The 24 judges were perched, as Judge Coleman described
8 the scene, on a two-tiered bench to accommodate their
9 number. The court had agreed to limit questioning of
10 the attorneys, so that the session would not
11 degenerate into a questioning riot, and so that the
12 attorneys would be able to complete at least a portion
13 of their prepared remarks without interruption. Once
14 the judges retired to the conference room, however,
15 the defects in the system became readily apparent.
16 The first case required, by various judges' estimates,
17 a total of four to five hours to go around the table
18 and obtain each judge's initial impressions. I was
19 climbing the walls, Judge Reeley recalled, describing
20 the deliberations as a very unsatisfactory judicial
21 experience. To arrive at a decision in one case
22 required two days of deliberations. Peter Fey

1 reported the first case took hours and hours. I think
2 it took two hours to decide what questions we were
3 going to vote on. We took the first vote and it was
4 12/12, from then on it was downhill. Right after that
5 in bank, you could just feel it, every judge in the
6 court knew it was not going to work. We couldn't even
7 decide where to go to lunch."
8 Those are just some anecdotal comments, but
9 I think are very telling of what goes on when we start
10 down the road expanding the collegial atmosphere or
11 the decision-making process into a number that exceeds
12 where we are now with the 11th Circuit.
13 Proposals are a dime a dozen these days,
14 but I would offer these thoughts, at the risk of
15 adding to the confusion. Before we reach a bench of
16 1,000, perhaps, by the year 2000, there needs to be an
17 appreciation of the landscape and the reasons for its
18 formation. In particular, there are three areas in my
19 opinion that are in need of serious scrutiny.
20 First, some are concerned about the ominous
21 judgeship approach that jolts the system with a large
22 infusion of new members. Enlarging courts in such

1 fits and starts, rather than through an orderly
2 process of planned change, cannot help but undermine
3 the possibility for paced evolution, socialization and
4 exacerbate institutional stress that already exists.
5 This, again, is especially acute when
6 coupled with the recent acceleration of volunteer
7 departures. The Federal Judiciary appears to be in
8 need of a more stable considered pattern of growth,
9 either a set number could be arrived for the
10 institution, or a limit set for the number of judges
11 that could be added over a certain period. Perhaps,
12 filling a vacancy needs to be justified with case
13 load, rather than filled under the presumption that it
14 is tied permanently to a particular court.
15 Second, the delays in filling vacancies due
16 to excessively -- the excessively politicized
17 confirmation process should be reexamined. Here
18 procedures that control the timing and stages of
19 decisions, similar to those used in the budgetary
20 process or those that we use in rules of civil
21 procedure might prove helpful in reducing the delay in
22 filling vacancies. This delay has burdened and does

1 burden the active judges, and it can create morale
2 problems. Whether filling a vacant seat or a new
3 seat, new judges need the opportunity to become
4 acculturated to their new colleagues and
5 administrative staffs, and to develop productive
6 routines and relationships.
7 The court, in turn, requires a certain
8 amount of time to teach new members their
9 responsibilities and rules for maintaining the
10 organization. Thus, even after the appointment of a
11 new or a replacement judge, the full complement of
12 judges is not up and running immediately.
13 Finally, I believe that there needs to be
14 an assessment of internal court administrative
15 procedures, that conducting that rather than turning
16 to the external alternatives of expanding the bench
17 would be a better solution. For example, some
18 circuits are staying abreast of heavy case loads. I
19 think a view of the standardized work load per circuit
20 indicator, which is terminations on the merits per
21 panel, shows that the 11th Circuit is handling the
22 heaviest production of business in the country. I

1 think the administration of justice may be well served
2 by examining some of the means used by the top
3 producing courts to determine whether there are
4 internal methods or organization of staff and work
5 that could be adopted by other courts to reduce the
6 pressure to add judges. That simply is a solution
7 that needs to stop.
8 Additional staff and advanced technology
9 could serve as alternatives to adding judges, and
10 thereby not expand an institution that's already
11 strained by phenomenal growth in recent years. It
12 simply seems to make good sense, good business sense,
13 to try these less intrusive means before passing
14 another ominous judgeship bill.
15 I thank you for the opportunity, those are
16 brief comments, but those are the issues that I've
17 dealt with and feel confident to speak on.
18 VICE CHAIR COOPER: Why do you think so
19 many judges are leaving the bench at an early age?
20 MS. BARROW: I think there's a morale
21 problem with -- in my work I've seen that it is very
22 much related to case load factors. I think there is

1 a crushing case load.

2 There are increased perks and benefits to
3 retirement now, better than they've been in the past,
4 and so that also has contributed to it.

5 I guess what I would like to see the
6 federal courts do is kind of bow up to Congress, in
7 much the way that Judge Tjoflat was speaking about
8 earlier, and just start to say, we are doing all we
9 can do, that we have a crushing case load, you can't
10 continue to play politics with the bench by expanding
11 it, where we don't need it sometimes, when we don't
12 need it waiting until it is a crisis before you do add
13 it. There needs to be some kind of paced evolution to
14 this process that's not there right now.

15 I think that the judges are leaving in
16 record numbers because of some of these problems.

17 VICE CHAIR COOPER: So, in effect, we
18 should tell the politicians to quit playing politics.

19 MS. BARROW: Uh-huh, maybe put their feet
20 to the fire like, you know, everyone else's, and just
21 ask them -- ask them to follow a timing, an outline,
22 a guideline, in very similar ways that we had to

1 impose that kind of process on the budgetary process,
2 the federal budgetary process, to get anything done.
3 VICE CHAIR COOPER: Judge Rymer?
4 JUDGE RYMER: Did your research into the
5 old 5th shed any light on its experience with
6 administrative divisions?
7 MS. BARROW: With administrative what, I'm
8 sorry?
9 JUDGE RYMER: Divisions.
10 MS. BARROW: Divisions? They did use the
11 administrative units, I think for a little while
12 towards the end. I don't think they were very happy
13 with that. From what I heard, it was already dividing
14 the circuit, they felt as if they were already one 5th
15 and one the 11th.
16 JUDGE RYMER: Oh, so your research would
17 suggest that it was a -- splitting of the circuit was
18 essentially fait accompli by the time the
19 administrative division concept merged, and that was
20 just an easy way to transist (phonetic).
21 MS. BARROW: That is correct.
22 JUDGE RYMER: Did your research then, or

1 has it since, shown anything about the utility of a
2 different or limited in bank system for resolving a
3 law of the circuit, rather than the 27 in bank?
4 MS. BARROW: No. I did not do any research
5 in that particular area. I do know that the 9th
6 Circuit has experimented with that, but I don't know
7 what they may feel has worked or hasn't worked with
8 that.
9 JUDGE RYMER: Just one final question, in
10 the research that you did at the time, did it suggest
11 anything about thinking that went on with respect to
12 the composition of the three new circuits, or was that
13 just primarily a function of easy geography?
14 MS. BARROW: With what, would you repeat
15 that, I'm sorry?
16 JUDGE RYMER: Of how the circuit was going
17 to divide itself, did your research shed any light on
18 whether there was any consideration given to the
19 appropriateness of the reconfiguration, or in the case
20 of the old 5th, was it just kind of a simple function
21 of geography that was obvious to everyone at the time?
22 MS. BARROW: No, as a matter of fact, that

1 was the debate, the debate centered on that for about
2 20 years, whether to break off Texas and Louisiana to
3 a circuit which would be a more parochial circuit, and
4 at that point it was felt to have an adverse impact on
5 the civil rights decisions that had been made.
6 By the time this ultimately was decided,
7 most of the judges who had had that concern were no
8 longer concerned with the divisions, the geographical
9 division's impact on any particular set of cases, but
10 rather, went with the balance, the population balance
11 between the two circuits, and putting Mississippi with
12 Texas and Louisiana as a more three/three balance,
13 better balance.
14 But, those decisions were made internally
15 and not until the judges could arrive, the two sides
16 could arrive at a consensus, was the bottleneck to the
17 legislation opened. That is a decision that I really
18 believe when you are talking about structural
19 alterations in the court, if the judges aren't of one
20 mind, or of a strong consensus on how to do it, I
21 don't think you are going to have a very successful
22 split. I think that has to happen. The so-called

1 "prayer meeting" that took place in the late Judge
2 Vance's office in Birmingham, which brought the two
3 sides together of the old 5th Circuit, was a critical
4 meeting, and it was not until that meeting that all
5 the judges felt comfortable then going to Congress and
6 saying, this is what we want, and this is the way we
7 want it.
8 VICE CHAIR COOPER: Professor Meador?
9 PROFESSOR MEADOR: Yes. Assuming the
10 volume of appeals continues to grow, even though
11 modestly --
12 (Whereupon, tape change.)
13 PROFESSOR MEADOR: -- I gather you are
14 reluctant to add judges, what would you suggest for
15 the Commission that it ought to consider on what to do
16 about this problem?
17 MS. BARROW: I think ultimately, far down
18 the road, maybe 30 or 40 years, we may have to
19 consider redrawing boundary lines across the country.
20 I don't think we are at that point yet.
21 Where I think that we should look is to
22 limiting the size of the institution and trying to

1 deal with as much work as possible through internal
2 organization of work load, technology. Technology, I
3 don't think has really hit the courts the way it has
4 other institutions, or has had an impact in the
5 federal court system the way it probably should.
6 If we can make some advances in those
7 directions, I think that we can go a long ways towards
8 not adding new members and changing, altering the
9 structure that way.
10 And, ultimately, I think that we have to
11 point the finger at Congress and ask Congress to begin
12 to streamline some of the jurisdiction of the federal
13 courts. I don't think the federal courts can function
14 in the special capacity that they are supposed to
15 constitutionally if we continue to take everything
16 there, every issue there.
17 PROFESSOR MEADOR: The question of dividing
18 the circuit, you mentioned the idea of the judges of
19 the circuit being unanimous on the dividing point, and
20 obviously if that occurred it would make it easier to
21 do, but why is it you say that all the judges of a
22 circuit must concur on the division before Congress

1 can enact a statute dividing it?

2 MS. BARROW: I wouldn't say that they have

3 to all agree before Congress can act, I don't think it

4 that's the way it happened in the 5th Circuit, I do

5 think that it is, those judges are the judges who have

6 to function and may implement that plan, and make the

7 circuits work, and if you alienate a group of judges,

8 or you make them feel that they are being separated

9 off for one reason or the other that's political, then

10 I believe that you are going to have probably a mass

11 exodus for one thing on the court, but also it's just

12 not good business to go in -- for any institution to

13 go in and tell another institution this is the way you

14 are going to do your internal business, without any

15 regard for the way they want to work out the political

16 solutions.

17 And, very specifically, I think that the

18 9th Circuit issue is probably going to have to involve

19 a couple of other circuits before you can diffuse the

20 politics that are preventing any kind of structural

21 alteration there.

22 PROFESSOR MEADOR: What structure do you

1 have in mind with the others?

2 MS. BARROW: Perhaps, the 10th, maybe

3 realigning the west, redrawing boundary lines for

4 those circuits, perhaps, the 8th, 9th and 10th

5 Circuits, so that you can diffuse the politics at that

6 point by adding another circuit into the configuration

7 of states.

8 JUDGE RYMER: What basis -- you are

9 suggesting, I think, that you think that the 9th

10 Circuit should be reconfigured.

11 MS. BARROW: I don't know how that a

12 circuit, given what I've heard and what I learned from

13 the internal decision-making process on the 5th

14 Circuit, when it reached the point of 26, I don't know

15 how the 9th Circuit can continue to exist and have any

16 kind of coherent law.

17 JUDGE RYMER: Well, is that based on any

18 continuing research or familiarity with things like

19 the in bank procedure that the 9th Circuit has got to

20 solve the problem of the 27 judge in bank?

21 MS. BARROW: No, it is not based on any

22 current research, it is simply a matter of having seen

1 and heard what went on with the 26 judge in bank with
2 the 5th Circuit, and the lack of collegiality and
3 interaction.
4 VICE CHAIR COOPER: Thank you so much. We
5 appreciate your presentation.
6 MS. BARROW: Thank you.
7 VICE CHAIR COOPER: Our next witness is
8 Laurie Webb Daniel, a lawyer from Atlanta, Georgia.
9 Ms. Daniel, good to have you with us.
10 MS. DANIEL: Thank you. I'm very happy to
11 be here.
12 Initially, I'd like to give you a little
13 background about my practice and the basis for my
14 remarks, so that you have some context, and the
15 interest that I have in being here.
16 I am Chair of the Appellate Practice Group
17 of Holland & Knight (phonetic). We have a firm-wide
18 appellate group, Holland & Knight believes that
19 appellate practice is a specialty area, and we treat
20 it very seriously. We have a number of practitioners
21 in our firm who do nothing but appellate work.
22 Collectively, we've handled matters in all of the

1 federal courts of appeals.

2 Our appellate practice group includes three

3 former appellate judges, state court judges, but they

4 have had that experience of judging at the appellate

5 level.

6 Another interest that I have is that I am

7 co-chair of an ABA subcommittee, part of the Appellate

8 Practice Committee of the Litigation Section. My

9 subcommittee is appointed to address the appellate

10 rules, issues that come up.

11 In preparing for this hearing, I thought it

12 might be advisable to discuss the issues raised by the

13 Commission's notice with some other people, to get a

14 sounding board for my own ideas, as well as to see

15 what other people were thinking about these issues.

16 I did not have a lot of notice, I really

17 did not realize I would be here until last week, but

18 during that time I have been able to talk to a number

19 of people within my firm, as well as some people

20 outside of the firm who were involved in the different

21 professional organizations that I've been involved in,

22 a couple of law professors, and some others. And,

1 I've formulated my statement in writing, which, of
2 course, you have.
3 What I'd like to do now would be to run
4 through, hit on some of the points that I've made in
5 my written statement in response to the issues posed
6 by the Commission's notice.
7 First of all, I might add that while our
8 firm has handled and does handle matters throughout
9 all of the federal courts of appeals, my personal
10 practice has primarily been in the 11th Circuit. I
11 have had some experience in some of the other
12 circuits, but my personal perspective is primarily
13 with respect to this circuit.
14 The general consensus is, I think, that the
15 11th Circuit is really doing pretty well, but there
16 are some things that need to be addressed. There are
17 some concerns.
18 On the timeliness issue, a lot of people
19 feel like things are not too bad here, but I have to
20 say that my personal experience has been otherwise.
21 I have had to wait two, three years on a number of
22 occasions to get a decision from the 11th Circuit.

1 Now, my practice tends to be commercial, fairly
2 complex commercial litigation, and I think as a result
3 it would involve more time just to process, to deal
4 with than certain other types of cases. Certainly,
5 the criminal cases will get preference, and would not
6 have the same perspective as I have.
7 Another concern, and I've heard this
8 expressed here today earlier, and it's one that comes
9 off my lips whenever I've been asked about this
10 subject in the past, and a number of other people have
11 expressed it, and that's the extent of the use of
12 visiting judges in the 11th Circuit, the district
13 court judges who come in and sit by designation, and
14 the visiting senior judges who come in.
15 I think that there are a couple of concerns
16 there. One is that the use of visiting judges impedes
17 the timeliness of rendering decisions, because the
18 senior judges do not have, they are not equipped with
19 the same staff as the active judges, and the district
20 court judges that come in tend to have their own
21 dockets and other priorities to deal with. When the
22 judges come in as visiting judges, the priorities are

1 just not the same, they are just not geared up to be
2 handling the 11th Circuit cases.
3 I think there's also another perception,
4 particularly with respect to the use of district
5 judges on appellate cases, and there may not be any
6 substantive basis for this, but I think from the
7 litigant's standpoint, when their case goes up on
8 appeal, they want to have an appellate judge deciding
9 the case. District court, there are many, many very
10 fine district court judges, but this is a perception
11 from the litigant's point of view, that they are
12 entitled to a judge who is used to the appellate
13 process, is used to dealing with judging from the
14 appellate standpoint, which is a slightly different
15 perspective from a trial judge's perspective.
16 I would echo the comments that have been
17 made this morning on oral argument. I've heard a
18 number of people express concern over the court's
19 limiting oral argument in cases. I personally have
20 not had that experience, but, apparently, other people
21 are having that experience.
22 One view was mentioned to me that the

1 denial of oral argument actually does not necessarily,
2 or may not necessarily speed up the process, because
3 just the nature of having the oral argument be set for
4 calendar forces the judges to get together and decide
5 a case, and if it's not put on an oral argument
6 calendar it may -- the judges may not be as diligent
7 about having the conferences that are necessary to
8 render an opinion.
9 One of my -- well, actually, two of my
10 partners in Washington, D.C., made a comment about a
11 procedure that is intended to be an expediting
12 procedure in the D.C. Circuit, which they felt
13 actually backfires, and that is the procedure for
14 summary affirments. They said they've had the
15 experience where that procedure has actually added at
16 least a year on to the time it took to a process a
17 case, that the chances of getting summary affirments
18 were very slim, but it takes a while to deal with the
19 summary affirments procedure, then when it's denied
20 the case goes back and starts over with the full
21 briefing schedule and has to then run its course.
22 And, they felt that that procedure was not being

1 effectively used.

2 Another procedure that I have found

3 personally to add some time to the processing of an

4 appeal is the procedure of carrying with the case

5 jurisdictional issues that are raised initially. This

6 has happened to me several times in more than one

7 circuit, where a jurisdictional issue was raised

8 initially, the parties briefed it, we got an order

9 saying that it would -- the jurisdictional issue would

10 be carried with the case, we went through full

11 briefing, including then an oral argument schedule,

12 and then the case was disposed on the initial

13 jurisdictional issue that was briefed long before the

14 merits.

15 When that happens, it just strikes the

16 litigants as being a waste of time, why wasn't this

17 issue decided initially if it was going to be the

18 dispositive issue in the case.

19 On the question of internal consistency, I

20 would again echo Emmet Bondurant's comments about the

21 unpublished 11th Circuit decisions. What is different

22 about the 5th Circuit, at least from some circuits

1 like the 9th Circuit, we not only have a large number
2 of unpublished opinions, in fact, I think that the
3 local rule states that decisions will be unpublished
4 unless a majority of the panel votes to publish. But,
5 the decisions are not only unpublished, they are not
6 available on any publicly available electronic
7 computer base, data base. You cannot get them on
8 Weslaw (phonetic) or Lexus (phonetic), so you just
9 don't know what's there.
10 I personally don't know if the judges know.
11 I don't know what their procedures are for circulating
12 opinions, but the public doesn't know. And, I don't
13 know, I mean, there could be a lot more inconsistency
14 in the 11th Circuit than anyone really knows about.
15 I don't want to call it secret law, but it's
16 frustrating sometimes, and I've had the experience
17 that Emmet Bondurant mentioned today, of just learning
18 about a case that is very relevant, very similar to a
19 case I was handling, and it was just chance that I
20 learned about it either from meeting someone who was
21 involved in it, or sometimes you'll have a published
22 district court opinion, in which case you know about

1 -- you see from the table that there was some action
2 taken, and then you can get the opinion from the 11th
3 Circuit.
4 But, if the district court case was not
5 published, there's no way to even know about it,
6 unless it's by chance. And, I think that's a
7 disservice. I think that it would promote consistency
8 to have the unpublished opinions available to the
9 public, if they are not deemed to be significant
10 enough to be considered binding authority, they
11 nonetheless have the status of persuasive authority
12 and could provide guidance to litigants and judges as
13 to the results in similar cases.
14 I know I personally had the experience of
15 having a decision in a case that was unpublished. I
16 felt that it was quite inconsistent with one of the
17 published opinions. There wasn't any basis for me to
18 seek in bank review, because it was unpublished, and
19 I was a little frustrated but then I realized, well,
20 at least this way no one will know I lost the case, so
21 it had that benefit at least.
22 But, I think overall it would be better to

1 have those unpublished opinions on line.

2 On the issue of national uniformity, I got
3 reactions from a number of people in a number of
4 different areas, from Florida all the way up to New
5 York, on a point that I didn't raise with them
6 initially, although it is a point that I'm
7 particularly interested in because of my position as
8 co-chair of this ABA subcommittee, and that is the
9 lack of uniformity in the local rules of the federal
10 courts of appeals. There are an awful lot of very
11 technical, what some people view as very picky local
12 rules, and they are all different for all the
13 different courts. And, practitioners who practice in
14 more than one circuit complain very bitterly about
15 this. I have heard this from a number of people.

16 There is a law professor, Gregory Sisk
17 (phonetic), who has written an article on this, and I
18 have it mentioned in the written statement, where he's
19 gone into great depth to analyze the problems of the
20 lack of uniformity in local rules. He calls it the
21 bulcanization of appellate justice. They are a
22 nuisance. I mean, you can learn the local rules

1 usually by really doing your research, although some
2 of them are not easy to figure out, I do think there
3 are some that are unwritten.
4 To the extent that these local rules
5 deviate from the federal rules of appellate procedure,
6 I think that the issue could fall within the scope of
7 the Commission. It's not the uniform application of
8 federal law, at least not the federal standards in the
9 processing of appeals, and as a practical matter, it
10 is a problem for the practitioners. I think it does
11 create extra expense and adds to the bureaucratic
12 nature of the federal appellate courts.
13 On the issue of the extent of the
14 deliberative attention of judges, I have heard the
15 concern expressed by some people that the courts are
16 relying more and more on law clerks and staff
17 attorneys. And, the concern -- well, the concern is
18 that they are relying on these non-judges more and
19 more for screenings and to make the initial -- some
20 initial decisions about the case that go on and really
21 impact the disposition. The concern, one person in
22 particular expressed a concern that the law clerks are

1 not -- well, they are out of law school usually, and
2 that they don't have the experience that judges or
3 even experienced lawyers would have on these issues.
4 The cutting back on oral argument ties in
5 with this issue, and I think bears the thought that if
6 the judges do not have oral argument they are missing
7 a step in the deliberative process, and that the oral
8 argument process is very valuable, and people would
9 like to see that kept in place.
10 Now, on the request for suggestions for
11 measures to ameliorate the problems, that's where it
12 really gets interesting, because there are all kinds
13 of divergent views that were coming to me from
14 practitioners, even just within my firm. One of my
15 partners is a former appellate judge in Miami, and he
16 was in the state court system down there, and he was
17 very adamant, he agrees with the article that Harvey
18 Wilkinson (phonetic) had in the Wall Street Journal,
19 we don't need more federal judges. I mean, he was
20 just agreeing with it all the way down the line, from
21 his perspective.
22 On the other hand, a lot of other people

1 that I've talked to within and outside of my firm have
2 felt that we could use some more judges in the 11th
3 Circuit.
4 Now, we have recently gotten a couple of
5 new judges in the 11th Circuit, and that may help
6 some, but I have to say with my personal experience,
7 and the delays that I've experienced in the cases, I
8 think, perhaps, maybe a few more could also help.
9 I don't believe that an artificial limit on
10 the number is a good idea. I think that there needs
11 to be some flexibility. On the other hand, obviously,
12 there's going to be a point where there are just too
13 many judges to make it manageable to operate a
14 circuit, and the in bank review problem is the one
15 that is the obvious one, what do you do when you want
16 the law of the circuit.
17 This morning, I spoke to Judge Dorothy
18 Beasley (phonetic), who is on our Georgia Court of
19 Appeals. She was Chief Judge of the Georgia Court of
20 Appeals a couple of years ago, when this issue really
21 came into focus here in Georgia in our state court
22 system, and she was quite happy to share with me her

1 ideas and what she was thinking about at the time when
2 she was dealing with that problem. And, her solution,
3 which has now been adopted in Georgia by statute, was
4 to have less than all the judges participate in the
5 decision that would establish the law of the case, and
6 I cannot remember how Judge Rymer characterized the
7 process, but in Georgia the court of appeals panels
8 are three judge panels, and the way it works here, if
9 there's one dissent, traditionally then it would go to
10 the full court, so we would have uniformity of
11 decisions, to make sure that you didn't -- it wasn't
12 so much the luck of the draw, what, you know, judges
13 you happened to get on a particular panel.
14 We have ten judges on our court of appeals.
15 That wasn't working, the Georgia Court of Appeals has
16 a tremendous case load per capita, and we also have,
17 as Emmet Bondurant mentioned, this two term rule where
18 decisions have to be processed within two terms.
19 So, to deal with this, the state has now a
20 procedure where if there is the need for the law of
21 the court, where it comes up where there's a conflict
22 with a prior panel decision, a seven judge court will

1 hear the case. What they do is, they take the next
2 three judge panel that is in line, they have a
3 rotating panel system, they take the next panel, put
4 it on the case, and then they add one judge. I think
5 maybe the Chief Judge is the one they add, and then
6 they have another method of designating that seventh
7 judge, but they then get seven judges to decide the
8 issue, and then that becomes the law.
9 And, there are times when all judges on the
10 Georgia Court of Appeals will decide a case, but they
11 are rare, there are a couple of exceptions for that,
12 and the idea is that most of the time if you have a
13 conflict then it will be decided by a seven judge
14 court, rather than every judge sitting on the Georgia
15 Court of Appeals.
16 Judge Beasley said this procedure has been
17 in effect about a year now, and she's quite pleased
18 with it, and says that she'd be happy to share her
19 experiences and talk further about the experiences of
20 the Georgia Court of Appeals on that procedure.
21 I would like to add a few comments on the
22 issue of growth, just as kind of a personal

1 perspective. Modern day brings all kinds of changes,
2 and it's startling. Four years ago, I was in a law
3 firm that had seven lawyers, and we merged with
4 Holland & Knight in 1994, all of a sudden I was in a
5 firm that had over 400 lawyers. We now have over 600
6 lawyers. We have experienced tremendous growth, and
7 have encountered some problems that are different from
8 those encountered by the judiciary, but some
9 similarities, and on the conflict issue, for example,
10 one concern I have is that our lawyers do not take
11 inconsistent positions or have positional conflicts on
12 matters we are arguing in the courts. We need to be
13 sure we are advocating fairly consistent positions. We
14 can't get in court one day and argue one position, and
15 then for the very next day arguing against ourselves.
16 And, the ways of dealing with that, and the
17 technology has helped an awful lot, our firm is spread
18 out. We have offices now -- well, Florida, Georgia,
19 Washington, D.C., Virginia, New York and also in San
20 Francisco, in California. We are all hooked up on the
21 same telephone system, we just dial four digits, we
22 speak to each other. We have E-mails, and we really,

1 I think, overall communicate pretty well, and when
2 people ask me, you know, what was it like going from
3 a small firm to such a big firm, and didn't you lose
4 the sense of collegiality and all of that, the fact of
5 the matter is, I feel like there's more collegiality
6 in a larger firm than in a smaller firm, because if
7 you have a smaller entity and you've got some discord,
8 it's felt a lot more than if you have a larger entity
9 and ways of dealing with the issues that have come up,
10 and have structure and process for dealing with
11 things.
12 So, frankly, the size that I've found this
13 growth has not been a problem, it's been exciting, and
14 there has been a lot of positive and addition of
15 diversity and new ideas that I would not have
16 encountered if I had been stayed in a smaller
17 environment. So, there are some pluses with growth
18 that come with the additional diversity and
19 perspectives when you get more people involved in the
20 process.
21 It's not hard to talk to people in other
22 states, and in other cities, and there are ways of

1 communicating and having a sense of collegiality, even
2 when we are forced to grow.
3 A couple of other thoughts on things that
4 might help deal with the case load, the heavy case
5 load that the federal courts of appeals have, and one
6 is technological advance and is fairly new, but one of
7 my partners in New York recently filed an appellate
8 brief using the CD ROM method, and he loved it, and
9 apparently the judges have had cases where there have
10 been the CD ROM filings, are very happy with it. It's
11 bound to cut out a lot of processing time, if all you
12 have to do to look at the case, the cases that are
13 cited, the record citations, is to just click on the
14 little pyramid in your computer and it pulls it all up
15 right there, you don't have to dig through papers,
16 mounds of papers, you don't have to go down the hall
17 to the library to get the cases.
18 And, another thing is, that shifts -- the
19 cost of that is on the parties to put the thing
20 together. There would be some initial costs to have
21 the hardware available, but the parties would put
22 together the cost, and in a complex case where you

1 have a lot of paper that's the kind of case where it
2 really could help out and I think alleviate some of
3 the time it takes to analyze those complex cases.
4 Another thing that I think could help deal
5 with the case load, and I think it already is doing a
6 good job in some places and maybe could be expanded,
7 and that is the mediation programs. The 11th Circuit
8 has an excellent mediation program. It's very user
9 friendly. I understand they are getting ready to open
10 up some more branch offices. It's currently based
11 here in Atlanta, but the mediators go all through the
12 circuit and mediating cases.
13 Steve Kenard (phonetic) is the person who
14 started that program here. They've added some
15 mediators. In addition, I'm spoken to him at length
16 about it, and my personal experience has been very
17 positive with this, and the litigants that I know who
18 have been involved in this process like it very much.
19 I've never heard a negative thing about it. It's
20 worked well for me. I'm trying to think, it may not
21 have settled every case, but we've had some real good
22 results, and Steve says that they actually target the

1 complex commercial cases that are the ones that seem
2 to drain the most judicial resources, the most time
3 and the most difficult to deal with, to process, and
4 the normal judicial process, those are the ones that
5 the program goes for and tries to get involved. They
6 stick with these cases and their success is, I think,
7 50 percent, which is not bad for a mandatory program,
8 but he says they tend to affect global settlement, so
9 there is often times related litigation in the
10 district courts that gets settled as well. So, it
11 eliminates future appeals from cases that are settled
12 through the 11th Circuit mediation.
13 I think it's a great program. I understand
14 -- I think all of the federal courts of appeals have
15 some sort of program but, perhaps, not as extensive as
16 the one here, and I think that's something that could
17 be a good project to focus in on and may have some
18 very good practical results.
19 VICE CHAIR COOPER: I hate to interrupt
20 you, but I want to see if someone has some questions.
21 MS. DANIEL: Yes, I'm through anyway.
22 VICE CHAIR COOPER: Your time is up, but I

1 haven't been flashing lights at you.

2 MS. DANIEL: Well, I could -- you know, I

3 can't tell when I start talking, there are no lights,

4 I'm used to that.

5 VICE CHAIR COOPER: That's all right, I

6 understand. Well, it's very informative, and we

7 appreciate the effort of surveying your partners.

8 Judge Rymer, do you have any questions?

9 Dan, do you have any?

10 PROFESSOR MEADOR: No thanks.

11 VICE CHAIR COOPER: All right.

12 Thank you so much. We appreciate the

13 effort that you did, of making the presentation to us,

14 and, particularly, getting the views of your other

15 partners.

16 MS. DANIEL: Thank you.

17 VICE CHAIR COOPER: Our next witness is

18 Judge John Godbold, former Chief Judge of the 5th and

19 the 11th Circuit Court of Appeals.

20 Judge Godbold, it's a real pleasure to have

21 you, and you certainly honor us by your presence by

22 being here today. Thank you so much.

1 JUDGE GODBOLD: Thank you very much.
2 You can tell I'm an old time courtroom
3 lawyer, because I'm talking from my yellow pad.
4 Let me first address some of the specific
5 questions that the Commission asked us to comment
6 upon. Timeliness, this is a big problem, I think it's
7 the greatest problem that faces my court. This is a
8 function, as I see it, of cases and the judges, and
9 the attitude of judges. A court can encourage
10 timeliness.
11 In the old 5th, we had a rule that a judge
12 who had had an opinion under submission to him to
13 write for more than six months was removed from the
14 bench until he circulated the opinion.
15 To my great surprise, after trying that out
16 for a year, the judges themselves suggested that the
17 six months be dropped to three months, and that was a
18 rule we were operating under at the time the division
19 occurred. I think our then Chief, or the Chief for
20 most of that time, never had to remove a judge but
21 once, but he did, and it really produced timeliness.
22 The 11th, I'm sorry, doesn't have that

1 rule, I preach about it once in a while, but the newer
2 judges have not succumbed to it yet.
3 A court needs rules of timeliness, and they
4 need rules of timeliness that have teeth. It is not
5 enough to say I consider first of all the opinions
6 written by other judges, or I get my work out in 60
7 days. These platitudes do not produce the firm
8 compliance with time that is necessary.
9 Judges have a funny way sometimes of
10 handling decisions. A judge is assigned an opinion,
11 it might even be me, and I put it over on the back
12 burner and I'm doing something else and I say I'll get
13 to that when I can. Well, if it takes five days to
14 write an opinion, it takes five days now or it takes
15 five days three months from now. The problem is not
16 so much -- or it's not only volume, it is time,
17 selecting time, when does one deal with a case. Does
18 he put it off or does he get on with it as fast as he
19 can and move it through the pipeline.
20 Oral argument, there's been a lot of
21 dialogue about that. There are varying views.
22 There's a certain amount of mythology tied up with

1 oral argument, mythology and history. The
2 spokesperson is trying to persuade judges of
3 something. Well, his brief may be a much better
4 persuader than his voice, and often is, and I agree
5 that -- I'm of the opinion that 15 minutes in my court
6 is not quite enough. We begin in the 11th with 20
7 minutes standard time, 30 if you have a really tough
8 case. Later they dropped it to 15, which I thought
9 was too short. There's a psychological difference,
10 and there are practical differences between 15 and 20.
11 The guy with 15 gets 20 anyhow, usually. So, that's
12 pretty short.
13 Do visiting judges help, and do they harm?
14 Indeed, they do help, but there's a great mythology
15 about this that is not backed up by statistics. In
16 the 11th last year, the visiting judges filled six
17 percent of our judge slots. Senior judges from within
18 the circuit filled ten percent. Well, one of those
19 six percent figures has got to be pretty powerful to
20 have much effect on a decision of this circuit.
21 Since I took senior status, I have sat on
22 ten of the 11 numbered circuits, and my approach, and

1 I think it's the general approach, is that on a matter
2 of the law and practice of that circuit, that I
3 wouldn't think about interfering with it. I may argue
4 the point, and I'll get pretty vociferous, once in a
5 while I might even dissent, though I can think of only
6 one occasion, largely I depend upon the local judges
7 to take the lead, and then I contribute to that
8 dialogue, and decision as I can.

9 On a strictly local matter, I worked on one
10 recently that had to do with misbehavior by a lawyer
11 who wrote an ugly and obscene brief. Well, I know
12 what we do with them in the 11th Circuit, but they
13 said what would you do with it in our circuit, and I
14 said, whatever your circuit policy is.

15 So, the idea that a visiting judge is
16 somehow a detrimental force is simply mythology. They
17 are creators, they give us ideas, they give us
18 thoughts, they give us the wisdom, and they do not
19 create trouble.

20 I recall one time when a visiting judge
21 wrote a bitter dissent in this circuit, saying he
22 disagreed with the law of the circuit, thought it was

1 all wrong, well that seemed to me totally
2 inappropriate. He was never invited back.
3 Opinions, a writer of our country has said
4 that the worst writing in America is done by judges
5 and sports writers. There's some truth in that.
6 However, the grand manner opinion that Professor Henry
7 Hart (phonetic) sold to the Bar of this country is
8 gone. Professor Hart had served on as law clerk on
9 the supreme court, and when he went back to his work,
10 when he went to his work at Harvard he carried with
11 him the idea that every opinion, no matter what court
12 it came out of, should be written in the grand manner,
13 which means using the predicate of the opinion as a
14 predicate to talk about everything.
15 Well, the grand manner opinion is pretty
16 well gone. I suspect a circuit judge now writes one
17 or two a year and that's all, and the rest of the time
18 he's writing to tell the parties how the case came out
19 and why.
20 Tied into that is timeliness, opinion
21 writing, structure of the court, I thought I'd duck
22 the characterization but I won't, are entangled with

1 the ego of judges. Most judges in the federal system
2 are well educated, with good practice backgrounds,
3 they are by and large capable and they know it so well
4 that they come to confuse a function. Judges don't
5 own the court, a lot of them think they do, they are
6 trustees for the people of this country, and the
7 primary question is not what makes judges happy, but
8 what are the needs to be served and how should they be
9 served.
10 Consistency -- let me go back just a
11 minute, in the matter of ego of judges, it surfaces at
12 many points, it particularly surfaces in desire for in
13 banks, and my court has too many, in which the demand
14 for an in bank and the argument at an in bank often is
15 the ego of the demanding judge, and the ego may be
16 important, but it should not be commanding.
17 Some judges need to school themselves
18 against the feeling that the law has to be padded and
19 molded in the precise form that he wishes. Well, I
20 doubt that our country put him in office for that
21 purpose. This is a decisional court, a dispute-
22 deciding court, and changes in the law flow from that,

1 not as a primary objective.

2 Dean Paul Carrington (phonetic), one of the
3 real scholars about the federal system, has said most
4 appellate judges in America think they are in training
5 to be (inaudible) or go to the supreme court, and we
6 need to get on with the business of case deciding, and
7 when the court has spoken on an issue then that's the
8 law and let's go on with other things.

9 In thinking of the nature of the federal
10 system as a dispute-deciding court, across the country
11 in the United States the rate of affirments approaches
12 85 percent. Now, the average lawyer thinks that he's
13 got -- he says, give me a level playing field, and
14 what he means by that, he wants a 50/50 shot.
15 Certainly, the client, I suspect, has at least that
16 expectation, with some differences in the percentage
17 of cases, but across the board about 85 percent are
18 affirmed.

19 It was Cardoza, I think, who said that in
20 appeals in the federal system in 90 percent of the
21 cases the result is for (inaudible), nothing anybody
22 can do, say, write, orally argue is going to deviate

1 from, or is going to depart from that sort of
2 expectation.
3 Besides any experience, an appellate lawyer
4 will tell you that dispositive issues are highly
5 predictable. What that means is that the court often
6 can get down very quickly, not only to decision, but
7 as to what the issues are. Excuse me for being
8 personal, but when I was a boy judge I sat out in
9 Houston with Judge Hutchison (phonetic), who at that
10 time was the longest tenured federal judge in America.
11 I sent him a draft opinion, which I dealt with every
12 issue that had been raised, he came down the hall to
13 talk to me and said --
14 (Whereupon, tape change.)
15 JUDGE GODBOLD: -- lawyers can think up,
16 and it was a wonderful lesson, because I've tried to
17 focus on what needs to be decided and written on and
18 what does not.
19 The 11th has a two-channel system of oral
20 argument and non-argument. It works, we think, well,
21 though we are working on it now trying to polish it
22 up. There have been some expressions that the lawyers

1 don't like it. At first they didn't like it, because
2 we inherited this from the old 5th and they did a
3 lousy job of, they just put it into effect, didn't
4 talk to the bar, didn't say anything, didn't explain.
5 Once it is explained to lawyers, and they understand
6 how it operates, at least that far they feel better
7 about it.

8 Several years back we ran a survey asking
9 -- well, that's not quite right -- we require in each
10 brief the party put a little paragraph at the first
11 saying, does this case, does it have oral argument and
12 why. It's not a waiver, it's just an informative
13 device.

14 In over a third of the cases both lawyers
15 said this case does not deserve oral argument, which
16 tells you two things, is there are a substantial
17 number that don't deserve oral argument, and the Bar
18 has confidence in what is being done.

19 Jurisdiction, all of us here in this room
20 know that Congress is not going to make any plenary
21 reexamination of federal jurisdiction. Maybe they
22 will deal with some specific matters if they become

1 urgent enough.
2 We are doing too much, both in numbers and
3 substantively, the courts are not necessarily the best
4 place to deal with some of the problems of the social
5 order, but we do get the problem of an orderly society
6 given to us because we are in place, and working and
7 generally well regarded.
8 I would say to the Congress, please, no
9 more jurisdiction of crimes that the states ought to
10 handle, and civil remedies that the state can handle
11 as good or better than we can. At least take another
12 look at diversity, at least to the extent of making it
13 available to only the non-resident. The origin of
14 diversity was that the non-resident was prejudiced.
15 Well, let's leave that on effect, but it was never
16 intended originally to be a refuge for the resident.
17 Next, what can be done with respect to
18 congressional changing of the review process in
19 administrative agencies. The big bear in this is
20 Social Security. A Social Security case, and the
21 process that's being handled, may get the attention of
22 as many as 13 different readers. The ALJ decides it,

1 it goes to a board in Washington where there are three
2 people. It comes back to the district judge, he sends
3 it to the magistrate, who sends it to his law clerk to
4 give him a recommendation. The law clerk sends it
5 back to the magistrate. The magistrate sends it to
6 the district judge, who sends it to his law clerk, and
7 then it comes back to the district judge. And, when
8 all these get through they send it to the court of
9 appeals, where it gets looked at by three judges.
10 Now, these cases are not that difficult,
11 and this is appeal gone wild. And, we could turn this
12 over to an administrative agency.
13 Staff attorneys, they are useful but they
14 are risky. It is very easy to use the talents of
15 staff attorneys so much that we slide into letting
16 them do things that judges ought to do. Twice I
17 testified before committees of Congress that were
18 concerned about staff attorneys, and they brought to
19 light what I had not caught on the 5th Circuit, staff
20 attorneys were writing what was called suggested
21 opinions, and the congressmen thought that was wrong,
22 and I thought it was wrong. So, they don't write

1 suggested opinions, they write memoranda. I can take
2 that memorandum, to the extent I agree with it, and I
3 can use it in writing an opinion, but the law clerk
4 does not produce an opinion.
5 In my chambers, my law clerk writes an
6 opinion occasionally, but she does so after I have sat
7 down and said there are four issues, here's what we
8 are going to decide on issue one, here's number two,
9 here's number three and number four forget about, we
10 are not going to address that at all, and she goes off
11 and writes under my direction.
12 Judgeships, how many, I doubt if -- I don't
13 agree with Judge Tjoflat, and I suspect he didn't tell
14 you the whole story, after a good many years of
15 arguing about it, the 11th opted to go for 15 judges
16 instead of 12, three new ones, and I was able to get
17 that adopted with the help of some others, then I went
18 to the Federal Judicial Center and as soon as I got
19 out of town they revoked it, and there it stands at
20 12.
21 Well, I've been on a court of nine, a court
22 of 12, a court of 13, a court of 15, and there's not

1 a heck of a lot of difference. And, I was on a court
2 with 26 actives and ten seniors, 36 judges, and that
3 makes a big difference.
4 In addition to the problems that you may
5 have specifically addressed, there's an underlying
6 problem, which to me may be the biggest one. As the
7 court gets too big, the nature of the process changes.
8 In smaller and moderate size courts, judges are
9 operating as individuals, though they may be in a
10 panel or they may be in an in bank court, but they are
11 speaking and thinking as individuals. This is an
12 individualized process, in which everybody
13 contributes.
14 When the court became too large, it became
15 like a legislative body. It formed cliques and
16 groups, and even in some instances it was decided who
17 would speak for the group, and there were shifts
18 between groups that were tradeoffs. And, I discovered
19 one time to my outrage that one of the groups had even
20 had a meeting ahead of the in bank to decide what they
21 would do. Now, this is the antithesis of the judging
22 process, but it's endemic to a group that is too large

1 for individualized thought.

2 I believe I'll stop there and if you have

3 any questions.

4 Oh, excuse me, may I mention one other

5 thing that Judge Rymer brought up?

6 VICE CHAIR COOPER: Yes, sir, go ahead.

7 JUDGE GODBOLD: You asked one of the

8 spokespersons about the use of administrative units.

9 This was a creation of statute. Quite frankly, it was

10 a political maneuver to give us some time to try to

11 get the ultimate division done. So, with the help of

12 then Attorney General the court was divided into unit

13 A and unit B, and operated in that fashion until

14 almost a year later the legislation was adopted that

15 made a formal split. It was a disaster, a necessary

16 item, but it was -- well, maybe that overstates it, it

17 was awfully hard to handle.

18 Assigning judges to new cases is easy, but

19 you've got to devote a couple of years to deciding the

20 old circuit cases by judges who may now be in

21 different units. You've got the old circuit cases

22 carried forward. So, we had unit A cases and unit B

1 cases, and mixed cases, and each unit had an in bank
2 and then you had an in bank over the in banks. It was
3 not a happy experience to try to run disputes over
4 personnel, do you work for unit A or do you work for
5 unit B, or do you work for both of them? It was not
6 for us a very successful event.
7 One last comment. The last speaker
8 referred to the history of the division, which did
9 take 20 years to ultimately get everybody persuaded.
10 Two things broke the ice, it stayed in the deep
11 freeze, and probably would be there now but for two
12 things. The groups who had felt that it would create
13 a magnolia court, as they called it in the southeast,
14 that was not sensitive to civil rights, and the second
15 one was which way did Mississippi go, and the
16 Mississippi judges, the Mississippi Bar, the
17 Mississippi people, all wanted to go to the east
18 because this was where they were naturally allied by
19 history, temperament, industry and so on.
20 Senator Eastland (phonetic) was Chairman of
21 the Judiciary Committee, and no split was going to
22 occur unless Mississippi went to the east, so

1 everything was frozen for months and months.

2 The two judges from Mississippi, realizing
3 that their desires and the desires of their state were
4 keeping the split from occurring, so they sat down
5 with Senator Eastland and said, put us with the west.
6 This was a magnanimous action, done against their
7 personal wishes, but in order that what they thought
8 was necessary should be carried out.

9 After that was done, all 26 judges of the
10 11th Circuit signed a petition to the Congress to
11 divide them as quickly as possible, and of ten senior
12 judges, nine concurred, so we ended up with 36 judges
13 in favor, one opposed.

14 Can I answer any questions now?

15 VICE CHAIR COOPER: Yes, sir.

16 You said 26 was too big, and I want to call
17 on your experience in Washington, Federal Judicial
18 Center, have you looked at the 9th Circuit and do you
19 have any opinion on the 9th Circuit, as to what should
20 be done or not to be done with the 9th Circuit?

21 JUDGE GODBOLD: Well, Mr. Chairman, I hoped
22 I could come and share my views and experience with

1 you without having to vote on the 9th Circuit.
2 VICE CHAIR COOPER: Judge, you certainly
3 don't have to say anything you don't want to, I can
4 assure you. I just was curious if you had any views,
5 and if you don't want to express them that's fine.
6 JUDGE GODBOLD: Well, I guess I'm -- my
7 position goes back to what I said earlier, I'Ve been
8 little, I've been moderate, and I've been big, and
9 little is best. Little is best. But, it's not easy
10 to do, and it takes -- well, there are two or three
11 things that tie into it.
12 In a great big group, one loses his sense
13 of I am responsible. In the great big group, I'm
14 thinking now about our 36 judge court, everybody
15 thinks somebody else is responsible, and I go back
16 again to what I said, that I don't know what the
17 nature of the process is in the 9th Circuit exactly,
18 but I can tell you that in general a great big group
19 loses a lot of its character as a court.
20 Can I help any further?
21 VICE CHAIR COOPER: Judge Rymer?
22 JUDGE RYMER: If the case load continues to

1 increase, and if, in your view, you know, a large
2 court is not optimally effective, then what does one
3 do?
4 JUDGE GODBOLD: Well, I think we are going
5 to do what we have continued to do for a long time,
6 which is do the best we can with the immediate problem
7 at hand.
8 You see, the approach very often is, when
9 you assemble a group like this, is everything is
10 discussed in plenary fashion. We are going to devise
11 a plan for the future. What's the best way of handling
12 this? And, you've done that in questions you ask.
13 But, I am afraid our decisions are going to
14 be in the future made ad hoc, circuit by circuit, as
15 the need arises. I think politically that's the only
16 way we are going to be able to do it.
17 It's hard enough to decide how to
18 reconstitute one circuit, than to reconstitute all of
19 them. You know, the commission in the early 1980s,
20 chaired by the Senator from Nebraska, Dan, do you
21 remember his name?
22 PROFESSOR MEADOR: Ruska (phonetic).

1 JUDGE GODBOLD: Yes, explored the
2 reconstitution of several courts and he didn't get
3 very far. I think he got to maybe one or two circuits
4 at a time, and if the court has too many cases just
5 wrestle with it, do whatever you've got to do about
6 it, you can't make the cases go away.
7 In redoing the 2nd and the 5th, we thought
8 that Arkansas would happily join a circuit composed of
9 Louisiana, Texas and Arkansas, that would have solved
10 the Mississippi problem. Well, what's a more natural
11 prediction than Arkansas, it's a long way from the
12 northern boundary of Louisiana to the Canadian border,
13 which is bound to the 8th, and Arkansas is a state
14 that's not typical of any of the others in the group,
15 but we are negotiating with the people in Arkansas,
16 and the judges said no, the political figures said no,
17 and the population said no. So, it's not easy to
18 reform.
19 We conferred with New Mexico, and they
20 said, nope, we are mountain state, we are not
21 interested in you farmers.
22 JUDGE RYMER: Other than the art of the

1 political possibilities --

2 JUDGE GODBOLD: I beg your pardon?

3 JUDGE RYMER: -- other than art of what is

4 possible politically, which is sort of what you are

5 suggesting in those comments, what criteria or what

6 measuring rod would you suggest for configuring

7 circuits in general?

8 JUDGE GODBOLD: I would -- I would work at

9 changing opinion among lawyers, among the Bar,

10 although the Bar usually will follow the leadership of

11 the judge, to train people, or to educate would be a

12 better word, that division is necessary, and they

13 ought not to be opposed because of the individual

14 feelings of judges. That's what we had to do for 20

15 years, not quite 20, I was there for 15 of them, is we

16 had to change the views of a substantial part of our

17 population, and we had to change the views of over

18 half of our judges, and with that in hand we had to go

19 to Washington and convince Congress. And, I'm afraid

20 there's no substitute for that.

21 VICE CHAIR COOPER: Dan?

22 PROFESSOR MEADOR: Let me ask a question

1 about the internal processes of the 11th Circuit.
2 As you probably know, we have encountered
3 what I would call a perception problem on behalf of a
4 lot of lawyers and so on. It may or may not be
5 reality, but a perception that a case that goes
6 through the process without oral argument, without an
7 elaborated opinion of some sort, that there's no
8 confidence, at least in some quarters, that any judge
9 has really looked at it seriously. And, there is an
10 argument that no case should go through without either
11 oral argument or a reasoned opinion, some view that
12 one or the other might satisfy that viewpoint, but the
13 absence of both is said to raise great doubts about
14 the process. What are your comments about that
15 perception?
16 JUDGE GODBOLD: Well, Professor, by
17 hypothesis an oral argument, a non-oral argument case
18 is perceived by the judges as a case in which oral
19 argument won't help anybody. It may help the
20 academics with something to talk about in the
21 classroom, but as far as the judicial process is
22 concerned it's a simple direct case.

1 And, I pointed out to you the figures
2 indicating that several years ago the lawyers didn't
3 feel badly about it, the lawyers as a group. I expect
4 an individual lawyer does.
5 So, if you are going to have decisions
6 without opinions, and we do have those, our rule
7 permits affirments without opinion in a case that has
8 no precedential value and no interest so forth, and
9 the opinion, or you call it an opinion, just as
10 affirmacy rule 36.1, and that ruling can be only for
11 the appellate -- can only be for the appellee, it
12 can't be affirmed for the appellate.
13 The non-argument procedure gets very good
14 attention, I'll tell you quickly what happens, Dan.
15 I'm the originating judge of a panel of three who sit
16 together on this task for a year. The briefs and
17 records come to me. I study the case, if I think it
18 can be decided without oral argument I write a
19 suggested proposed result, maybe an opinion, and send
20 it to judge two. It does the same thing, he sends it
21 to judge three.
22 If any judge thinks the case -- any of the

1 three judges thinks the case deserves oral argument,
2 he simply checks a little block, there's no discussion
3 or dialogue, it goes to the clerk and switches to the
4 oral argument track.
5 If all three judges agree that it doesn't
6 deserve oral argument, they agree with the result, and
7 they agree with an opinion a written, then it goes to
8 the clerk as an opinion.
9 Now, when you explain this to lawyers, they
10 begin to feel somewhat better about it, if you have
11 the view that there has to be an opinion in every
12 case, then the courts of appeal can't do this, most of
13 them can't.
14 Publication is another matter that I won't
15 get into, that gets awfully convoluted as to what's
16 going to be published and what's not.
17 Does that help any?
18 VICE CHAIR COOPER: Judge, thank you for
19 today and for your service to the country in so many
20 different capacities. We certainly appreciate the
21 effort that you did by coming here today and your past
22 service to the Federal Judiciary all these many years.

1 Thank you so much.
2 JUDGE GODBOLD: Thank you.
3 VICE CHAIR COOPER: We have one more
4 witness, and it's Peggy Zemetronack (phonetic), did I
5 pronounce that correctly?
6 MS. ZEMETRONACK: Yes, thank you.
7 VICE CHAIR COOPER: All right. She's with
8 Citizens for Honesty in Government.
9 And, since you weren't a scheduled speaker,
10 there will be a five minute time limit, so just use
11 your time wisely, Ms. Zemetronack.
12 MS. ZEMETRONACK: Thank you very much.
13 Thank you for the opportunity to speak to
14 this honorable Commission this morning. My name is
15 Peggy Zemetronack Dadik (phonetic), and this is my
16 husband, Michael. I am the President of Citizens for
17 Honesty in Government. You have a number of citizens
18 from different groups here from Florida, and also from
19 Atlanta, from the Atlanta area, and from other areas
20 in Georgia.
21 I would like to address some key issues.
22 We have not, of course, had sufficient notice to

1 really prepare a lot for this morning, but we
2 represent, really, a new group of citizens. We are
3 pro se litigants, but we are not the typical pro se
4 litigants who do not understand the mechanisms of the
5 courts.
6 We were thrown in the court system
7 unwantingly back in 1991. My husband and I have been
8 to over 700 hearings in our own cases. We prevailed
9 in the 3rd Circuit last spring. So, we are pro se
10 litigants who have been recognized by the courts as
11 credible.
12 I would like to say that I believe we can
13 provide a good deal of input to this committee. We
14 would like the opportunity to do some of that in
15 writing.
16 But, part of what we've heard here today
17 confirms what we have believed are serious problems in
18 our federal court system. You see, part of the
19 problem with staff attorneys is that judges don't read
20 pro se briefs, and this is the reason. The staff
21 attorneys look at the briefs that come in from
22 opposing counsel. Opposing counsel is less than

1 ethical on many occasions, and what they say in their
2 briefs is, these are pro se litigants and they don't
3 know what they are doing. So, no one reads that non-
4 credible brief, and the pro se litigant loses.
5 Unlike the attorneys who came here and said
6 they have no problem reaching oral argument, we have
7 consistently been denied, in the 11th Circuit, oral
8 argument since 1994.
9 We, as citizens, and I speak for many
10 citizens, because I teach pro se litigants how to do
11 legal research, how to be credible and not waste the
12 judges' times across the country. I teach seminars.
13 And, we citizens feel that we pay plenty of taxes, and
14 in return for that we deserve access to an impartial
15 judiciary, not to their staff, not to people who are
16 easily reachable by less than credible attorneys, and
17 they are out there.
18 We've also had problems in the clerks'
19 offices, and no one will do anything about it. Here
20 in the 11th Circuit, we have absolute evidence that
21 our documents have been tampered with. We sent
22 letters, motions to the Chief Judge here before it was

1 Judge Hatchett and it was ignored. No one would do
2 anything about the tampering with the files, and we're
3 speaking about a federal felony. This is a serious
4 problem.
5 We are on our way after this hearing over
6 to the U.S. Attorney's office in hopes that they will
7 do something of it, because we have certified copies
8 of documents showing that documents were removed from
9 our files so that by the time it got to the appellate
10 panel the meaningful documents were gone. And, we
11 have proof that this is happening across the country
12 to pro se litigants. It's a very serious situation.
13 We need to make Congress aware of it.
14 The lack of ethics, which we all know is
15 there, is just being ignored. We don't know the
16 answer, we hope Congress will come up with an answer,
17 but most of our laws have been based on attorneys,
18 like the attorneys we have heard speak here this
19 morning, who are credible, honest, who bring honor to
20 their profession, judges like the judges that we heard
21 speak here, like Judge Hatchett and Judge Godbold, who
22 are to be respected.

1 That's the way I was raised, that's the way
2 my peers were raised. We want to be able to maintain
3 that respect in the judiciary, and if we are going to
4 be able to do that we have to recognize that middle
5 America cannot always afford an attorney. There are
6 times when they have to come into court on their own,
7 because they just ran out of money, paying it to
8 attorneys who weren't doing what they were paid to do.
9 For example, in our own situation, it was
10 over $200,000.00 and our attorneys were losing when we
11 said, well, we can't do any worse.
12 The lack of security in the clerk's office
13 is a major problem. Anyone can go in to any federal
14 clerk's office, ask for a file, and it is handed to
15 them across the counter. There are no security
16 cameras, there is no one watching. They say, take the
17 file over to that bench and you can look through it.
18 A dishonest opponent can easily go with a briefcase
19 which he has in his hand, pull documents out of the
20 file, slip it into his briefcase, and your records are
21 gone. And, when the appellate panel looks at it, your
22 arguments are not there.

1 And, when they think it's a pro se
2 litigant, who doesn't know what he's doing, it's a
3 major problem. That pro se litigant is prevented from
4 having justice.
5 I was very shocked to hear Judge Hatchett
6 say here this morning that it's staff attorneys who
7 are dealing with the pro se cases. The pro ses have
8 an equal right to have justice by an Article III
9 judge. They deserve it, the people who try so hard,
10 my husband and I spend an average of 17 hours a day
11 working on our legal problems. We have had to give up
12 our lives to do this, but we feel that what we are
13 working for will change what's happening in our court
14 system for other Americans, because the one thing we
15 have learned since 1991 is that we have a terrific
16 judicial system. We have good judges, who are just
17 not getting the documents that people are filing, when
18 they are not represented by attorneys.
19 And, we talked about egos here this
20 morning, and part of it is the attorney ego that
21 creates that, because an attorney who is losing to a
22 pro se litigant, who knows what he's doing, just can't

1 take it, and he will absolutely pull out the plugs and
2 do anything to ensure that he doesn't lose against
3 that non-trained person who is coming in armed with
4 the law and armed with honesty, and because pro ses,
5 of course, cannot succeed unless they come in on the
6 basis of honesty and understanding the law.
7 I would like the opportunity to submit some
8 other suggestions to this Commission, and I certainly
9 appreciate the opportunity to speak this morning.
10 There is a gentleman here, who mistakenly was thought
11 to be in our group also, his name is Johnny O'Daniel
12 (phonetic), and he's with a group from the Florida
13 Keys called the Florida Key Residents for Ethics in
14 Government. I don't know if you'd be able to hear him
15 for a few minutes, but I will certainly be glad to
16 step back if you can give him a few minutes also.
17 VICE CHAIR COOPER: Sure, that will be
18 fine.
19 You can come forward.
20 Thank you so much, and we'll be glad to
21 take any written submission you would like to submit.
22 MS. ZEMETRONACK: Thank you so much.

1 VICE CHAIR COOPER: Yes, sir, can you
2 identify yourself? There was some confusion, that
3 maybe you were both with the same group, but come
4 forward and we'll give you a few minutes.
5 MR. O'DANIEL: Yes, sir. My name is Johnny
6 O'Daniel, and we just drove up from the most southern
7 part of the 11th District, the Florida Keys. This is
8 a very serious and very close to the heart problem
9 with me and a lot of the people down there.
10 We have a bad problem in the 11th Circuit.
11 Right now, litigant pro ses win only three percent of
12 the cases, not a very fair balance.
13 Now, as Peggy just spoke of, we have a bad
14 problem in the 11th Circuit with court documents and
15 court records disappearing. I would like to suggest
16 to this panel here today that when a person views
17 court files, court dockets, that they must show an ID
18 and sign in.
19 Pro ses are, like I say, considered the
20 bottom of the totem pole.
21 I would like to comment on Judge Hatchett's
22 here today speech, I'm very proud we have judges like

1 that today, but on thing did bother me, last year, I'm
2 going to give you a one for incident, we had a case
3 where a judge refused to correct a court document. We
4 filed 5,200 372s against that judge, 5,200, that's
5 probably more than the rest of the judges in the
6 United States combined together. Yet, what did this
7 judge do? He dismissed them.
8 This judge stood up here today and told you
9 that he's in the business of making laws, that's a bad
10 problem. Our courts today are here to determine the
11 laws, not make them, to uphold John Q. Public's
12 constitutional right. If it means setting up in a
13 court where litigant pro ses are not held to the same
14 standards as attorneys, fine, let's do it, let's see
15 that all persons' constitutional rights are upheld.
16 Being a litigant pro se, I should not have
17 to know the approximately 7 million laws on the books
18 today, it's an impossible task. I don't need to know
19 them to have my constitutional rights upheld, that's
20 what we pay judges to do, to interpret the
21 Constitution, to interpret rights.
22 That's all I'm asking that happens in the

1 11th Circuit today, you know, it hasn't always
2 happened. I'm ashamed of our judicial system, but I'm
3 proud that we have people like Judge Hatchett, you
4 know, come up here and says, yes, I have a problem
5 with my court, oral argument is very important, and it
6 is very, very important to pro ses. Pro ses must have
7 and must be guaranteed a right to oral argument.
8 Thank you.
9 VICE CHAIR COOPER: Thank you for taking
10 your time.
11 This hearing is now adjourned.
12 (Whereupon, the hearing was concluded.)
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