COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

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VICE CHAIR COOPER: The hearing will come to order. First I would like to introduce -- we are pleased to have Judge Pam Rymer joining us from the 9th Circuit Court of Appeals by way of technology and voice mail. These hearings are being recorded for the benefit of the Commissioners that are absent. I am Lee Cooper, Vice Chair of the Commission, a lawyer in Birmingham, Alabama with the Law Firm of Maynard, Cooper, and Gayle.

We are pleased to have with us this morning, as I said, Judge Pam Rymer from the 9th Circuit, who is here by way of teleconference. We have Judge Gil Merritt, former Chief Judge of the 6th Circuit Court of Appeals, and we have Professor Dan Meador, who is James Monroe Professor Emeritus from the University of Virginia Law School and is Executive Director of the Commission.

This is a public hearing called by the Commission on the structural alternatives for the Federal Courts of Appeals. This Commission was created by Congress and charged with the following

functions: 1) study the present division of the United States into several judicial circuits; 2) study the structure and alignment of the Federal Court of Appeal system with particular reference to the 9th Circuit; and 3) report to the President and the Congress its recommendations for such changes in the circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals consistent with fundamental concepts of fairness and due process.

The Commission thus has a broad mandate to examine the entire Federal Appellate system and make recommendations to strengthen and hopefully improve it. As was stated in the announcement of public hearings, the Commission is interested in obtaining views on whether each Federal Appellate Court renders decisions that are reasonably timely, are consistent among the litigants appearing before it, are nationally uniform in their interpretations of federal law, and are reached through processes that afford appeals adequate and deliberate attention of judges. The Commission has really much to do within a

relatively short period of time since our final report under Congressional mandate is due in December.

In undertaking this important mission concerning the administration of Appellate justice in this country, the Commission welcomes the views of all interested persons and organizations either as witnesses at the hearing or in writing, and we are pleased to have some distinguished witnesses with us this morning. On behalf of the Association of the City Bar of New York, we would like for you to identify yourself for purposes of the record.

MR. SCHALLERT: Edwin Schallert.

VICE CHAIR COOPER: Pam, can you hear him?

JUDGE RYMER: Yes, I think so.

VICE CHAIR COOPER: Okay. Why don't we try to move the microphone to the table, Ed. It is certainly fine to stay at the table. See if that cord will reach. Either way. If you are more convenient at the table, the microphone will stretch.

MR. SCHALLERT: Distinguished members of the Commission, Professor Meador, I am a member of the firm of Devilweiss and Plimpton here in New York City,

and I Chair the Committee on Federal Courts of the Association of the Bar of the City of New York. I greatly appreciate the opportunity to present the Association's views as part of the Commission's important work.

My written testimony on behalf of the Association, which was previously submitted, could be distilled into four points. First, we do not believe there is any need at this time for significant structural changes in the Courts of Appeals. Other than possible changes to the 9th Circuit, as to which the Association takes no position, we are deeply skeptical of any material changes to the structure of the Appellate Courts.

Second, the most pressing problem in the Court of Appeals for the 2nd Circuit is not structural. Rather, it is the problem of judicial vacancies. With 5 vacancies, the 2nd Circuit now has only 8 active judges. 35 years ago, the Court had 9 active judges. The Court's caseload has grown almost tenfold during this period. Continuing vacancies threaten to compromise the high standards of justice

that litigants in the 2nd Circuit have long expected.

Third, the fact that even with vacancies the 2nd Circuit has functioned as well as it has provides powerful evidence of the resiliency of the current Appellate Court structure, we believe. With a full complement of 13 judges, or with the 15 judgeships for which authorization has been sought, we believe the 2nd Circuit could indefinitely maintain its traditional high standards for disposing of cases. Even with vacancies, the 2nd Circuit consistently ranks as one of the fastest Circuits with a median time of filing to disposition of approximately 8 months. The Court also continues to afford the opportunity for oral argument in virtually every appeal. While the Court uses summary orders rather than published opinions in over 60 percent of its cases, those orders typically provide several pages of reasoned explanation, unlike the conclusory disposition that some Appellate Courts sometimes issue.

The case for structural changes in the Courts of Appeals has traditionally been premised in

part on the effect of the growth in Appellate caseloads on the quality of adjudication. For example, in 1975, the Forusca Commission asserted that Courts had kept case with rising appeals mainly through "fundamental changes in the process of adjudication", including widespread curtailment of oral argument and decision without any indication of the reasoning impelling a result.

This assertion is not accurate in this Circuit. The 2nd Circuit had handled a several hundred percent in its caseload without --

JUDGE MERRITT: Mr. Schallert, could I interrupt you? We have your statement -- my name is Merritt -- we have your statement which outlines these recommendations. Do you think the Commission should make a recommendation to Congress on the point you just previously made concerning reasoned decisions? That is that you made the point that you think there should not be sort of one-line firm type decisions. As you know, not the 2nd Circuit, but some Circuits are or have been doing that recently. Do you think that this is something the Commission should address

in its recommendations to Congress?

MR. SCHALLERT: Well, Judge, I believe that the notion of having reasoned explanations for decisions is something that should remain a criteria for assessing any potential change. Indeed, in the long range plan of the Judiciary Committee, the Judicial Conference that was issued in 1995, I think they recited what they considered the basic hallmarks of reasoned decisions. I think my only point is that at least in this Circuit, the Court has been able to handle a very large expansion of its caseload and not compromise the quality of decision making in the sense that it is still able to give reasoned decisions. I am not sure with regard to what your jurisdiction is whether that is something within your bailiwick. But certainly from a litigant's point of view, there is a better feeling of the quality of justice when there is reasoned explanation as part of the decision, even in the form of a shorter summary order that leaves the parties feeling as if they have got a better explanation of what has happened and that leaves them feeling better about the process whether they win or

lose. And certainly I have been on the receiving end of both types of decisions. But I think the explanation is a helpful one.

JUDGE MERRITT: Do you think it is important for this Commission to address the judicial vacancy problem when we report to Congress?

MR. SCHALLERT: Well, again, not knowing exactly what is within the Commissions bailiwick, as I indicated, that is the most pressing problem in this Circuit and I believe in several other Circuits too. I know there are some proposals for structural change, I suppose, that have been advanced. Senator Leahy, for instance, has proposed legislation that if an emergency has been declared in a Circuit, the Congress cannot recess until it addresses that. I am not sure that there frankly is the need for a structural change as much as frankly political movement by both the Senate and indeed the nomination process. It becomes so protracted in some cases.

JUDGE MERRITT: Do you have any suggestions for how we do that?

MR. SCHALLERT: Well, I think reminders to

Congress about the effect of vacancies on the day-to-day operations of the Court is something that can't hurt. It is certainly rather striking, as I say, in a Court like this one where you see a Court operating with frankly the same -- one fewer active judge than it had 35 years ago. When the Chief Judge was a clerk on the 2nd Circuit for then Judge Marshall, the Court had more judges than it has today. That its not an acceptable result.

JUDGE MERRITT: The 2nd Circuit has been doomed so by having quite a large number of visiting judges. There are other Circuits that have the same problem. That is a mixed sort of thing. It is a matter of survival. But certainly we agree. I don't know -- the question of judicial vacancies is one that has been a problem for Appellate Courts now for some years, actually since the size of the judiciary has increased. The question would be how to deal with that. One way to deal with it in a more principled way would be perhaps for the President, once the vacancy has been there for a while, to have the authority to just fill the vacancy with confirmation

until Congress acts upon the recommendation one way or another. That would be one principled way to deal with it. What do you think of that?

MR. SCHALLERT: Well, the Association, let me make clear, I don't know has taken any particular position on that. Having not studied, I would like to frankly think about it a little bit. But the -- at this point, almost anything to address the problem would be a step in the right direction.

JUDGE MERRITT: Well, we need a way to get these filled in that interim period of time after so many months have gone by. Because otherwise, there is no particular incentive once the Executive and Legislative branches are at a loggerhead. So maybe this is something we ought to try to address anyway. We get your point.

VICE CHAIR COOPER: Is it -- go ahead. This is Executive Director Meador. Dan?

PROFESSOR MEADOR: You say the Court today has about the same number of judges, and yet the caseload is far larger. In your observation, what has happened? Something must be done differently to

enable the same number of judges to handle a much larger caseload. What is your perception as to what is different today about the way the Court functions?

MR. SCHALLERT: Well, Professor Meador, that is something I address a little bit more at length in my written statement. I think there are two points. The first observation was that we believe they have been able to keep up with the expanded caseload without seriously compromising the standards of justice that have been traditionally applied. I think there are a number of factors that have contributed to it. This Circuit was one of the first, for example, to use a fairly vigorous settlement conference approach and so-called CAMP Program, Civil Appeals Management Program, in this Circuit, which apparently has been quite effective in using staff counsel with the parties to achieve a higher level of settlements. I am told that 40 percent of counseled civil appeals that go through that process end up settling. That is just an example.

I think the Court obviously has judges who are working longer hours, as are many attorneys. It

has the prodigious efforts of senior judges that have helped. Visiting judges have clearly contributed to it. I think the assistance of law clerks and the use of computer technology -- I mean, it is a whole array of factors that I have tried to identify in the written testimony to explain the ability to handle the increased caseload.

PROFESSOR MEADOR: Let me ask you one other question. As you know the caseloads in the Courts of Appeals have more than doubled in just the last couple of decades. In the memory of everybody in this room, they have probably increased two or three times. Suppose over the next 10 or 20 years that Appellate caseloads double again? What do you think this Commission ought to say about that or try to address about that? Looking ahead in the future and assuming or guessing that you may have substantial growth yet to come, do you have any recommendations about what we ought to do or the Commission ought to recommend about that?

MR. SCHALLERT: Well, Professor Meador, it is very interesting having had the opportunity to go

back and read the Forusca Commission report and the report of the Froyne Committee and the like. The analysis of each of those commissions to some extent was similar in terms of starting with the growth of the caseload, projecting out the possibility of continued growth of the caseload, and then reaching recommendations in the case of both that committee and the Forusca Commission of the National Court of Appeals. My own sense is that -- and I think the thrust of our testimony is that even a doubling or tripling over the future is not necessarily cause for those sorts of significant structural changes, each of which we think comes with significant cost and disadvantages. If there were a simple solution that would not introduce more delay and more expense to the litigation process it would be one thing, but each of those solutions we think comes with a price.

JUDGE RYMER: May I follow up on that question, please? I assume that your association deals with a number of matters that aren't simply of importance in New York City but rather across institutional, city, and probably even national

boundaries. To what extent do you think the legal landscape in the next 10, 15, or 25 years is going to effect the continuing viability of a small Appellate Circuit dealing with federal appeals?

MR. SCHALLERT: Well, Judge, I have several thoughts on that. I think that -- let me start with the first part of your question. There are certainly areas of practice where we at least like to think in New York tend to attract really nationwide issues and international litigation. The fact is though that the mix of that caseload and the types of challenges are always changing. For example, the 2nd Circuit has long been a Court that has probably received its disproportionate shares of securities litigation. As a result of enactments like the Private Securities Litigation Reform Act, it may be that that caseload is changing and certainly the standards that are being applied to cases are changing. I think it is very hard to forecast. Although this may be deemed a small Circuit, if I understand your question correctly, the fact is that the population within it and the range of cases within

it is enormous.

JUDGE RYMER: To what extent do you believe that the decision of where to file a case is influenced now by (indiscernible) consideration.

MR. SCHALLERT: Well, that is a very interesting question. The truth is that I don't believe it is affected as much as some of the literature would suggest, and let me give an example of that. One of the concerns, I know, that has prompted focus on structural changes is the problem of inter-Circuit conflicts and the fact that there is different law in different Circuits. It happens that in my own practice I have encountered, up until the Supreme Court decided the AMCAM case, rather different standards, for example, that would apply to the settlement of class actions. The 3rd Circuit had different standards for judging the settlement of a class action than other Circuits. The truth is that although those standards as stated were quite different, in the application to particular facts, I do not believe the variation was all that material. In other words, good settlements tended to be approved

almost regardless of the legal standard and bad settlements tended to be rejected by Courts almost regardless of the different legal standards. And at least when I counsel clients or advise clients, I hope that I am not having them go so closely to the line that frankly those shadings make any difference. If you have a good case, I think it can be litigated in many Federal Courts in the country. So I think it is often less a function of where the relevant law is as opposed to where the parties are and where it is most convenient to litigate an issue.

VICE CHAIR COOPER: I think the sum of your testimony is not what is wrong with the 2nd Circuit but everything that is right with the 2nd Circuit. Is that a fair summary?

MR. SCHALLERT: I think that is the gist of it, Mr. Cooper. I know that that was one of the questions that the Commission put in its public hearings. I don't want to sound like a modern day pan gloss, but I do believe if it isn't broke, don't fix it is part of the theme of our testimony.

VICE CHAIR COOPER: Would you say that if

we had to double the size of the 2nd Circuit? Would it concern you if you had twice as many judges and a full complement of judges in the 2nd Circuit?

MR. SCHALLERT: Well I believe the 2nd Circuit, for example, has not advanced as a proposal having as many judges as some of the formulas of the Judicial Conference would have permitted. I mean, my understanding is that even the 15 judgeships for which authorization has now been sought falls short of the numerical result that would come out of the Judicial Conference study. And I believe the reason for that, to answer your question, is that, yes, I do think that there will be limits to how many judges that would be the best size for the 2nd Circuit. I don't think 13 or 15 exceeds that limit, but it may be getting close to it.

PROFESSOR MEADOR: What would you recommend when that limit is reached or surpassed, assuming caseloads grow and you get to the point, wherever it is, that you would say that is too many judges? Do you have suggestions as to what the Commission might think about that?

MR. SCHALLERT: Well, Professor, while it is important to anticipate the issues, I guess the thrust of my testimony is I would wait until those issues are a little more ripe, at least in this Circuit, because the structure we think with 13 or 15 judgeships that the Court should be able to handle for some fairly indefinite period of time the caseload that it has. I think that the pattern in the past practice has been to wait until those issues, as perhaps with the 5th and the 11th Circuit, reached such a critical stage. Maybe that is not the best solution, but it is the best solution that I can see to the problem.

VICE CHAIR COOPER: As a representative of the Association of the Bar of the City of New York, do you have a committee or were you selected to be the representative or tell us about that?

MR. SCHALLERT: Sure. The Committee on Federal Courts which I chair has a traditional jurisdiction over issues of the structure and operation of the Federal Courts. It is a very broad-based committee. We have within our committee

everything from practitioners to professors to Magistrate Judges and the like. The statement that was submitted was circulated not only to all of them and received their approval but also went to the Executive Committee and the President of the New York Bar Association as that is the standard procedure for getting approval of these statements. In fact, both the outgoing President of the City Bar and the incoming President of the City Bar both reviewed the statement before it was submitted.

VICE CHAIR COOPER: So you are here truly in a representative capacity.

MR. SCHALLERT: I like to believe so, at least as to what is in the prepared statement. Obviously some of the questions -- I want to distinguish that some of those may be mine.

JUDGE MERRITT: And the thrust of your testimony and your written statement is basically don't change the structure. You can make recommendations around the edges, but don't do anything to change the basic territorial structure of the Appellate Federal Judiciary?

MR. SCHALLERT: Yes, Professor Merritt -- or Judge Merritt. And by the way, I take to heart Professor Meador's comment in his University of Chicago Law Review article that practitioners tend to react instinctively negatively to any proposal for structural change. I would only respond to that by saying that litigators learn to trust their instincts, and that is certainly our reaction, Judge Merritt.

VICE CHAIR COOPER: So your report can be summed up as my gut tells me let's don't do anything?

MR. SCHALLERT: Yes, Mr. Cooper.

VICE CHAIR COOPER: All right. Thank you, so much. Any other questions? We appreciate you taking the time to be with us and preparing your written statement.

MR. SCHALLERT: Thank you again for the opportunity.

VICE CHAIR COOPER: We are pleased to have as our next witness, Judge John Newman, former Chief Judge of the Court of Appeals of the 2nd Circuit. Judge, thank you so much for taking the time to be with us this morning.

JUDGE NEWMAN: Judge Merritt, Mr. Cooper, Professor Meador, and Judge Rymer, if you can hear me wherever you are.

JUDGE RYMER: I can. My ear is there.

JUDGE NEWMAN: Thank you. I appreciate the invitation to appear here today to discuss issues concerning the Federal Appellate Courts. Let me make clear that the views I express are entirely my own and in no sense do I appear for the Court on which I serve.

I realize your immediate focus is the 9th Circuit and that your mandate also includes consideration of various structural alternatives that might merit consideration as the Federal Courts endeavor to handle far more volume than we have ever experienced in the past, and especially the likely volume that we will receive in the future if current trends in Appellate filings continue.

But with all respect, my basic point to you today is that it is entirely premature to consider structural alternatives until substantial efforts have been made to moderate the volume of Appellate

caseloads. Having served as a Federal Judge for 26 years and as an Appellate Judge for 18 of those years and as Chief Judge of my Circuit for 4 years ending last July, I have become increasingly convinced that unless the caseload volume of the Appellate Courts and indeed all Federal Courts is moderated, the Federal Court system will lose the distinctive characteristics that have justified our existence for two centuries. It might be possible for District Courts to handle increased volume by simply adding judges without suffering any fundamental loss of essential characteristics. District Judges enjoy the luxury of operating in relative isolation and their roles are not significantly changed by the addition of increased numbers of colleagues down the hall handling additional volume.

The situation is entirely different in Appellate Courts. We are group Courts, transacting our business primarily in panels of three, and responsible for maintaining the coherence of law within our Circuits. Those two salient characteristics place realistic limits on the size of

any one Appellate Court. For judges to work effectively in panels of three month after month and year after year, they must sit with each other with some frequency. We use the word collegiality, but that term does not begin to capture the subtle elements of respect, trust, cooperation, and accommodation that characterize members of a group Court at work. At some point, if volume continues to grow and more and more judgeships are created, a Court of Appeals expands beyond the size at which its judges can work effectively. And for the Court of Appeals as an entity, undue size poses an entirely unacceptable threat to maintaining the coherence of Circuit law.

JUDGE MERRITT: Judge Newman, we have your written statement, which is a very fine statement indeed, of the difficulties of having Courts of Appeals getting very larger, and you make the point that the solution to this problem is to deal with the numbers on the input side of the caseload. And of course there are two ways to deal with those numbers, one of which you are suggesting, which is a relatively new idea.

The first way or another way is to talk Congress into reducing Federal question jurisdiction or reversing the jurisdiction. That is an idea that has been unsuccessful in the past. But could you explain to us the sort of new idea that you have proposed here to use the State Courts in a somewhat different way to take up the slack and to reduce the input side of the equation?

JUDGE NEWMAN: Thank you, Judge Merritt. Let me start to explain it by pointing out a premise that you all understand. We run a dual-Court system in this country and the State Courts have about 97 or some say 98 percent of all the litigation and all the appeals. So no matter what happens to caseload volumes, the State Courts are going to bear the essential brunt of increased volume. They are already high volume courts and they will stay high volume courts. There is no inevitable reason that the Federal Courts must become higher volume courts than they are now.

Now how can it be adjusted or how can it reallocated? Judge Merritt, as you point out, some of

the proposals up until now have simply said take whole categories of Federal cases and put them in the State Courts. The usual candidate is diversity or perhaps more precisely in-state plaintiff diversity.

My suggestion for the consideration of this Commission and for the Congress before it ever gets to the issue of structural alternatives is to reallocate cases to the State Courts not by entire categories but by a system of discretionary access so that categories would be identified for mostly reallocation, but within the category. Take in-state plaintiff. Any particular case as to which the need for a Federal forum could be demonstrated could be brought into the Federal Court on a petition by either party. Every time I suggest this to lawyers, they give me some wonderful examples of cases where they say it has got to be in the Federal forum. They give me the air crash case, although that may be taken care of with the new jurisdictional arrangement that Congress is on the way to enacting. But they give me that example, an air crash which involves the law of many states. Or they tell me about the case against

the largest single employer in a small county. And if he is a popular employer, the plaintiff is prejudiced. If he is an unpopular employer and there is a small jury pool, he is prejudiced. So I say fine. If you can identify a few cases like that, petition them into the Federal Court. Just make a showing of need. But don't bring thousands and thousands of cases into Federal Court where there is no need just because there is a handful of cases where there is a need.

My proposal is what I call discretionary access. The Congress would say, all right, here are some categories of diversity cases and some federal question questions where by and large they don't have a strong claim to a Federal forum. File them in State Court. File a removal petition to Federal Court by either party if you can show a need. Just a simple little petition. You don't need a hearing. It is not an elaborate procedure. You just identify characteristics. If the Federal District Judge says, yes, that is right. That really needs a Federal forum. He says granted and it becomes a Federal case.

JUDGE MERRITT: For example, you might put

ARISA cases.

JUDGE NEWMAN: I would put ARISA cases in because the vast bulk of ARISA cases are simply state law contract cases. If it is the rare ARISA case that poses a very novel issue of the reach of the ARISA statute, any Federal Judge in America would recognize that on the face of the complaint and he would grant the petition or he or she would grant the petition for in effect removal to bring it into Federal Court, sure.

JUDGE MERRITT: And your basic idea for the categories of cases that would fit within this arrangement would be cases that are heavily dependent on state law, at least in the beginning?

JUDGE NEWMAN: That would certainly be the prime category. If any case belongs in State Court, it is a case where the decision turns on the meaning of state law. If states rights means anything in this country, it ought to mean that the State Courts are the fundamental forums for telling us what the content of state law is. I always feel awkward in a diversity case trying to predict what New York or Connecticut or

Vermont will do.

JUDGE MERRITT: If you would, explain in a little more detail the mechanism that you would use to accomplish this? You could have -- there are several different ways to think about it. Some may be more palatable and more efficient than others. What is your suggestion?

VICE CHAIR COOPER: Let me ask a question along that same line, Judge. Would the petition be discretionary by the District Judge and what would be the standard -- could you appeal from a denial of that under your proposal? And would then that be an abuse of discretion standard? I think that goes along with Judge Merritt's question.

JUDGE NEWMAN: Let me try and deal with both. There are various procedural ways to accomplish discretionary access. The fundamental choice is whether it is an entrance scenario or an exit scenario. You could either say file in Federal Court and let the District Judge remand if it is inappropriate, or file in State Court and let the parties remove if it is appropriate. I happen to

think filing in State Court with removal is better. I think if you filed in State Court -- because the bulk of these cases will stay in State Court. So you start there and you have prejudgment remedy practice readily available and TRO's if that is needed. All of the paraphernalia that surround the initiation of a case would be immediately available.

JUDGE MERRITT: So, for example, if ARISA were one of the categories of cases, those cases would be filed first in the State Court?

JUDGE NEWMAN: Correct, subject to a removal petition. Now how would the removal petition work to answer Mr. Cooper's question. Again, there are various ways. I have my preferences, but I am more interested in the principle than the details. But to respond to your question, my preference would be it is the simplest possible procedure. There would be no appeal. Now, that may seem a little startling. Why should a District Judge's decision not be subject to appeal? Well, several District Judge's decisions today are not subject to appeal and one of them is the vast bulk of removal rulings. Under the statute,

there is only the tiniest leeway for appeal of a remand decision on a removed case. There is a very special case, but it is very rare. Most remand decisions made by District Judges in America today on remand of a removed case are not appealable. So there is no natural law right to appeal one of these.

PROFESSOR MEADOR: Would you allow mandamus by the Court of Appeals?

JUDGE NEWMAN: No, I wouldn't. If I was doing it, I wouldn't, Professor Meador, and I will tell you why. The reason we grant an appeal in the general run of rulings made by a District Judge is because that ruling either is the final ruling on rights or a procedural ruling integral to the ultimate ruling. If it is a Federal Court case and that judge says claim dismissed, default judgment, summary judgment or whatever, that judge is adjudicating substantive rights. If under discretionary access a District Judge is simply saying leave it in the State Court, he is not determining a single substantive right of anybody. He is simply saying leave it where 97 percent of all cases in America are tried anyway,

and there is nothing wrong with that. And even if he does what some might say is wrong -- he leaves it in State Court where you or I might say bring it into Federal Court, it is not terrible. He hasn't denied anybody a day in Court. He hasn't extinguished a right. He has simply said let it be in State Court. Now what I might do, Professor Meador, is create this much of a safety valve. Suppose he leaves it in State Court and the case gets tried and somewhere along the line an issue that didn't look like it was novel bubbles up. Take your ARISA case. It looks like a normal cut and dried contract case. What is the meaning of the pension terms? But somewhere along the line as they get to the end, the State Judge says what I am really doing is construing ARISA, and he makes a ruling and it is a very novel ruling, but you couldn't tell that until you got pretty much into the case or maybe at the end. I would let the fellow appeal the federal question to the Circuit Court at that point. So that if the issue really looms large in the case, give him the Federal Appellate forum then. But again, don't give them the forum for 100,000 cases because a

handful need it.

JUDGE MERRITT: But then the appeal to the Court of Appeals would be a discretionary Appeals Court right 1292, and you would have to seek --

JUDGE NEWMAN: You could do that. You could do a discretionary. I think that would be sensible. Then some say well do you mean the whole appeal comes and do you split it? And when I say split it, people say that is unheard of. The fact is it is not unheard of. We split appeals when we have the temporary emergency Court of Appeals, and we sent the Economic Stabilization Act issues to the TECA and we sent the other issues to regional Court of Appeals, and we lived with it very well.

JUDGE MERRITT: We split interlocutory appeals now under 1292. I mean, you bring up a particular issue.

JUDGE NEWMAN: That is right. You are talking about bringing up one issue at a time. I am talking about the possibility of splitting the appeal so that the federal issue goes to the Federal forum and the rest of it goes to the State forum. We did

that with the Temporary Emergency Court of Appeals, and both the regional courts and the TECA itself said that is a good way to do it. Give us the specialized issue and not the other. So we can do that. But really that is a detail and there are different ways to do it. If I saw a discretionary access enacted, I would be happy with almost any arrangement. Because I think the Congress needs to experiment with this. Indeed, I wouldn't legislate it nationally. I think if Congress was considering this and holding hearings, they ought to perhaps designate a couple of Circuits and try it out for a couple of years and learn from it.

Professor Meador, experience may show you need mandamus. If experience shows you need it, then have it. But I would rather experiment for a couple of years in a couple of Circuits and learn from it and refine it and improve it, and then see how we can go about moderating bulk.

JUDGE MERRITT: But the bottom line theory that you have here, which is relatively new, is a new mechanism for use of the State Courts to take up some

of the caseload, particularly in beginning those cases that turn primarily on state law issues.

JUDGE NEWMAN: Exactly.

JUDGE MERRITT: That is the bottom line of your suggestion that is relatively new and original.

JUDGE MERRITT: I think that is fair to say, Judge Merritt. It is new in that it takes an existing proposal of reallocating and refines it by saying don't reallocate all of them. Leave open the entry to the Federal Court for the few that need it. Now a flavor of that proposal is contained in I think either chapter 10 or 11 of the long range plan, which is the chapter that reckons with the what-if scenario. What if volume gets out of hand? What will we do then? And in that chapter, there is some recognition of the possibility of discretionary access. I would try it out now or in the next two, three, four years, before things get out of hand, and see if it works. It may not work, but I think it is worth a try and I see no downside risk to it.

VICE CHAIR COOPER: Let me go to another interesting point you make in your written remarks.

It is let's stop this three-judge panel on appeal and go to a two-judge panel. Would you tell us about that for a little bit?

JUDGE NEWMAN: Well, I did suggest that, Mr. Cooper, but I also qualified it. Because it is a somewhat deceptive proposal that has been made. The literature includes it and says, well, you can go from 3 to 2. And people then say, well, let's see. If you have a 12-judge court, 3 judges would mean 4 panels, but 2 would mean 6 panels. That is a 50 percent increase in panels. Maybe that would be a 50 percent increase in disposition rate. And the qualification is it won't because the judges still have to write the opinions. So if they all sit in panels of 2 and they all write no more than they wrote in panels of 3, you don't get any increase at all.

Now I think going to panels of 2 or even 1 in some cases would produce some increase in productivity because a lot of cases are disposed of by summary order. In our Court, it is up around 65 percent. Some Courts are down to say 12 percent of published opinions. I think that is way too low. But

the summary orders take relatively less time than the full opinions. So if you went to panels of 2, you would see some judges and some Circuits that use central staff -- we don't have our central staff draft summary orders, but I think some courts do -- the judges could be a little more productive.

I am not sure the 2 judge or the 1 judge, again, is ideal. I think a 1 judge could handle -- for example, there are a lot of very easy sentencing appeals. We have lived with the guidelines now a long time and most of the issues are straightforward, but we are seeing appeals because the fellow pleads guilty and his only shot is to take a sentencing appeal. I think one judge could rule on those and I think any Federal Appellate Judge in America could be counted on to say, no, this issue is really quite novel and I am going to refer to a 3-judge panel. I make the suggestion, I will be candid with you, not because I think it is such a great idea, but because I think it is a useful counter to the other suggestion of discretionary appeals, cercariae practice. I am opposed to cercariae practice in the Court of Appeals.

I think every person who has his substantive rights litigated and adjudicated in a District Court should have a right of appeal before some Appellate forum, even if it is only one judge. And if it was a cercariae decision, that is different from a merits decision. It is too easy on cercariae to say, well, I don't know quite what I would do but I will deny certain and then I won't have to worry about it. I don't want to see any District Court litigant put in that position if I can avoid it. So even the most trivial case I would rather see come before one Appellate Judge on the merits, with that Judge having the opportunity to give it a 3-judge hearing if it seemed of substance.

JUDGE RYMER: Judge Newman, one of the suggestions that they made is for some variety of system of Appellate jurisdiction in District Court, in effect a cercariae type of view in the Appellate Court. Do you have a view on that kind of proposal?

JUDGE MERRITT: Like the New York Supreme Court Appellate Division, I suppose. I mean some variation on that theme.

PROFESSOR MEADOR: Yes, I think it would be the creation of what some people call an Appellate Division in the District Courts.

JUDGE NEWMAN: Within the District Court? So in effect you would have a four-tier system. You would have a Trial Court, a District Court, an Appellate term of a District Court, and then discretionary review up to the Court of Appeals.

VICE CHAIR COOPER: Discretionary review to the Court of Appeals.

JUDGE NEWMAN: I would resist four-tier systems until it was the last resort. I think many arrangements are better than that. The three-tier system is cumbersome. It takes a long time to go from the District Court, Court of Appeals cercariae, to the Supreme Court and then the end. Four levels is that much worse. I think it is far better to make it as efficient as possible to get to the Court of Appeals and let them handle it. And again, I would much rather see efforts to reallocate jurisdiction become the first priority before we ever set foot in this pond of tinkering with structures that assume we are stuck

forever with this volume. I don't think we are stuck forever with this volume. The Supreme Court went for years with mandatory Appellate jurisdiction and people said this is terrible, terrible, terrible. There are too many cases and we have to do something. They did something. The Congress took away mandatory Appellate jurisdiction and turned it to cercariae. We can do the same with Circuit Court Appellate jurisdiction. We can leave many of those cases in the State Courts, where they will be well taken care of subject to a safety valve entry into the Federal Courts. And my point is don't rush to figure out all of these structural rearrangements. I say that to you and I say it to the Congress. I think the best service you could render is to urge the Congress to get its priorities straight and say the first order of business in any hearings of the judiciary committees of the Senate and House ought to be jurisdiction.

JUDGE MERRITT: Let me ask you --

JUDGE NEWMAN: Let me just finish the sentence if I may. In fairness, if the Congress says, look, we have had a hearing -- we will hold hearings

on jurisdiction and we have tried and we just can't do it. It is politically infeasible. Okay. Then maybe you move on to structure.

JUDGE MERRITT: But they have never considered this other discretionary access idea.

JUDGE NEWMAN: Not at all. I think if the Senate Judiciary Committee and the House or maybe a joint committee of them took a hard look at reallocating jurisdiction, they would find that either my discretionary access proposal or some variant of it or something like it new that they would think of would provide a way of getting past this problem, at least for the foreseeable future. 100 years from now, that may be a different problem. But we don't have to solve the problem forever. We have to solve it for the realistically foreseeable future.

PROFESSOR MEADOR: You mentioned a moment ago or a few minutes ago that in your mind there is some limit to the number of judges on the Appellate Court that make it feasible to act leisurely and properly and so on. I have a two-part question. One, do you have a number in mind? Is there some

approximate number beyond which you think a Court of Appeals should not go or cannot go? And secondly, what would you do if the volume of appeals overran that number?

JUDGE NEWMAN: Well, that sounds like a 9th Circuit question.

JUDGE MERRITT: It may be an every Circuit question in the next 10 years.

JUDGE NEWMAN: I am hesitant to presume to tell the 9th Circuit what they should do.

JUDGE MERRITT: I don't think it is limited to the 9th Circuit.

JUDGE NEWMAN: Well, as to any Court, I have said -- and I have written this before -- I think a Federal Appellate Court is at risk of not functioning well when it goes beyond 15 -- 15 actives. Then there will be 5, 6, or 7 seniors. Even that is a lot of people and you begin to sit with each other less frequently. Would it be chaotic if we went from 15 to 17? No. But I remember being in a meeting of our Court where they said, well, let's ask for two more, and I said you know I can see our successors

being here in the year 2020 and the Court is then 41 and they say, let's just two more and it will be only 43. Two more can be a dangerous route. I think 15 is sensible. I think that is a useful thing. Can you -- you could operate a little better a little higher. But that is about where I think you begin to see the shortcomings. And if you look around the Circuits, the Courts that are larger are the Courts that are having less oral argument, greater use of summary orders, more central staff bureaucracy. So the shortcomings are there. They are still rendering high quality justice I am willing to assume, but the shortcoming -- from the bar -- if the bar doesn't get oral argument, they consider that a shortcoming. If they don't see a reasoned decision, that is a shortcoming.

JUDGE MERRITT: Well, having suggested that there is a limit, whether it is 15 or some larger number, the question then comes what to do.

JUDGE NEWMAN: All right.

JUDGE MERRITT: There are several possibilities. One is just a split of the Circuits

legislatively. Another is a solution where you might divide each Circuit into divisions, particularly if there are a number of states in the Circuit or ways in which you could create divisions. What is your thought there?

JUDGE NEWMAN: Well, there are two broad approaches. If you force me, as you are skillfully doing to face up to the problem of what you do when any one Appellate Court has more volume and more judges than it can usefully handle. You either make a structural arrangement of the sort Judge Merritt just indicated, and I will come to my preferences in a second. You either divide the Circuit completely. You divide it administratively. Or you go the other direction, as Professor Meador has suggested, and you have larger Circuits or maybe one national, but you make a structural arrangement. There is one whole set of alternatives there. The other whole set of alternatives is you leave the Circuits where they are and you make procedural adjustments within the Circuit to enable them to move more business but frankly at a less satisfactory service to the bar and the

litigants.

Now coming to the structural. If my choice is between more Circuits or larger Circuits, I would go for more Circuits. I appreciate the downside risk is more conflicts between Circuits. I don't think that is all that serious and I would be perfectly willing to see an inter-Circuit tribunal as an ad hoc tribunal. I would not create a permanent Court. But I can envision an ad hoc inter-Circuit tribunal where every Circuit designated one of its number to be available to resolve an inter-Circuit conflict, and then when they arose -- and they are usually statutory -- the Chief Justice could either designate or you could draw 7 names by lot. I don't even think you would have to convene all 13 people. Most of those questions, they need an answer. And if the Congress doesn't like the answer, they can change it by legislation. So I would rather split the Circuits rather than combine them if we got to that. As to how to split, I would rather go with administrative splits before I chop them up completely.

JUDGE MERRITT: This divisional idea. Divide them up and try that out.

JUDGE NEWMAN: A divisional idea. Particularly if that is what the Circuit thought best met its needs. I would at least authorize a Circuit to do that and try it out.

JUDGE MERRITT: Would you -- I know this is a detail, but we have got to think in details. Would you authorize the Circuit to do it or would you authorize the Judicial Conference to set some criteria. For example, you could have a rule that says when a Court has more than 15 active judgeships, the Judicial Conference may provide for a divisional arrangement. And when the Circuit has as many as 25 judgeships, the Judicial Conference shall provide for a divisional arrangement. I mean, you could say that.

JUDGE NEWMAN: I think a two-tier arrangement like that makes a lot of sense, Judge Merritt. My inclination would be at the lower level or at the first level of problem of number of judges where the problem arises, I think I would let the Circuit itself decide. And then as it got up to the

higher number, whether that is 21, 25, 27 -- whatever number is deemed to be a very serious problem, at that point I might, if I was framing the legislation, authorize the Judicial Conference to direct the use of administrative divisions. But I think I would give the first option to the Circuit itself, at least at the first tier of problem and let them try it.

But I think all those things ought to be authorized for experimentation. We talked years ago about the 50 state laboratories. Well, we have got 13 Circuit laboratories. We ought to use them. We ought not to try to figure out in one fell swoop what is the best national solution. We have got Circuits and we ought to try them out and authorize these adjustments. Sunset them after 3 years or something like that. Congress is doing that frequently now. And learn from experience. But I think the two-tier approach would make a lot of sense -- the two-tier in numbers would make a lot of sense.

VICE CHAIR COOPER: Assume hypothetically that the 2nd Circuit got up to the number of judges that you thought were in excess of what would make a

workable Appellate Court. Would you then put New York into two separate Circuits or would you prefer a one-state Circuit, since they would have most of the caseload.

JUDGE MERRITT: You can take the Fifth Amendment.

JUDGE NEWMAN: That sounds suspiciously like a 9th Circuit question too. But I will ignore the 9th Circuit and try to answer it just in your terms, Mr. Cooper. If Congress forced upon us, let's say, 41 judges, and we as a Circuit thought this is just not a way to run a Court of Appeals, we have got to divide. And the question was how to divide. There is no question in my mind that I would be for splitting New York State rather than keeping New York State as one Circuit and putting Connecticut and Vermont off to the side for a couple of reasons.

In the first place, a Court of Appeals benefits from having personnel drawn from more than one state. We have seen that in our Circuit for years. I saw this proposal of why don't you just cut Vermont off and throw them in with the first because

the numbers look a little better. That would be a terrible mistake and it would do no good -- no good in terms of volume. They contribute hardly any volume to us, but they give us the input of a Vermont judge who served us with distinction over the years for decades. We want that input. We don't want to be a New York Court or a New York and Connecticut Court.

Now people say, well, if you have one big state and you divide it, you create problems. I think those problems are minimal frankly. You could take two districts. Our state is a four district state. You could divide it two and two. People say, well, what would you do with diversity? What if the two different Circuits of New York came out differently? I think that would happen once every 10 years. And if you wanted as you split it to create an inter-Circuit embank -- three judges from each Circuit to settle that great state law question -- of course, the simpler way would be to certify it to the New York Court of Appeals and let them tell us because they are the only ones who know. So if there is certification, the two Circuit dispute on state law is really a non-

issue. But you could have an embank. I think you would use it once in ten years. It wouldn't be a big deal. And you could handle it. I would much rather see that than keep -- again, if we had only a 41-judge Court. I am not talking about now. I don't want to read in the papers tomorrow that I was urging splitting New York.

VICE CHAIR COOPER: Yes, let the record reflect he is not authorizing splitting up the State of New York today.

JUDGE NEWMAN: Thank you, Mr. Cooper. I appreciate that. That won't stop some people, but I do appreciate your protection.

JUDGE RYMER: Judge Newman, do you not see any problem about splitting a Circuit -- excuse me, splitting a state arising from different federal constitutional law particularly in criminal areas.

JUDGE NEWMAN: No, I don't, Judge Rymer, any more than if the 2nd Circuit and the 1st Circuit both come out differently. They are adjacent. Sometimes --

JUDGE RYMER: Yes, but they are not

governed by one single Supreme Court that is trying to guess what is going to happen on a collateral review.

JUDGE NEWMAN: You mean one U.S. Supreme Court?

JUDGE RYMER: No, the state Supreme Court -- I mean the State Supreme Court of New York, not the New York Court of Appeals -- the highest Court in the state presumably has got an eye towards what is going to happen on habeas review in criminal cases.

JUDGE NEWMAN: Well, I can appreciate that if you did split a state, each Court would on some cases have to reckon with the state law of exhaustion and matters of that sort. I think that probably could happen even now if a prisoner was housed outside of a state, as many of them are. They are incarcerated all over the country on prisoner exchange programs.

JUDGE RYMER: So you don't have a capital case situation as many states in the 9th Circuit do, with which I am more familiar. But it strikes me that it would be somewhat difficult for a single state to face the possibility of inconsistent federal constitutional applications of let's say capital

(indiscernible).

JUDGE NEWMAN: Well, I guess -- you are right, we have not yet gotten into the death penalty cases, although we are heading there. These cases are on their way and we have already developed rules to anticipate that. I think the problem you identified could arise. My guess is a) it will rise infrequently; b) in the rare cases where it arose, if there needs to be a uniform dual Circuit answer for the State of New York -- again, I don't want to mention California, an embank could handle it. You would just simply designate three judges from each Circuit and let them hold an embank and decide what the uniform rule of the two Circuits who share that state would be.

JUDGE MERRITT: Plus the fact that if there is a split between a state Supreme Court and a Court of Appeals division, the Supreme Court can resolve the split. Sometimes you get a split now between the Supreme Court and the State and a federal question in the Circuit within the state exists and the Supreme Court may not initially but after a while

if it is an important split, the Supreme Court takes the case and resolves the federal question.

JUDGE NEWMAN: Right. I took Judge Rymer to focus not so much on the difference between the Circuit Court and the state Supreme Court but as between the two Circuit Courts that shared the state. That if they were each coming out slightly differently on an exhaustion point. And that is the case where I suggested that you could have an embank between the two Circuits.

JUDGE RYMER: That is where I was going.

JUDGE NEWMAN: Yes. But I think it would be very rare and I think if it happened, you could do it. But again, I would try it out. Judge Rymer, if you are right, there are going to be a lot of those, and I am wrong. But I might be right and there will be few of those. Neither of us knows for sure. We can make a reasoned prediction, and I would be willing to concede that in your part of the country, your prediction is more soundly based than mine. But the best answer would be for Congress to try it out for a two or three year period and learn by experience.

Then we wouldn't have to guess.

JUDGE RYMER: That brings up something I would like to -- it is a very difficult question to ask. But it seems to me that none of us has a crystal ball even at 10 years out let alone 25 years. And one of the possibilities that this Commission could recommend would be founded in flexibility. To point out a number of possible -- say some of what you have mentioned that could be -- that legislation could authorization for experiments among the various Circuits. Do I hear you to be saying that you think that would be a good direction in which to go?

JUDGE NEWMAN: Absolutely. I think any proposals that come out of this Commission and that commend themselves to the Congress should be adopted by the Congress in one or two Circuits and for a 2, 3, or 4 year terminal period. I think we should learn by experience. To try to restructure the whole system, either on jurisdictional grounds or on structural grounds and figure we know all the answers is a mistake. We should try it out. My preference obviously is try out jurisdictional arrangements

before you try out structural arrangements, because I think they will largely solve the problem. But any solutions I think should be experimental, done in a couple of Circuits, done for a short time period with a sunset provision, and the Congress and the Judicial Conference should monitor them very closely.

VICE CHAIR COOPER: Judge, I hate to call time because I am enjoying it and it looks like you are having a good time too. But we appreciate so much your honoring us with your presence here today.

JUDGE NEWMAN: Thank you very much. If I can be of any help as any of these matters unfold, I would be delighted to do so. I appreciate the opportunity.

VICE CHAIR COOPER: Thank you. Appreciate it.

JUDGE MERRITT: Let me just say, Judge Newman, as usual you have been your usual incisive self and thoughtful self and we very much appreciate the efforts you have made to think through these problems.

VICE CHAIR COOPER: Thank you so much.

Our next witness is Professor Judith Resnik of Yale Law School. It is good to have you with us this morning.

PROFESSOR RESNIK: Thank you. I am very happy to be here. Hello, Judge Rymer, from afar.

JUDGE RYMER: Good morning, Professor Resnik.

PROFESSOR RESNIK: Judge Merritt and Professor Meador. And actually a Yale law student who helped me prepare these materials, Eric Beaver, is here, and I would like to thank him as well.

I am very glad to be here. As I came in, Professor Meador, you were saying have us look into the future. The first point of my comments is that I think it is hard to look into the present and see that the actual structure of the United States Courts is not as we often describe it. I think we already have a four-tier system, which is to say that at the District Court level there are two sets of judges, magistrate and bankruptcy, and District Court judges that therefore our functional work force at the trial level is in excess of 1,400 people, and that the

functional Appellate Court is no longer 187 people, but rather that we have the senior judges, so our numbers are really 15 to 25 depending or above in the Circuit level, and that these judges are in turn aided by about 300 District Court Judges who sit by designation, which is to say that I appeared in a very small Circuit on the East Coast and walked in and found one Judge from one Circuit and one from two others.

So that as a consequence, the structure that we are describing has actually already been substantially transformed, and transformed I think, we should be appreciative of the innovative efforts of a judiciary struggling desperately to staff cases. So on one level we have seen actually an internal reformatting that has enlisted a work force of 1,600 people. And therefore I hope that the Commission will help lead the way away from a conversation that acts as if we are talking about the adding of one or two people and that focuses this way and that states our federal work is 1500+ and we need every person there and even in light of that transformation we radically

reformatted Appeal, which is to say that about a fifth of the cases nationally get oral argument and there are published opinions in about 6,000 out of 25,000 cases.

VICE CHAIR COOPER: Does that bother you that you are having less and less oral argument and less and less published opinions, since we are saving a lot of trees?

PROFESSOR RESNIK: My suggestion is actually that the insight to be celebrated from 1891 is that a single judge doesn't render final judgment. So what I am really concerned about is that there be serious Appellate review by at least two if not three additional people. I a less concerned about the production of vast bodies of thin precedent. And maybe that is a thin precedent in the sense that with a lot of litigation, there can be 800 variations on a theme. But in fact as we who get to stand back from the system a little bit and try to describe it more generally as either because we move between Circuits or we talk about it as a general system, there are threads that can be pulled and there are two or three

positions on major issues that the Appellate boards develop.

Here I take a suggestion actually from the Federal Judiciary Volume in 1989 about the Circuits. Professor Carrington reminded us that Roscoe Pound suggested less precedent or that we needed fewer published opinions. I, however, think that we definitely need written opinions. Litigants need to know what the outcome is of their case. So my suggestion would be an increase in written decision of more than a sentence or two that explains why these two or three Appellate Judges said either, yes, you are right or, no, you are wrong.

JUDGE MERRITT: You know, this is the product of a division in the Circuits themselves. There is no uniform rule in the Circuits about one word affirmances. Some Circuits -- the 7th Circuit and the 6th Circuit and other Circuits -- I think the 1st Circuit -- don't engage at all in that. Other Circuits do. This is not uniform.

PROFESSOR RESNIK: One of the facets of this conversation is that on one hand we are talking

in the aggregate about the Circuit Courts, and then we all know as we get close to any one of them that they have very different both processes and outputs.

JUDGE MERRITT: And some judges in some Circuits over the years feel very strongly that there should be reasoned decisions or at least an effort made at reasoned decisions, and other Circuits don't follow that principle.

PROFESSOR RESNIK: As an occasional Appellate litigant, I have to say that I am very eager to have an explanation of why something came out as it did on behalf of my clients in the situation. As an academic, I don't see the need for 8 million descriptions of variations. So I think that the point would be a serious communication to the parties.

The conversation thus far has talked about the diversity. One of the obvious insights of the United States constitutional system is a commitment to variation. Hence, my view is that when you insist upon a uniform rule, be it a model that says 14 people equal a Circuit Court or there has to be a written decision, you have to be sure it is the right rule.

I think from your question that I certainly share a view that I would be for a written description that is communicative. And whether there is a page -- I am not talking about magic numbers of words, but something that explains how come it came out like this.

Several people have made the point and from a variety of perspectives that there is actually less Appellate review, less supervision of District Courts. There is more cases, but from a variety of doctrines of discretion and from the vast expanse of the pre-trial process, the actual work of telling District Judges that their outcomes should change has diminished over time. There are comments from Judge Schroeder, for example, on the 9th Circuit, from academics, and from a variety of different perspectives saying, yes, we have got an incredibly busy Appellate Court. But are they actually superintending? Less than they used to. Reversal rates are down. Doctrines of discretion have increased.

JUDGE MERRITT: I would doubt that in the

case of orally argued cases, which are the cases that are more traditional type cases -- they are not the pro se cases, they are not the cases submitted on briefs, they are not the -- well some of them are sentencing guideline guilty cases. But in the traditional case, I would doubt that there has been a change in the relative reversal rate of the District Courts. The problem is to carve out statistically exactly the cases that we are talking about.

PROFESSOR RESNIK: And I agree completely. I know your staff is working on inquiry in that direction and obviously one empirical question is how do you measure decline in substantive review.

JUDGE MERRITT: What has happened is we have had a change in the type of cases -- the mix of cases that the Appellate Courts get. 10 or 15 years ago, we had no appeals of guilty pleas (indiscernible) for example. That creates a very different problem. We had very few prisoner pro se cases. As you know, some prisoners file several cases a year. So the mix of cases has changed.

PROFESSOR RESNIK: So the desegregation

point comes back, which is the Appellate docket itself needs to be disaggregated and empirical work needs to be done. But if point one is you've got a four-tier system, point two is you have a mobile work force. Visiting and designated judges staff the Federal Appellate Courts. So the idea that if you say, gee, how many combinations of panels can I get if there are 24 judges as compared to 18 judges, look at the numbers of combination of panels you get. Because the Federal Appellate Courts have some 300 District Court Judges sitting by designation.

VICE CHAIR COOPER: Is that good or bad?

PROFESSOR RESNIK: Well, the question raised, I think, as one looks at the current structure is what to think about the concept of the Circuit law. If you think about 1891, the insight was we need appeal and we need review. It wasn't so clear that the answer was we need insular Circuit law. And as I listen to the exchanges this morning, I am really struck that I think a serious project for your Commission is to say, okay, we have developed a tradition that Circuit law is insular, but we are in

the late 20th Century where Judge Rymer is listening to us through electronics and many of the lawyers practice across the United States and our infrastructure is increasingly inter-jurisdictional. Hence, the suggestion is to revisit the question about whether or not insularity of Circuit law ought to be the end game of this project as compared to serious Appellate review of individual decision making.

JUDGE MERRITT: Well, let me emerge slightly. We do have some designated visiting judges, both District and Court of Appeals Judges sitting with us, but I think practically all the Circuits have tried to eliminate that to the point that the active Judges of the Court together with the same Judges who were previously active Judge and know each other continue to maintain the law of the Circuit. And speaking frankly as a Circuit Judge, it is much easier to deal with one of your own Judges than it is with a visited Judge. I just visited with the 2nd Circuit. Judge Newman and I sat together and it was a great pleasure. But he has to communicate with me in a different way. I am not as aware of the customs of

the Circuit. It is more difficult for us to communicate in the same way that I communicate with my own colleagues. So there is a substantial difference over time in the efficiency it seems to me in having Judges of a Court sitting together.

PROFESSOR RESNIK: You have the possibility then of going in two directions. Step one is we can't staff our cases with the numbers we have. We rely on the system of roving judges. Option A, figure out a way to try to bound it by saying we need more judges -- be it by creating a fourth tier of District Judges reviewing or some fashion. Option B -- gee, roving judges suggest the possibility of less insularity. Because the current problem for a litigant frankly is that when I am faced with a Court in which there is one Appellate Judge from that Circuit, my view is that that Appellate Judge is making that -- I either have a weak panel in which I can't expect much to occur, or alternatively I assume that the one Appellate Judge from that Circuit has a disproportionate influence. And as a consequence, I am not really getting at least two people reviewing.

JUDGE MERRITT: There is some tendency on the part of visiting judges who are sitting on a Court with other judges from that Circuit to defer. To not be quite as strenuous as they might be about a question if they were sitting on their own Court. And that is what you are talking about?

PROFESSOR RESNIK: Yes. And I am also suggesting that one option is to say, look at this. We just had a discussion about inter-Circuit coordination here if you were sharing a state. Look at this and think about this as either a vehicle for inter-Circuit. Notice me as an Appellate advocate to say, okay, you have got a 1st Circuit, a 2nd Circuit, and a 5th Circuit judge. Come in knowing the law of that Circuit because you are going to have to figure out a rule that argues to that and then I will have real Appellate review of that decision.

These are different alternatives. Right now we have in some sense the worst of both worlds. We are mired in a conversation as if we were really talking about a small federal judiciary when it has changed.

PROFESSOR MEADOR: Let me ask you this question. What would you suggest that this Commission recommend out of all of this picture you are describing here. Do you have ideas or suggestions?

PROFESSOR RESNIK: Yes, I do. One actually -- not in my written comments, because I hadn't been focusing so much on the access hand. My suggestion in terms of access to the Federal Courts is that there is a volume of cases which are justified because they involve people from two different states. Diversity is one set of them. But actually the large mass torte is another in which it seems to me that what should be urged is a set of courts created by the state systems to respond to the assumption that coming from a single -- that out-of-staters are not as warmly treated. And that is to say some set of national courts based in the state system that deal exclusively with inter-state disagreements or conflicts between people from different states. So that would -- instead of this discretionary access to the Federal Courts, I would urge the states -- and then there are questions about commerce clause authority here -- to

create a set of courts to deal with what we call diversity cases and whose sole justification for being in Federal Court is that they come from citizens from different states. And I would include in that packet the large cases as well as the small cases, because the large mass torte or the small mass torte still has this question of what is the rule of law and the operative assumption remains state law.

JUDGE MERRITT: But having discretionary access would be a significant (indiscernible) for the states to do what you are talking about because now they have very little incentive to do this. I have seen no -- maybe you know of an instance where there is some movement in this direction, but I have seen very little movement here.

PROFESSOR RESNIK: Well, you could look at the mass torte litigating committee, which is a compilation of judges from different states and see them as creating an ad hoc group to deal with inter-state jurisdictional issues. My suggestion though -- I am not enthusiastic about this discretionary access hinging on a District Judge. I think it is both

cumbersome and I think we ought to carve out categories of cases and say presumptively Federal Court. But I think that there is a vast volume of cases in which the role of the states is very important. The state is the basis of the law. But it is actually an inter-state conflict and I would like to see Congress funding and enabling this capacity because we know that our state systems are terrifically vulnerable in their court structures and very underfunded. So I think that at the moment in the world in which State Courts already bear such great burdens, that for the Federal judiciary to say now let's give them some of ours is not as wise as for the Federal judiciary to be recommending the creation of auxiliary resources.

And it also responds to this ability to enhance the role of the Judge, which gets me to my second recommendation. There is a genuine problem around the role of the Judge. Here I think that we have to face that the tradition of -- however important and useful the 7-person working conference of the Circuits used to be, it simply will not/is not

currently, nor can it be in the future, the model. As a consequence, I think we need to look at how to make the task of judging good for litigants and good for the people who engage in it and esteemed. There are two prongs to this. One is for the life tenured judiciary who feels besieged and underpaid. Looking, for example, at the function of the designated judge. Right now we have District Judges who sometimes sit on Appellate Courts. Does this make the job more interesting and better? Australia -- some of the states within Australia organized their system so that out of a 12-month year, for 3 months the judge who was a trial level judge is an Appellate Judge. Looking at the notion that makes this less utterly overwhelming as a grind of a torrent of cases and alters the activity to give one the energy to do the hard job of judgment.

So one is to think about -- you already have a rotating system in the back-ups to the Appellate panels to some extent. Here we are back in our conversation about experimentation and innovation. Look hard and ask the people who participate in them,

both from the Appellate point of view and the District point of view, what is the utility of this mixed system.

Second, judicial sabbaticals. Judges are exhausted. They should be. Many systems to which we regularly compare ourselves give judges breaks.

Third, thinking about moving toward a national Appellate system because we have got our traveling judges in which they move via visiting around. If this becomes unattractive, then I think you have to look at your tier notion, which is to say that you already have four tiers. Do you formalize them into an Appellate division of the trial level court, in which case you are giving your magistrate and bankruptcy judges the vast amount of first tier decision making and your District Judges are part-time Appellate Judges and part time trial level judges. And along that side, since you are turning a good deal of first entry decision making over -- have turned to bankruptcy and magistrate judges, pay attention to them. Because they are the adjudicators for United States citizens in a lot of cases and need to have

some of the sense of authority and importance because they are the people to whom litigants go.

That gets me actually to a suggestion about the relationships with Congress. The concern from a lot of people that look at this is of the efforts from the judiciary to attempt to at some level appease or placate a Congress that looks like it is very overly engaged in the management of the Federal Judiciary. And hopefully this Commission will take the occasion upon which to consider how to embed the notion of the Article III judiciary as not as dependent on Congress's whim and not as engaged in these sort of battles of an individual person. It is terrifically important. We are living in a world where the ABA Commission on the judiciary told us that it is a very fragile world. And as a consequence, how does this Commission use its suggestions or make its suggestions to augment the independence of the judiciary, which goes to some of the notions of internal flexibility models. Perhaps a few uniform rules created by the judiciary that says appeal in this system requires two or three judges and it

requires some statement of reasons to the litigants, be it published or not.

PROFESSOR MEADOR: Let me ask this question. You mentioned the idea of Appellate review at the District level and formalizing that, I gather, a little bit more. Do you have any other suggestions concerning structure or organization of the U.S. Courts of Appeals themselves?

VICE CHAIR COOPER: And including in that geography and size -- too big, too small, does it make any difference? Could we have one state Circuit? Should we split states or not?

PROFESSOR RESNIK: I take it we have now entered the world of what has been termed this morning the 9th Circuit question here?

VICE CHAIR COOPER: Not necessarily. If you look at the 11th and the 5th, a lot of commentators say that they are the size that we need to be taking a look at also.

PROFESSOR RESNIK: As a person who has practiced in both the 9th, 2nd, and several of the other Circuits, I do not believe that the size of the

Circuit has any kind of talismatic number to it, and I am not of -- I share the view of what I take to be the majority of people in the 9th Circuit who are judges and lawyers that there is no pressing need to split it at this point, and further that the focus on it has, I think, actually distracted from this much harder conversation about what to do now with the transformed federal judiciary in terms of numbers and use of visitors and the like.

VICE CHAIR COOPER: Do you have any explanation of why there was a need to split the old 5th and there is no need to split the 9th? They look like mirror images of each other if you took a time capsule and compressed it together.

PROFESSOR RESNIK: As I understand, first from the few books that have been written about the split of the 5th, including some reviews from one of my colleagues, that like the current conversation occurs in a political and social context and is not -- unfortunately not done from the point of view of how do we maximize the best of all possibilities for U.S. citizenry in terms of access. But in these

conversations, Congress's attention is drawn by political and social factors and not by the lower administrative ones.

PROFESSOR MEADOR: Excuse me, if I can get you back up to my question. Forget the 9th and 2nd.

PROFESSOR RESNIK: Fine.

PROFESSOR MEADOR: Take the Courts of Appeal. Assuming -- imagine the continued growth in the volume of appeals and you had more judges and so on, somewhere out there down the line -- 10 years from now or more -- do you have any suggestions about what might be done among the U.S. Courts of Appeals to meet the problem? Would you just let them go on and on and on? Do you have any suggestions at all about what this Commission might think about looking ahead?

PROFESSOR RESNIK: Well, I think my suggestion is that we are down that line and what has occurred is a four-tier system. And one of the tasks of this Commission is to figure out whether to formalize that fourth tier and create a tier between the current Federal Appellate Courts and the trial level courts. And in the population of that fourth

tier whether to use District Judges exclusively or whether to have some of your current Circuit Judges share in that -- using judges from two sets of courts. I think that is the question. I think it already exists that there is this fourth tier, and the question is how do you frame it. Because currently --

JUDGE MERRITT: I am having a little trouble following the fourth tier. I had originally thought you said there were now four tiers, one of which is the bankruptcy/magistrate tier. The second is the District Judge tier and the third is the Court of Appeals and the fourth is the Supreme Court. Now are you using the four tiers in a different sense?

PROFESSOR RESNIK: Thank you. That is very helpful. Yes. There is a way in which -- you always want to have these sort of moving diagrams for this possibility. In some ways, the magistrate and bankruptcy judges are below the District Courts and you appeal to them. But in some districts, for example, the magistrate judge is actually on the wheel and you go directly to that person with much less review. So there are moments when you have got four.

Sometimes they collapse into three. Meanwhile, the bankruptcy judges sometimes create their own little Appellate Court, and then you have got some District Judges who sit by designation on the Court of Appeals. That is our current -- I don't have a mobile or some other moving diagram to do it, but they actually change places, which is hard to capture and which requires that use of the word four tiers in different ways.

Then the question is, okay, what do we do? One version is leave it as it is. I am a little leery about that, to try to be directly responsive, because I think it is both haphazard and we have this kind of odd reliance on outsiders and this sort of thinner Appellate process. My suggestion would be, therefore, that you need to acknowledge it and then build upon it, and here I think I share both what I take to be Judge Rymer and Judge Newman's exchange about experimentation and flexibility. Since we don't have a magic bullet at the moment, we can't only say here is the answer. But let us now say, okay, expand the use of bankruptcy Appellate panels, for example, or

track that record and see about that as a model. Look at our District Courts. Look at who should sit by designation on the Courts of Appeals. Are we looking for judges five years out? Senior Judges? How to use them as part-time Appellate Judges? Or should we reject this part-time system and go as has been more the U.S. tradition to single job opportunities. I think that is the agenda, informed I hope by some of your peerism, and then also with a series of proposals that say here are the 7 options of how we can do it and here are at least three or four that ought to begin.

What are our goals? Getting decisions reviewed. So that you really have -- the real potential risk is that we have not a vigorous Appellate system and we have these single judge decisions that are not truly subject to review. And here this great reliance on staff and the minimal opinion that is written is the haunting feature of the current story.

So my sense is sort of applaud a judiciary trying to manufacture a judicial power and then look

at the process of that manufacture. Reject the parts of it you don't like, like this potential bringing law back and forth, and formalize those that you do or at least authorize their formalization.

VICE CHAIR COOPER: So what you are really saying is that we really have a three and/or four tier system now depending on whether you are stretching the accordion or squeezing it and where you are in the country?

PROFESSOR RESNIK: Yes. And actually varying it sometimes from district to district. We currently have discretionary Appellate review now because the staff system screens out and only a fifth of the cases get to the sort of full process. So that the debate about should we have it --

JUDGE MERRITT: But that is a vast overstatement of the situation -- an oversimplification because of the change in the mix of the cases. There is no particular change in the old types of cases -- the private law cases and public law cases that have come into the Court. The staffing that I know about is to be a shortcut in certain

particular kinds of cases that are new in the mix. So I read (indiscernible) articles all the time and they say just what you said as though that describes the system, but it is much more complex than that.

PROFESSOR RESNIK: Judge Merritt, part of the impulse to overstate is to try to move the conversations away from should we have two more judges. But the second concern is that your statement does reflect that there is a category of cases in which there is not really appeal as a right. It is not all the cases in the United States, but there is a category of cases that go presumptively to staff for screening. That means that the model that said every aggrieved litigant has appeal as a right, some set of them -- some which you may believe shouldn't have appeal as a right -- do not currently get life tenure judges of three reviewing the merits. So this sense of discretion is that which we used to call appeal, a packet of things -- that written decision, three judges, briefing, oral argument - doesn't exist for a whole lot of litigants. Now there are different versions of what could be appealed, but some segment

of these cases are presumptively in many Circuits looked at by staff on the assumption --

JUDGE MERRITT: They are not decided by the staff. There is not any case in the 6th Circuit that is decided by the staff. None.

PROFESSOR RESNIK: It is not a sense in which it is decided by the staff, but that sense of direct access to life-tenured judge is no longer available. Now one visions is that that should no longer be available, and in some sense I take that to be the --

JUDGE MERRITT: You say that the screening process by staff is a process of bureaucratization by which the staff denies the case?

PROFESSOR RESNIK: I am not making the argument of decision. I know that in some Circuits, and I hardly would presume to talk about the 6th -- that in some Circuits, at least as described to me by other Appellate Judges, staff provides a single opinion which is then circulated to the others for signing off on, and that at least some Appellate Judges, and I believe some who have testified before

this panel in other venues, have suggested that what they understood appeal to be 20 or 30 years ago is not what their Court is routinely doing in all of their cases. And then the question is do we strive to try to return to that system or do we say this segmented system is all right, and I take it the suggestion of using a formalized 4th Appellate tier, this District Court review, is a means of giving more specific review to all litigants at least once along the way.

VICE CHAIR COOPER: Professor, it is always good to talk with you.

PROFESSOR RESNIK: Thank you kindly.

VICE CHAIR COOPER: We appreciate your time and effort and your written statement here.

PROFESSOR RESNIK: Thank you.

VICE CHAIR COOPER: And thank you for being with us today. Our next witness is Judge Joseph Weis for the United States Court of Appeals for the 3rd Circuit. Judge, it is good to have you with us today.

JUDGE WEIS: Good morning. As I see it, the role of the Courts of Appeals is to provide

uniform coherent enforcement and application of federal law. I don't think the Courts are following that goal now as well as they could. The primary reason is that the structure of the Courts of Appeals is wedded to a concept of regionalism and not nationalism.

Regionalism had its beginnings, of course, 200 years ago with the first judiciary act. At that time, the speed of transportation was measured by a schooner, a river flatboat, or a horse and wagon. Communication had exactly the same speed. 100 years later, when we got around to the Everts Act, we had made some improvements. The steam locomotive and steamships set the pace for transportation. The telegraph was available, but certainly only for very brief messages and not suitable for voluminous communication. The telephone was in its infancy. So there wasn't enough dramatic change to inspire Congress to look at the whole structure of regionalism, and instead it opted to a band-aid solution at that point. Adopt a decentralized Appellate intermediate system.

I think that today we ought to look into the future and realize that the radical changes in communication -- today we have instantaneous e-mail, fax, interactive video, computerized legal research. The speed of transportation is measured by the speed of jet planes. So our whole outlook should change. Should we really remain cramped and constricted by the idea of regionalism? I think the answer should be no. Industry has not felt that need, and I think the new concepts should come into court planning as well.

So what I propose is we get back to the whole idea of a unified Federal Appellate system, and I would propose that that be accomplished by having a unified Court of Appeals, one United States Court of Appeals to cover the whole country. I know as soon as I raise that concept, there are those of my brethren who would stone me and dismember me on the spot.

VICE CHAIR COOPER: Is that because there would only be one Chief Judge, Your Honor?

JUDGE WEIS: Well, the beauty of my proposal is that there would be more chiefs. And since I propose that there would be no increase in

salary for any of the chiefs or any member of the unified court, it should appeal to those who long for the chiefship. So I don't see that as a real obstacle to it, although there are others. Incredulity seems to be another effect it has on people.

VICE CHAIR COOPER: Professor Meador has a question.

PROFESSOR MEADOR: One question about your proposal that I am not sure that I have ever seen you address is that. And that is in administering the system, one aspect of what we have right now is a kind of decentralized administrative structure. Forget the law of the Circuit and all that, which is very much a part of it I know, but along with it is this administrative decentralization in which you have these 12 geographical units administering the system. Now what do you do about administration? If you end up with 20 or more 9-judge Courts of Appeals, all divisions of the one United States Court of Appeals, still in all don't you have to have some administration in that and can you fill out how that would work?

JUDGE WEIS: I think that we ought to separate the ideas of administration and the judicial review. I think that has been another restraint that we shouldn't have. What is the virtue, for example -- and again, I am not guilty of heresy -- in saying that a Court of Appeals within a certain region has greater competence in administration than would an organization composed of District Judges and Circuit Judges? I would separate completely the ideas of the Court functioning clock-court as an administrative agency, and I would put that to the side. If we get into a discussion of the administration of the judicial system, we could go to other models. Perhaps regional or perhaps four regions of the country or maybe two regions and something of that nature. But that should not interfere as I see it with the role of the Appellate Courts. We don't want the tail wagging the dog in that respect. That is why I haven't bothered to go too much into the administrative end, because I think that is a separate problem.

JUDGE MERRITT: What advantage exactly -- what value are you enhancing by abolishing the

regional Courts of Appeal and creating a one Court of Appeals that would be presumably assigned to sit in different regions of the country? Different judges would be assigned to sit in different places. You still are going to hear appeals by oral argument in San Francisco and New York and New Orleans or wherever it may be. My question is what are you gaining by abolishing the regional Courts of Appeals and in lieu of that reassigning judges to sit in basically the same locations and hear the same cases?

JUDGE WEIS: First of all, it is a complete change of mindset. We no longer have a bulkinization of federal law and no longer a regionalization of federal law. Each judge in the unified Court of Appeals speaks on a national basis. An opinion from a division in California is binding national law. It is not simply confined to a few states. The judges no longer think in terms of Circuit law. They think in terms of federal national law.

JUDGE MERRITT: What exactly does that enhance?

JUDGE WEIS: First of all, it eliminates the --

JUDGE MERRITT: Uniformity of law you think?

JUDGE WEIS: Yes.

JUDGE MERRITT: You don't think that you are going to have a lot of infra-panel conflicts when you have -- now within a Circuit -- 6th Circuit or 9th Circuit or whatever -- there are serious problems of intra-Circuit conflict. We have got the mechanisms to try to straighten it out in the worst cases, but as you know different panels do things differently. In the case of a national Court of Appeals, you are going to multiply very substantially the possibility of conflict.

JUDGE WEIS: I don't think so for this reason. There should be a distinction between deliberate creation of conflicts, which goes on every day now, and the inadvertent creation of a conflict. It is the deliberate conflict that I think is contrary to the basic idea of uniform federal law. The 9th Circuit will disagree with the 5th Circuit which will

disagree with the 6th which will disagree with the 3rd. In a uniformed Court, you have no deliberate creation of conflicts. I think that you would have fewer inadvertent conflicts because the national precedent has been set. When the lawyers brief the case, they wouldn't be briefing the different versions of one Circuit versus another.

JUDGE MERRITT: So what you are enhancing in your view of a centralized national Court of Appeals is the lack of intra-Circuit conflicts or the lack of conflicts within the national law.

JUDGE WEIS: Right.

JUDGE MERRITT: That is really the bottom line.

JUDGE WEIS: The deliberate creation of them, yes. The inadvertent problem would, of course, have to be addressed.

JUDGE MERRITT: Any other value that you are enhancing other than the reduction of conflicts in the application -- the declaration and the application of the national law?

JUDGE WEIS: I think so. I think I could

hope for a better product, if you will. My idea is that the judges would be consolidated or would work in divisions of 9. 9 has always seemed to me to be a workable group for collegiality purposes. And again I am speaking of collegiality in the sense of efficient committee work, not congeniality. They are so often confused. If you have an entity of 9 judges, the pace of the work would be such that you could have pre-filing circulation of opinions which would reduce the opportunity for intra-divisional conflicts to begin with. It would also give a panel of 3 the back-up of the thinking of the 6 other judges. So I think that that would be a better work setup than the one we have today where you have 28 judges in the 9th Circuit and 6 in the first.

We would also spread the work of the divisions out not primarily on the basis of geography or state lines, but rather on the basis of workload. It would give a whole set of flexibility to the system that it lacks today. And the workload of each division could be adjusted as the workload of the Court itself changes too. If they fall off in one

area, then the lines, if you will, or the division could be readjusted to take care of the change in workload.

VICE CHAIR COOPER: As I understand it, you are going to use the 9th Circuit as a model for this plan. Explain how that works. I have read your paper about that, but I think -- and your paper is in the record about how you would recommend setting up the 9th Circuit in divisions as sort of a model to see how it works, and then try to expand it nationally.

JUDGE WEIS: Yes. I think the 9th Circuit is the ideal laboratory in this country. I know of no other unit of the Courts of Appeals that is large enough to really try out this idea of a unified Court. So my proposal is that the 9th Circuit not be split, but that it be set up in more or less permanent divisions of 9 judges. Having set the 9 judge units as a --

JUDGE MERRITT: Would it be territorial?

JUDGE WEIS: To some extent, but it wouldn't be bound necessarily by territory. Again, we would look to the volume of the appeals to be handled

by each division.

PROFESSOR MEADOR: But you would have to have some mechanism or rule about routing what appeals to what division, wouldn't you?

JUDGE WEIS: Oh, yes. Certainly.

PROFESSOR MEADOR: Would that be territorial?

JUDGE WEIS: It would be territorial in the sense that it would focus on districts. In other words, if it should develop that the total load is let's say 9,000 appeals -- I know it is more than that. So we would look to a model where 3,000 appeals would go to each division. Now to get to the 3,000, perhaps we would have to have one division which would do nothing but cases coming from the districts in California. Let's say the central district of California would have 3,000 appeals. Then the other two divisions you would split up between the other districts of the 9th Circuit.

JUDGE MERRITT: Would you do anything on subject matter jurisdiction? Another way to do this if you are going to have divisions of a Circuit or

divisions of a centralized national Appellate entity is to have some territorial jurisdiction and some subject matter jurisdiction. Would you consider anything -- most judges are against subject matter jurisdiction courts. Most judges, I would say 90 percent are. But that doesn't necessarily mean it is a bad idea. What would you say about that?

JUDGE WEIS: There is enough flexibility in the idea of a unified national court to allow for specialized divisions. It is quite possible that something could be modeled on the Federal Circuit, for example, where a division would handle taxes, patents, trademarks, and so forth. But I wouldn't see any real likelihood of doing that in the 9th Circuit because there wouldn't be enough cases in the specialized area, I think, to make it work.

JUDGE MERRITT: Well, for example, in the 9th Circuit you -- I am not familiar with their caseload, but you might very well have an Immigration Court that would handle all immigration cases that come to the Appellate level or Social Security specialized. But I mean there are lots of different

variations.

JUDGE WEIS: It could be done. I don't --

JUDGE MERRITT: Do you think that is a good idea?

VICE CHAIR COOPER: And why is the division better than a split? Explain that to us.

JUDGE WEIS: Because you still retain one court. You have the Court of Appeals for the 9th Circuit, which would act as the parent body. It supervises the three divisions and it keeps them in line and it acts as a court of final resort to resolve any interdivisional conflicts. One of the things I envision on the national basis is that the unified court would have within itself a body to enforce uniformity. I call that simply a central division, which could be a permanent thing or temporary. Judges could float in and out of it or be assigned to it for a period of years. But its function would be to resolve not only intra-divisional splits, but the occasional opinion of a panel that simply just doesn't fly. And instead of dumping all of those cases on the

Supreme Court, this central division would be available to overrule a division as it were.

JUDGE RYMER: Judge Weis, if you were using the existing 9th Circuit for laboratory purposes in this regard, I assume what you would envision is some mechanism to trigger a probably limited embank that would go Circuit-wide to resolve intra-Circuit conflict on matters of total Circuit importance?

JUDGE WEIS: Yes. I would envision two types of embanks. One an interdivisional court embank, and the other would be the 9th Circuit's present 11-judge embank.

JUDGE RYMER: Why two? I don't understand that exactly.

JUDGE WEIS: Well, suppose that we had conflicts between division 1 and division 2.

JUDGE RYMER: Yes.

JUDGE WEIS: Then the 11-judge embank would come into play.

JUDGE RYMER: Right.

JUDGE WEIS: And those judges could be selected either as you do now by some lottery

proposition or perhaps allocated so many to each division or whatever. The mechanics I don't think at this point are important. It is the concept that I am trying to get across.

JUDGE RYMER: Well, sometimes the concept is proved by the details. But you would envision just that for an umbrella embank proceeding to resolve inconsistencies between the divisions, but you would also envision an embank process consisting of the whole number of judges on each division for divisional purposes?

JUDGE WEIS: Yes.

JUDGE RYMER: Okay. Thank you.

VICE CHAIR COOPER: Judge, I am not sure you were here earlier when I said that -- that is Judge Pam Rymer from the 9th Circuit who is joining us.

JUDGE WEIS: I gathered that. It sounded like a voice from heaven becoming involved in the proceedings here.

VICE CHAIR COOPER: I think that is a compliment, Judge Rymer.

JUDGE WEIS: Intended to be so.

VICE CHAIR COOPER: And you think that your concept for a national Court of Appeals would follow the same general format, without getting into the details, that you are recommending for the 9th Circuit?

JUDGE WEIS: Yes. But I prefer not to use the word national Court of Appeals because of past problems. So that is why I used the word unified Court of Appeals.

VICE CHAIR COOPER: All right.

JUDGE WEIS: The national court was a fourth layer, and I think that we should try to stick to the traditional three layer.

VICE CHAIR COOPER: Did your Federal Court Study Committee take a look at this concept when you -- as you were chair of the Federal Court Study Committee?

JUDGE WEIS: Yes, it did. And it took a look at three other models and decided not to adopt any one of the four. We had the time constraints, and I am sure you are very familiar with that with your

work on this committee, and we had limited resources as well. So that we did recommend for further study the structure of the Courts of Appeals because we thought that the Courts of Appeals presented the biggest problem in the Federal Court system.

Following our suggestion, the Federal Judicial Center did commission a study of the Appellate structure. And unfortunately it didn't do what we had intended. What we wanted the Federal Judicial Center to do was take at least the four models that we submitted and any others that might come to mind and then analyze the pluses and minuses of the various structural proposals. Instead, the Commission ended up saying that it didn't think at the present time that there should be any alteration in the system. Well, that is not what we wanted to know. We wanted to know whether some of the schemes that we had come up with simply were not workable at all and should be completely discarded or whether any of them were worth further study and so forth. So as far as I am concerned, we are back at square one from the study committee's recommendations that the problem

needs to be addressed and that we should look far into the future rather than simply looking at today's problems and a band-aid solution once again.

VICE CHAIR COOPER: That was your favorite. What were the other three -- I hate to use the word schemes, like you hate to use the word national. But what were your other three alternatives?

JUDGE WEIS: One was a model toward inserting another entity into the system. Another was to create a number of what is called jumbo courts, as I recall. Judge Lee Campbell was much in favor of that, of having perhaps four large courts. And then another proposal was that we have a three-judge panel composed of District Judges. And supposedly they would be able to filter out the cases that required only error correction and not law promulgation.

PROFESSOR MEADOR: Let me ask you this question. Your committee also found the problem of inter-Circuit conflicts to be of sufficient concern to recommend a device for dealing with those. Laying aside the specific recommendation that you had in your

report -- laying that aside, is it your view -- do you continue to hold the view that there is a significant inter-Circuit conflict problem that ought to be addressed in some fashion?

JUDGE WEIS: Very much so. And I think that the problem is getting worse all the time. It is interesting that I believe in the last two months the Law Week publication has devoted a page or two to existing conflicts that occurred during that past month. Every Appellate Judge I am sure has the experience of almost on a daily basis of encountering Circuit conflicts. The studies that have been done so far on that bother me a bit too because they focus on the petitions for cercariae that are filed in the Supreme Court and then make certain conclusions from that data. What those studies do not do is analyze the many inter-Circuit conflicts in which counsel decide that it is simply not worth the time to ask for cercariae because it will not be granted. They aren't the type of issues that would appeal to the Supreme Court in its policy making role. So I think that a more detailed study to develop some of the hundreds of

conflicts that are still in effect would be very helpful.

The other point that maybe I could just talk about briefly is the percolation theory, which is that the Supreme Court benefits from the development of a point of law by decisions in various Circuits. I just can't buy that idea. I think it is too expensive for the litigants. It is too expensive for the country. It is time wasting and it doesn't make sense from a policy standpoint. Many of these conflicts that exist there are searching, as it were, for the right answer. But we know in law many times it is more important to get a answer rather than the "right" answer. And interpretation of a statute, once the wording is made clear, will furnish guidance for office counsel and the business world. It is far more important that they get an answer soon than the "right" answer five or ten years later. So again I think that the unification of a Court of Appeals would do away with this percolation theory, which is simply trying to put a good face on the inter-Circuit conflicts.

VICE CHAIR COOPER: Judge, thank you so much for being with us today. We appreciate your thoughtful consideration.

JUDGE WEIS: You aren't going to stone me the way some of my colleagues do?

VICE CHAIR COOPER: No, sir, we don't st one. Because certainly speaking for myself, I may be where you are one day and you may be where I am.

JUDGE MERRITT: I thought you had already had enough of that in the past.

VICE CHAIR COOPER: You are probably right. As chair of the committee, I would suspect you have had enough stones coming in your direction.

JUDGE WEIS: Yes, indeed.

VICE CHAIR COOPER: We are going to take a 10-minute break, and we will reconvene at about 11:05.

(Whereupon, off the record.)

JUDGE SCHWARZER: Thank you for fitting me in on relatively short notice, which helps me since I happen to be here and will not be in San Francisco when you are there. My comments are limited to the

9th Circuit alignment, although if you wish to ask me any other questions, I will try to answer. They will be brief because I have given you a statement and I don't plan to go through that statement in any length. I will just hit some of the high points.

Of course, this is an issue that has been debated and discussed and argued about in the 9th Circuit for well over 20 years. But I come to taking a position on this rather late in the day. I have never signed on to the position of the leadership. I have listened and I have considered it. But it really wasn't until I spent some time at the FJC on the FJC study and workshops held for Appellate Judges and also in my recent experience in having sat by designation on some eight Circuits around the country that I began to think through the problem and tried to sort out my own ideas and come up with an answer to this issue based on the merits as opposed to politics.

I see that there are two questions for the Commission on this subject. The first one is whether there is a crisis that requires any immediate action to realign or restructure the 9th Circuit. And the

second question is putting aside the problem of any immediacy, is there any evidence to show that the administration of justice will be improved in the 9th Circuit by realignment or restructuring.

I would answer the first question, no. I see no evidence of any emergency that requires immediate action. The 9th Circuit, of course, has a heavy workload and a shortage of active judges as a result of a number of vacancies, but it is getting its work done and it is getting it done efficiently. So I know of no way that a realignment or restructuring would help the 9th Circuit with its heavy workload.

The second question has more ramifications. It is true that if the pressure of the workload could be lessened, that would be desirable from the point of view of the administration of justice. But as I said, neither realignment nor restructuring would seem to be bring that result about.

It is true that the Circuit is large, but there is no indication that reducing its size will ease the pressure of the workload. The question is

whether it will be more efficient as a result of being smaller. I spent a lot of time on the statistics. I am sure you have spent a lot more time on it and also in observing the Circuits, but I don't see any correlation between Circuit size and efficiency. A lot of attention is focused on time to disposition, but it seems to me that that is an imperfect measure of efficiency. And even if it were used, it doesn't correlate to Circuit size.

JUDGE RYMER: Judge Schwarzer?

JUDGE SCHWARZER: Yes, Judge Rymer.

JUDGE RYMER: You have just mentioned a criteria, which is efficiency, by which I assume you are measuring whether a Circuit and/or a Court of Appeals works well in your judgment. What criteria do you think that the Commission ought to apply across the board in deciding whether Circuit alignment or Court of Appeals structure works?

JUDGE SCHWARZER: Well, in my statement, I have identified two criteria. One of those is efficiency and there are a number of factors that you could look at that are not related to Circuit size.

The other one is coherence -- intellectual coherence, which covers a range of matters such as intra-Circuit conflicts, the abstract notion of collegiality, that is not friendliness, but how often judges are able to sit with each other so that they have an understanding of how each other thinks. I mean there is obviously quite a difference. I have sat on the 1st Circuit where everybody knows exactly how everybody else thinks. It is a very out-of-body experience coming from the 9th Circuit.

JUDGE MERRITT: Is that good or bad?

VICE CHAIR COOPER: We have got an out-of-body person speaking to an angel now, so we want to figure this out.

JUDGE MERRITT: Well, what did you think about that 1st Circuit experience?

JUDGE SCHWARZER: What did I think of that? Well, it is interesting, but not as interesting as sitting on the 9th where you have obviously considerably more intellectual input. Not just because there are 28 active judges but because there are innumerable senior judges and visiting judges who

sit there. I think the size is not an impediment to sufficient intellectual coherence. It is just interesting to see how a structure like the 1st, which almost seems like it comes out of the 19th Century given the size of the Court -- how that works. But I don't see that it is even anything that is open for consideration. It is not feasible.

PROFESSOR MEADOR: You didn't -- I think you didn't sense -- or did you sense in the 1st Circuit a greater coherence in the law there? A greater degree of collegiality which in turn made for a smoother decision making? Did you get any sense of that in the 1st Circuit compared with the 9th?

JUDGE SCHWARZER: Well, there is a little more to it in the 1st Circuit than numbers. There is a tradition in the 1st Circuit of avoiding dissent. And that goes back at least to Steve Briar and maybe before that. He was quite remarkable in having the Court reach a consensus on issues. And actually that is a controversial issue because it does to a degree stifle independent thinking and originality and creativity and finding new ways for the law to move.

But that is part of the tradition in the 1st Circuit. So, yes, there is a lot more coherence and in that sense collegiality. People go out of their way to avoid dissent, whereas in the 9th Circuit I think at times there is some sense of I wouldn't say urgency, but there is more impetus to dissent because there are some issues that people feel are important but where new thinking needs to be developed. But I think that a five judge court is out of the question. So it is merely a kind of an artifact that is interesting to observe, but I don't think we can learn a lot from it.

JUDGE MERRITT: So at least empirically, the smaller court has in this instance produced fewer dissents and a more coherent body of law?

JUDGE SCHWARZER: Certainly fewer dissents -- few, if any, dissents. Now you might say it is more coherent. I suppose it is possible also that by reaching consensus differences are -- well, I won't say swept under the rug, but obscured by the way decisions are written so as to eliminate differences. I can't say authoritatively that that happens.

JUDGE MERRITT: You wouldn't say, for

example, that the Marshall Court -- I am talking about Chief Justice Marshall -- where for many years there were almost no dissents or few -- produced a more coherent body of law to shape the beginning of the nation than the current Supreme Court does where there are frequent plurality decisions? You would say that the current Supreme Court is -- the body of law that we have is just as coherent on the subjects that it speaks upon as the Marshall Court was?

JUDGE SCHWARZER: I can answer that one categorically no, but I don't think the conditions are comparable. I mean, the Marshall Court didn't have to deal with sexual harassment, for example, in which the Supreme Court is having a terrible time.

JUDGE MERRITT: It had to deal with subjects much more difficult than sexual harassment in Marbury v. Madison, for example, or Osgood. I mean, you know it had for its time -- anyway, it had to deal with very difficult questions where coherence was thought to be important and where speaking with unanimity was thought to be important. But you don't place any value on that?

JUDGE SCHWARZER: To coherence? Yes, of course it is desirable. But I don't know that the situation that confronted the Marshall Court is analogous to the situations we confront today. But coherence is desirable. But coherence at the cost of writing opinions that are capable of being interpreted in different ways isn't necessarily true coherence. I am not suggesting anybody is doing that. And of course the Marshall Court also was operating under the English tradition, which also didn't recognize dissent. That was still an experience that was utmost in their mind.

JUDGE MERRITT: The English tradition was the oral statement of the various opinions of the individual justices of the House of Lords.

JUDGE SCHWARZER: Right.

JUDGE MERRITT: So there was -- the innovation that the Marshall Court provided was the innovation of the written opinion to speak as one for the Court.

VICE CHAIR COOPER: Judge, I have got a series of questions in no particular order. How big

is too big if we keep going. Focus on that. And number two, in your written paper you say that you are against splitting the 9th Circuit and you say that if you were to split it, splitting California would be a terrible mistake. I think you say egregious. So if you were to split it, then should California be a Circuit unto itself? And number three, I would like you to focus on Judge Weis's recommendation of divisions and how would that work. Do you like that idea or you don't like that idea?

JUDGE SCHWARZER: All right. Let's -- I will try to take them one at a time. How big is too big? That is a hard question to answer. But I think if we look in history, history suggests that when the time comes to split a Circuit, everybody knows it. It comes up from the bottom and not from the top down. The 8th Circuit when it was split into the 8th and 10th in 1928 is an example. That was a subject that was discussed for a long time, but eventually the request came from the judges and the people that were practicing in the courts, and there was general popular support. In the 5th Circuit, the same thing.

I believe every judge in the old 5th Circuit except one was in favor of that division. It took quite some time to work its way through, but it was supported by the judges and by the bar and the public.

I am not suggesting that the size of the 9th Circuit is cast in concrete and that the Court should never be split. But I think the evidence is that on the whole, the judges in the Circuit and the lawyers that practice before the Circuit and others who have an interest in it are supportive of the present structure. I think we will know when the time comes that we will need another Everts Act and that will be the time to act on it. But the impetus for a split now comes from outside of the judiciary and outside of the practicing bar and it is essentially a political impetus. Now your second question?

JUDGE MERRITT: You are saying there is uniformity you think within the 9th Circuit that there should be no division of the 9th Circuit?

JUDGE SCHWARZER: I didn't use the word uniformity. I think there is overwhelming support for the present structure. I think there are some people

that might have some questions about it, but there is not a ground swell that supports a realignment or a geographical change.

Now about California, I never took that issue too seriously. But as I thought about it recently, I think that the notion of splitting the State of California and having potentially diverging federal rules of law in the north and the south -- I don't think you are going to split it east and west -- is undesirable. Now Judge Becker this morning said that is not a problem because the California Supreme Court has just decided to accept certifications. But they are not going to accept certifications of federal law. So I think that would be very disruptive and undesirable.

Of course, unless you split California, you don't get any significant reduction in filings.

VICE CHAIR COOPER: Yes. I think California has over 60 percent of the caseload now.

JUDGE SCHWARZER: Yes. And it is probably growing relatively more rapidly.

JUDGE MERRITT: Suppose you have a

divisional structure within the 9th Circuit where any conflicts could be resolved by a Court embank or some type of arrangement for resolving any California conflicts that might be depending on state law? A divisional structure. You wouldn't abolish the 9th Circuit, but you could divide it into divisions.

JUDGE SCHWARZER: Is this a Judge Weis type of divisional structure or some other one.

VICE CHAIR COOPER: That would be one way or the other way. What are your thoughts on that?

JUDGE SCHWARZER: Well, one thing that had been proposed back in the 1970's, I think, was a super embank. If you split California, you can have one level of embank for each of the Circuits, and then if necessary they would get together in another embank, which adds another tier. Which I don't think that is desirable. I don't know what a divisional structure would add.

JUDGE MERRITT: Well, the 5th Circuit before it actually split divided itself into division A and division B. And the divisions were, as I remember, pretty much what the Circuit split in the

end turned out to be. The 5th Circuit went along there for I have forgotten how long, but for a while, and decided cases on an individual basis. But they retained the embank during that period of time.

JUDGE SCHWARZER: Well, that would be a geographical division. And I take it that that was in anticipation of an ultimate geographical division into two Circuits. I don't know what a division of the 9th Circuit would add to what we have today unless it were in anticipation of an ultimate split of the Circuit, which gets -- I am sorry?

JUDGE RYMER: Judge Schwarzer, rather than conceding of it as in anticipation of an ultimate split, the argument would be that the division would have more of the attributes of collegiality that would characterize a small Court of Appeals. But you would retain the administrative convenience of the large Circuit as well as the ultimate possibility of coherence in the law of the Circuit along the coast and along the lines that your paper reflects.

JUDGE SCHWARZER: The problem with that argument, it seems to me -- it has a theoretical

appeal. If you had three divisions of 9 judges each, that would be appealing. But that is not the way it is going to play out in reality because the volume of the work would require you to have a considerable number of visiting and senior judges continue to sit. So each division will still end up with a functional equivalent of maybe 20 judges because of the constant --

PROFESSOR MEADOR: Let me ask, that is not necessarily so, is it? You could have as many divisions as you need to keep the Court down to some reasonable size -- whatever you think it is, 9 or 12. If you need three divisions to do that or four divisions. And each division would have -- under the idea as I understand it, each division would have jurisdiction over appeals of certain designated districts within the state with an embank available to iron out any conflicts among these divisions. What do you think of that idea?

JUDGE SCHWARZER: Yes, but that doesn't really -- Professor Meador, that doesn't really answer the point that I just made. If you reduce the size --

the number of active judges in each division, you will still have a large number of visiting and senior judges sitting with them. So you are not going to achieve the goal of a small collegial court because the volume of the work will not get any less. It will continue to increase and you will need a large number of judges. Now dividing that large number of judges into three divisions may result in some marginal increase in collegiality, but not significantly. And the downside of it is I think it will be conducive of splits among the divisions. Because the advantage now of having judges from the whole Circuit sitting with each other is that it does provide cohesion and coherence. True, large numbers. But if there are no contacts between the northwest division, the judges there, and the judges in the southern division, they are much more likely to diverge in the way they deal with issues that Judge Rymer points out, common issues that effect our whole region than the way it is now where you have judges from all parts of the Circuit sitting with each other and cross-pollinating. I think that is a valuable part of this institution.

Did I answer all your questions?

VICE CHAIR COOPER: I think that is right. If, in fact, this Commission were to recommend -- this is a hypothetical question -- and Congress agreed to split the Circuit, how would you do it? I realize you are opposed to it.

JUDGE SCHWARZER: How would I do it? Well, without conceding any part of my position, I think I would create a Circuit that has some significant component besides California. I think that at the very least you would have to have Arizona, Nevada, California, Hawaii, and the Pacific territories. That would be sufficiently sizeable, but it would reduce the number of filings. And there is a certain geographical coherence to that Circuit. But I had thought for a long time that that would be an entirely workable compromise. But I don't think it would result in any benefits. It isn't going to make it more efficient. It is not going to make it more collegial. I think you would lose some of the benefits of the regional structure. And one other point that I made in the paper was the fact that the

large number of judges that is available to help each other has always been a valuable resource when you have had uneven growth and decline in the filings of various districts. I am sorry, Professor Meador.

PROFESSOR MEADOR: Let me go back to a question that Judge Rymer asked earlier on that had to do with criteria. If you think about factors that ought to be taken into account in determining Circuit boundaries or Circuit alignment, the (indiscernible) Commission identified several of those. For example, each Circuit ought to be at least three contiguous states. And one of the factors enunciated there was that appeals should be decided by judges drawn from the region from which the appeals come. Now one of the arguments that one hears is that there is a certain sense say in Alaska or Montana that the appeals from those regions are not being decided by judges drawn from the regions. How much importance, if any, would you place on the regional character of a Circuit?

JUDGE SCHWARZER: Well, the (indiscernible) Commission didn't define what they

meant by region. And it is obvious in the political argument that the definition is in the beholder's eye, and it is somewhat result oriented. I think the argument in favor of a regional Circuit is the argument against a national Circuit such as you have just heard about. I think that is the justification for arguing in favor of a regional Circuit. You don't want a national Court. You want some contact between the judges and the region generally where they come from. But there is much to be said for treating a 9th Circuit territory as a region because of a large common interest that cuts across the states. In resource law, for example, and environmental protection, water law, fisheries, Indian law, and various other kinds of issues that are common although they appear in somewhat different context in different states, but they are common to the region. So I think it makes sense to treat the 9th Circuit as a region. So I think that qualifies under the criteria of the (indiscernible) Commission.

JUDGE MERRITT: Do you think there is any value for a Court of Appeals Judge to be knowledgeable

about the role of a state or two or three or four states? Is there any value in having knowledge on the part of a Federal Court of Appeals Judge on local law?

JUDGE SCHWARZER: Local law?

JUDGE MERRITT: I am talking about state law. That is coming from an environment of practicing law or teaching law in a particular place normally gives you some additional understanding of the law including the customs and the way a state is divided for judicial purposes and the practice of law. Do you think there is a value in having that knowledge present?

JUDGE SCHWARZER: That is certainly of value of having that knowledge on the part of District Judges. Judges from the Court of Appeals hear appeals from a number of states. So it doesn't seem to me that there is any great value to be attached to the fact that the judge is familiar with the law of one state, and of course it only applies to diversity cases anyway. Now one could argue, I suppose, that judges should be familiar with the circumstances in the area out of which cases come that they decide.

But again the question is where do you draw the line. Their work isn't limited to a single state. It isn't limited to two states.

JUDGE MERRITT: But it is a matter of degree. If you have a National Court of Appeals, then it would be difficult for a Court of Appeals judge to -- like it is for a member of the Supreme Court to be knowledgeable about the law and mores of a particular set of states or state. But if you divide the Circuits in a way where say a judge has one, two, or three states, a judge can be very familiar with the conditions that exist in that one, two, or three states.

JUDGE SCHWARZER: Well, there is a trade-off here. I think you want judges to think in terms of the region from which they come. There is merit in that. And you want them to have a sense also that they are administering the national law. If they were sitting on a national court and they had no contact with the region -- they were like people -- like judges of the Tax Court, for example, whose only contact is with tax law -- I think that would

undermine some of the values of Courts of Appeals. On the other hand, if you cut it too narrowly and say a Judge for the Court of Appeals should be limited to one or two states, I think then you narrow their national vision. So I think the truth lies somewhere in-between, but I don't think that there is any magic.

JUDGE MERRITT: Let me ask you this. You know Judges and lawyers are often called upon to make distinctions, and the discussion of all this is plagued with certain distinctions that are alleged or have to be made. You have on the West Coast, from Alaska to the Mexican border one Circuit. On the East Coast from Maine to Florida, we have five Circuits. Now where does that bring you out? I am not aware of any perceived great problems on the East Coast about having five Circuits, any more than you are nationwide with 12. Why is the argument made that somehow it would be more deleterious to have more than one Circuit on the West Coast?

JUDGE SCHWARZER: Well, I didn't make that argument. My argument --

JUDGE MERRITT: No, I am not attributing

it to you. I am trying to get a distinction, though, if you can make it.

JUDGE SCHWARZER: Well, everybody knows the structure of the Circuits is an historical accident that evolved. There is no rhyme or reason to it. It is not symmetrical and it is certainly not elegant. The question is are we going to be any better off by moving states around like chess pieces. Saying this state ought to go here and this state ought to go there and that is going to look a lot more neat and clean. Are we going to be any better off? My approach to this is I see no evidence that tends to show there will be any improvement in the administration of justice by tinkering with the borders of Circuits. That is the bottom line of my position.

VICE CHAIR COOPER: Judge Rymer, do you have a question?

JUDGE RYMER: No thank you. They have been answered.

VICE CHAIR COOPER: All right. Judge, thank you so much. We appreciate your being with us

and we particularly appreciate your service as Director of FJC. Thanks so much for being here today.

JUDGE SCHWARZER: Thank you very much.

VICE CHAIR COOPER: As our last witness this morning, we have another 9th Circuit colleague, Judge O'Scannlain of the United States Court of Appeals 9th Circuit. Judge, it is good to have you with us.

JUDGE O'SCANNLAIN: Thank you very much, Mr. Chairman. Judge Merritt, my colleague Judge Rymer, Executive Director Meador, my name is Diarmuid O'Scannlain, and I am a Judge at the United States Court of Appeals for the 9th Circuit with chambers in Portland, Oregon.

I want to touch on four topics briefly. First, what are the practical constraints for structural change given the two fundamental functions of the federal judicial system, trial and appeal of cases.

Second, how best to allocate the law declaring and error-correcting duties within the Appellate function by pursuing opportunities for

synergy between the existing Circuit and District structures.

Third, how discretionary jurisdiction, already established at the Supreme Court level, might be phased in at the Court of Appeals level.

And then finally what to do about realignment of my own Circuit, the 9th Judicial Circuit, although I intend to submit part 4 of my remarks on the tables for the record only unless various members of the panel wish to go into it.

JUDGE MERRITT: Well let me -- this Commission is prompted by the intensely political question of splitting the 9th Circuit, without which we wouldn't be here, that is, if that question had not been raised. The politics of the situation is that because there was a difference of opinion between the Senate and the House, we created a Commission. What is your view of splitting the 9th Circuit? Should it be left as it is? Should we consider some divisional approach, leaving the 9th Circuit as the administrative entity but providing for a judicial conference? Should we divide the 9th Circuit into

divisions? What is your view of that?

JUDGE O'SCANNLAIN: Well, in my view, a split of the 9th Circuit is inevitable. I don't necessarily suggest it has to be today or in the next 5 or 10 years, but I cannot understand how a Circuit of our size can continue to expand. That is the fundamental focus of my remarks. My point is that because of the functions of a Court of Appeals, they are two-fold. One is error correcting and the other is law declaring. Now you can extend the 9th Circuit from 28 to 38 to 58 or 108 for that matter if all you are concerned about is error correcting because all you are doing is generating three-judge panels.

The problem is how can the Circuit speak as a law-defining, law-giving, law-declaring body when you get into such a large group of people.

JUDGE MERRITT: Our common law system is that the application of the law to the facts is the way law is made. In other words, the dispute resolution part of the judicial function is the way we decide what precedent is. That is, the law in action speaks louder often than the exact words on a page of

the written opinion. The holding of the case becomes what is important. So it is hard for me to see how we are going to divide error correction from precedent creation.

JUDGE O'SCANNLAIN: Well, in an ideal world, you wouldn't need the Court ever to sit embank. That is the fundamental problem you've got. Obviously every three-judge panel honestly and sincerely believes that the decision that is made by that three-judge panel is the law of the Circuit. But the problem is we get 400 suggestions for rehearing cases out of the 9th Circuit every year, and a judge on my Court will call for a vote on probably about 40+ or maybe 50 cases a year, and we will actually sit embank probably 20 to 30 times a year. The problem that -- I mean, the ideal that the three-judge panel will speak for the Circuit is wonderful, except that I can tell you that in at least 25 cases every year, we disagree.

JUDGE MERRITT: But a lot of that disagreement is the application of the law to the facts, isn't it?

JUDGE O'SCANNLAIN: Well, I don't know how refined you can be between an application of law to fact or an elaboration or interpretation of law. That gets into a very, very rarified distinction. The problem is a practical matter, which I think is what you need to be focusing on. It is does a three-judge panel always speak for the Court? And if you can say yes, then it doesn't matter how many judges you have. In fact, that is I think part of the theory behind the idea of a national unified -- or at least a unified, I don't want to say national -- court such as Judge Weis has presumed. In other words, the first in time speaks for the country.

In theory that is what we apply within the 9th Circuit. But the first in time does not always speak for the 9th Circuit because there is so often a necessity to rehear cases embank.

VICE CHAIR COOPER: Do you think -- I know in your paper you point out of the embank decisions of the 9th Circuit, you have approximately an 84 percent reversal rate by the Supreme Court of the United States. Would splitting the 9th Circuit change that

or not change that? Or is 11 embank not enough because of the size of the Court? What would redoing the structure have to do with this high 84 percent reversal rate by the U.S. Supreme Court?

JUDGE O'SCANNLAIN: Well, to be specific, the 84 percent figure that I gave in my remarks relates within the context of reversals of the 11-judge embank court in the last 18 years. It is not advanced as a reason for a split. The only fundamental reason for an eventual split of the 9th Circuit is a recognition that a Court of Appeals cannot expand infinitely. There is at some point a recognition that the Court is too unwieldy as a law-declaring Court. Now who knows what that number is?

I agree with Judge Schwarzer that I think our Court is doing a magnificent job. We put our heart and soul and energy into making sure that this works. But as I understand your charge, it is not merely to say aye or nay should the 9th Circuit be split today. Your charge is to look at the structural alternatives of the entire system, looking out hopefully perhaps at another 100-year dimension.

After all, in the first 100 years, we have only had two Circuits to split. So bulkinization isn't really that much of an evil. And what we need to do is focus, it seems to me, on what can be done to reduce the volume of cases coming to the Court of Appeals that require additional judge-manpower.

It seems to me that you can only do that two ways. I did not at all speak to the very important issue that Judge Newman spoke to this morning, which is hopefully a redesign of jurisdiction. Now that is a real political can of worms and I am not sure whether your Commission wants to take that on or not, but he is absolutely right.

VICE CHAIR COOPER: Only if we were king, I think, could we get that to happen.

JUDGE O'SCANNLAIN: Okay. All right. But at least he is absolutely right in recognizing that that is the problem. There is a wonderful chart in one of the studies that shows --

JUDGE MERRITT: You would think that we would deal with the problem then, wouldn't you? We are not going to sit here and not deal with what most

judges perceive to be the key problem, I assume.

JUDGE O'SCANNLAIN: Well, I say more power to you. I just don't know what you feel your jurisdictional limits are. But what was fascinating is there is a wonderful chart in one of the studies that shows the history of the volume of cases before the Courts of Appeals since 1891. And it follows a very, very flat trajectory from 1891 to about 1963 or 1964, and then a skyrocketing rise to our present level. Inside our Court, our volume has increased 7 percent per year until about the last year or so. So we don't know how good the trend is. It has dropped to only a 3 percent increase. But the fact of the matter is that that spike occurred because Congress has decided to give more and more private rights of action enforceable through the Federal Courts and more and more jurisdiction over various kinds of issues, transferring a lot of state crimes into the Federal domain and that kind of thing.

Now who knows what Congress's intentions will be over time. I just sort of approached this subject on the assumption that, number one, we have no

power over Congress. We assume that Congress will either continue to give more jurisdiction to the Federal Courts or less, we don't know. But what we can do is to highlight the structural limits of what you can do by adding judges. And the fundamental conclusion I have reached is you can add judges infinitely at the District Court level, but you can't add judges forever at the Court of Appeals level.

PROFESSOR MEADOR: Let me ask you this question. You say you see down the line that the split of the 9th Circuit is inevitable. What do you think about as an alternative to that the proposal that you heard discussed earlier when Judge Weis was up here of leaving the Circuit intact but creating divisions within the Court of Appeals and thereby bringing about Appellate Courts of a workable, reasonable size.

JUDGE O'SCANNLAIN: Well, as an experimental idea, I think it makes a lot of sense. You have got several issues to concern yourselves with. Number one, if it is experimental, fine. Because otherwise you would have to ask the question

of will that really take care of the problem of the 5th Circuit let's say in the next 20 years or the 11th Circuit in the next 20 years. Secondly, I think you need to determine before you adopt that recommendation, are we assuming that there will be no further growth in the Court of Appeals? Right now we are at 28 judges, but we are understaffed in terms of the formula that the Judicial Conference has used over the years. We are supposed to have 38 to 40 judges if you apply the formula. And as a matter of fact --

JUDGE MERRITT: No Court of Appeals -- maybe the 1st Circuit does, but no Court of Appeals actually has the formula.

JUDGE O'SCANNLAIN: Well, whatever. I mean the point is that relatively speaking we are way under and you can point to other Circuits that are over. But the point is that at some point you have to decide are you looking at splitting into divisions today based on a constant number of 28? Because we do have a pending request. It was in for 10 new judges which has now been reduced to five new judges. You have got to decide, are we going to look at the

divisional arrangement on the assumption of 33 judges or larger or 28. That is step number one.

Step number two, I think you need to take into account what about the Judicial Conference. Now this gets to be a very, very touchy intra-judicial political issue because there has been quite a drum beat lately about the idea that the 9th Circuit is underrepresented on the U.S. Judicial Conference. Every Circuit has one Chief Judge and one District Judge. And if in effect you are going to have mini-Circuits within the 9th Circuit, does that mean then that we should have an additional two members on the Judicial Conference, presumably at the Court of Appeals level as well as at the District Court level? Somebody needs to sort of test that because that is going to surface.

And then lastly, I think you have got -- pardon?

VICE CHAIR COOPER: Given only two choices, which I realize the Commission doesn't have and you don't either -- if you only had the choice of setting up a division concept or splitting the 9th

Circuit geographically, which would you choose?

JUDGE O'SCANNLAIN: Well, it depends on whether we are talking long term or short term. If you are talking about a permanent resolution of the overall structural problem, I think you have to assume that you are going to have to split Circuits, or at least recognize that to keep the Circuits more or less as they are today, you have to control in-flow or allow some level of cercariae. My recommendation there, which is in my remarks, is that we ought to be experimenting with the notion of an Appellate division at the District Court.

VICE CHAIR COOPER: But how would you split it then, if that is your choice?

JUDGE O'SCANNLAIN: Well, part 4 of my remarks goes into 7 or 8 different alternatives. The one I prefer is the one that was recommended by the (indiscernible) Commission. I share Judge Newman's view. He is absolutely right. There is no -- he pointed out that there wouldn't be any particular problem within his own Circuit. I think he identified all the issues, and I said just about the same thing.

The last thing I want to say, though -- getting back to I guess Judge Merritt's question on the divisional issue -- and that is in addition to, number one, whether we are staying at 28 or not, and secondly, the Judicial Conference issue. The third, of course, is how do you deal with the embank Circuit law resolution with divisions? I think we haven't touched upon that. I haven't heard much discussion about that yet, but you need to think that through very carefully. I sense within our own Court a kind of unrest at the moment about the viability of the 11-judge limited embank to speak for 28 judges or for 33 judges for that matter.

JUDGE MERRITT: And that is not permanent. It is made up for each case -- the 11 judges?

JUDGE O'SCANNLAIN: Yes.

JUDGE MERRITT: That is not a stable group of judges.

JUDGE O'SCANNLAIN: No, no. So if you were to go divisions, would you still keep the 11-judge arrangement? Would you have to ensure, for example, that you would have to have certain

representation from each of the three divisions? How would all of that work? I think you need to kind of think through that problem as well. Because as you can appreciate, and I think even Judge Schwarzer would agree that 9th Circuit Judges are not reluctant to view their responsibilities as members of the three-judge panel to decide the case in a manner in which they see they are applying Circuit law, yet that hasn't avoided the problem of embanks.

JUDGE MERRITT: So you have a lot of inter-Circuit conflicts, I take it? Or nuances of white there?

JUDGE O'SCANNLAIN: Well, that is a very, very hot -- red hot issue within our own Court, Judge Merritt. I guess I am of the school within our Court that suggest that there are many more intra-Circuit conflicts than perhaps we are willing to admit.

PROFESSOR MEADOR: Let me ask another question you may not want to answer.

VICE CHAIR COOPER: Of course you don't have to answer anything we ask you, you understand. But I would worry about one that was prefaced with

that preamble.

PROFESSOR MEADOR: This one may be particularly one you don't care to address. But it is said -- you may have heard it said that -- it is phrased in many ways, but the upshot of it is that the overwhelming sentiment among the judges of the 9th Circuit and the practicing bar is opposed to a split. How do you read the sentiment among the judges of your Court on that question?

JUDGE O'SCANNLAIN: Well, I think it is subtly, slowly, but resolutely shifting. That would be certainly a correct statement let's say 5 years ago. But in the last five years, there is certainly a sense that there is some merit to examining a split. I don't think I am at liberty publicly to disclose conversations that we had as a Court in a symposium about two months ago, but I think it is fair to say that it can no longer be said that the Court of Appeals unanimously or near unanimously opposes a split.

VICE CHAIR COOPER: In fact, you would propose the split that the (indiscernible) Commission

came up with as the best alternative?

JUDGE O'SCANNLAIN: It is the best alternative. I have gone through quite a few options.

VICE CHAIR COOPER: Right. And you put that in your paper.

JUDGE O'SCANNLAIN: Yes, I did.

VICE CHAIR COOPER: The problem is it doesn't have as catchy a name as the stringbean or the horseshoe.

JUDGE O'SCANNLAIN: Oh, okay.

VICE CHAIR COOPER: And you like that better than the divisional concept if you are looking out 10 or 20 years?

JUDGE O'SCANNLAIN: Yes. If it -- ideally what I would like would be a serious consideration of to what extent the Court of Appeals workload can be shared with the District Court. Some level of Appellate jurisdiction at the District Court. Certain cases go straight to the Court of Appeals and some go to an Appellate division. Out of the Appellate division, we would then apply cercariae. Obviously there would be direct appeal and others. My

suggestions are not cast in stone. All I hope I have been able to do in my paper is to suggest concepts that you can start to work with.

JUDGE MERRITT: Well, what did you think of Judge Newman's suggestion of a set of cases in which you petition the Federal Courts for access, that is, the diversity situation and the other example that we discussed was ARISA. Were you here when he --

JUDGE O'SCANNLAIN: Yes, yes.

JUDGE MERRITT: What did you think of that?

JUDGE O'SCANNLAIN: Well, I guess I haven't sensed that there is that huge a source that would be effected by that. To the extent it can be identified in any given Circuit that there is an enormous number of cases that are strictly diversity or strictly state law or even ARISA, I would have no objection to that because I fundamentally do agree with Judge Newman that the federal system is from day one identified and designed to be a system of limited jurisdiction courts as opposed to the state system. And while the trend has been ever so slightly to

increase the amount of state litigation at the expense of -- excuse me, increase the percentage of federal litigation at the expense of the state system, there are limits as to how far that is going to go and no one is proposing any kind of a radical shift there. To the extent that this would help with the in-flow problem, I would say that it is worth exploring. Absolutely.

VICE CHAIR COOPER: Does anyone have any other questions? Judge, thank you so much.

JUDGE O'SCANNLAIN: Thank you.

VICE CHAIR COOPER: We appreciate you being here and giving us an insider's view of the 9th Circuit, I guess would be the way I would put it. The hearing will be adjourned until 2:00 this afternoon.

(Whereupon, off the record until 2:00 p.m.)

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

VICE CHAIR COOPER: Judge Edward Becker, Chief Judge of the United States Court of Appeals for the 3rd Circuit. Judge, thank you so much for being with us today.

JUDGE BECKER: Thank you, Mr. Vice Chairman and Judge Rymer, Executive Director Meador. For the record, let me first identify myself. My name is Edward R. Becker. I have been a Federal Judge for approximately 27 and a half years. I was a U.S. District Judge in the Eastern District of Pennsylvania for 11 years. I have been a Judge for the United States Court of Appeals for the 3rd Circuit for over 16 years. I enter on duty as Chief Judge of the 3rd Circuit Court of Appeals on February 1. I have been a member and chairman of the Judicial Conference of the United States Committee on Criminal Law, a member of the board of the Federal Judicial Center, and a member of the Judicial Conference Committee on Long Range Planning. It is that latter role that prompted me on January 26 to write to the Commission in some detail expressing my thought on the Commission's

charter. I felt that because I was so heavily involved in the drafting of the provisions of the long range plan dealing with the structure of the Appellate Courts that I had a duty to give the Commission, for whatever it might be worth, the benefit of my views. I deliberately sent that letter on January 26, that is before February 1, so that it would not come on the stationary of the Chief Judge of the 3rd Circuit. Because in connection with the proposals therein, I speak only for myself and I do not purport to speak for my Court. I will, however, speak for my Court on a number of other matters in which I know that the Commission is interested, namely the manner in which the 3rd Circuit does its business. I will not talk in detail about my letter, which is part of the record, although I will review salient points made.

I would like to begin with a brief description of how Appellate Judges do their work. I do so against the background of much fanfare about how Courts of Appeals can be more efficient and of the need to increase productive capacity in order to meet the workload of the Courts of Appeals.

Now while the work of a Federal Appellate Judge is extremely demanding -- I mean, for me it is and has been for 16 years a 7-day-a-week job -- the process of doing it is very simple. You get the briefs and the motion papers or what have you and you read them. Then you think about them and you talk to your law clerks about them and you read their bench memos. But you read the briefs and you read the motion papers and then, obviously after the rest of the process is through, you write and you rewrite and you rewrite and of course it is the duty of every Circuit Judge to contribute to keeping up the consistency and coherency of the Circuit law and you read the opinions of the other judges.

But there is one very interesting thing I want to tell you about briefs. I found out long ago that they don't read themselves. You have got to read them yourself. So what are the efficiencies? How can we to cope with this be so much more efficient? Facts? E-mail? The Internet? They don't help you read the briefs. The only efficiency I know of is if you have somebody else read the briefs and tell you

what is in them. And that would be, in my view, an abdication of our duties. It is reported that in certain Circuits, at least within certain kinds of cases, where they have the so-called screening function, the briefs in many cases are reviewed by staff attorneys who then come and report to the judges. We don't do that in the 3rd Circuit. We do not use staff -- staff attorneys never look at a counseling case in the 3rd Circuit. They do pro se cases and they play a very important role in pro se cases. But pro se cases are decidedly different from counseling cases. Not that we give them any less attention. We don't. But many of them -- the vast majority of them, the statistics show, really have no merit at all. We probably reverse maybe 10 or 15 percent of them, but you really need an interpreter. They are written in longhand and sometimes it is gibberish. And the staff attorneys perform a very important role in presenting them to us in an efficient way so that we can read them. That is not a problem that we have in counseled briefs.

In my view, the efficiency of delegating

to staff attorneys or Appellate magistrates or what have you work on counseled cases and having them report to the judges in my view is highly undesirable. Professor Hazard wrote in 1965, "It is not difficult to imagine ways in which the Appellate system could be reshaped to handle the present volume of appeals at a much higher rate of speed or to handle a much greater volume of appeals at the present rate of speed. But it is difficult to imagine how one could organize a judicial establishment that would have this kind of productive capacity and at the same time retain the intimate personal responsibility that is characteristic of the Appellate judicial process today." That was true in 1965 and even though caseload has vastly increased, it is true -- I know it is true in my Circuit and I believe in most Circuits today. But I just do not know how we can, in terms of the most critically important duty of Federal Appellate Judges, that is, to listen and read the briefs and read the papers, how we can be more efficient and how we can delegate that.

In so far as responsibility for the

maintenance of the consistency and coherency of Circuit law, I don't see how you can delegate that. I am going to talk about that a little bit more. Lately, one of the judges from another Circuit said, well, they have the staff attorneys check this, that, and the other and we have it all on computer. There is no substitute for a judge having in his or her head knowledge of the law of his or her Circuit, and I will tell you how we do that in the 3rd Circuit in a few minutes.

VICE CHAIR COOPER: Judge, let me ask you one question that you have raised really for the first time we have seen in these public hearings. I take from your written paper that you say that maybe the D.C., Federal, and 1st Circuits are too small from an economic point of view looking toward the future. That they don't have the caseload to justify the money that Congress has to put into them. Would you amplify on that a little bit? I mean, what should we do about it since we are supposed to look at everything?

JUDGE BECKER: Well, I think what you have to do is to look at it within the framework -- let me

-- if I can bridge into that, Mr. Vice Chairman.

VICE CHAIR COOPER: That is fine. Go ahead. Just keep that in mind.

JUDGE BECKER: Yes. I intend to get to that. I just wanted to finish this thought. The only other delegation would be if you relied more heavily on law clerk drafts of opinions, which judges don't want to do. The critically important thing in terms of this delegation is while Appellate commissioners and Appellate magistrates and staff attorneys are capable people, and while mass produced justice would probably be correct 95 percent of the time, these folks are not judges. They are not Article III judges. And if you miss, things fall between the cracks. If you miss 2 or 3 or 5 percent of the cases, that is in my view a very serious matter.

Now to turn directly, Mr. Cooper, to your question, but with some back-up. And I would like to reference the letter that I wrote to the Commission. I basically said that the seminal document with which this Commission should begin is the long range plan of the Federal Courts. The message I draw from that is

that this Commission should not do its work only with its eye on 1998 and what we need now, but with its eye on the future, and the year most recently cited is 2020. If you are familiar with Professor Baker's article, he makes 2020 the judicial equivalent of 1984.

Now I asked, and you have them now -- a month or more ago, knowing that I was coming here, I asked the administrative office to update the projections as to the Federal Appellate caseload. Because 2020 looks through the roof -- what we in the Long Range Planning Committee call the nightmare scenario. You have, I take it, this document that they produced to me.

VICE CHAIR COOPER: Yes, sir. Yes, sir, I do.

JUDGE BECKER: And although the number of Appellate filings in 1997 exceeded those reported in the previous year by less than 1 percent, and the total Appellate filings projected for 2020 have decreased by approximately 13.4 percent -- that is due largely to a decrease in projected prisoner appeals --

the fact of the business is that they still project a threefold increase in filings by 2020. That is a matter of concern. Now my point is that this may counsel certain realignments and the basic principle that I would apply is to have in mind that the Everts Act, which created the Courts of Appeals, was passed in 1891. So leaving aside the split of the 5th Circuit, it has been 106 years since there has been any significant change in the structure of the U.S. Courts of Appeals. And if you make a change every 100 years, I think the Republic will survive.

The Long Range Planning Committee -- and your staff aid sitting with you, Dr. Judith McKenna, played a very important role in this enterprise -- really thought long and hard about the basic structure of the Federal Appellate Courts. We did not get into Circuit alignment. We didn't deal with that. But we thought about the question of whether there should be specialized courts and we unanimously rejected that. We said that generalists courts where you bring a broad-based view are the best kinds of Appellate Courts. We considered the matter of intermediate

panels. We thought about the idea of an Appellate division of the District Court. We unanimously rejected that. We had retreats. I was the facilitator in retreats that we had all around the country. And by and large, there was no support for an Appellate division of the District Court. The District Judges said they are too busy. And if I may borrow a phrase from Professor Carrington's work, "Appellate Judges should have a reviewer's frame of mind." And District Judges sitting on an Appellate division are not likely to have a reviewer's train of mind.

VICE CHAIR COOPER: Do you think that could be summed up as there would be a fear of the sneer of the peer? It is if you had a fellow District Judge --

JUDGE BECKER: I could not have done that well, Mr. Cooper, and I thought about it for 24 hours.

PROFESSOR MEADOR: Let me ask for a clarification about that. District Judges now constantly review trials through new trial motions, correct?

JUDGE BECKER: Correct.

PROFESSOR MEADOR: So what is the difference between that and what we are talking about, that is, the Appellate division?

JUDGE BECKER: Well, they are reviewing their own work. That is partly what Mr. Cooper said. Here they would be reviewing everybody else's work. I want to say that I think the principle problem is workload. They are just too busy.

PROFESSOR MEADOR: Well, suppose you added District Judges to cover that additional workload?

JUDGE BECKER: Well, if you are going to add -- in my view, it doesn't make any sense to add District Judges to do Appellate work. If you need more Appellate Judges, then add more Appellate Judges. Don't add District Judges.

PROFESSOR MEADOR: I am not trying to sell this. I am just trying to give you the arguments that are made that it is easier to add District Judges than Appellate Judges because at the Appellate Court you have all of the problems of collegiality and so on and so on, and it is just easier to do it at the District

level.

JUDGE BECKER: Well, then I think you defeat the purpose of having an Appellate Court and having more coherence and consistency in Circuit law. I mean I think if we had no other alternative, Mr. Meador, and if the nightmare scenario of 2020 should eventuate, I think it is a possibility. We also rejected the notion of an inter-Circuit tribunal. The Supreme Court's caseload is down. We met with the -- I was one of the members of the Committee who met with the Chief Justice. There does not appear to be any need in the foreseeable future, even if there would be a few more Circuit splits or a few more Circuits created, for that. We also thought about and rejected the matter of discretionary review. Speaking for myself, if I have got to review a file to decide -- the so-called easy case, to decide whether to take it -- if it turns out to be an easy case, I would rather decide it. We are better off if we decide it in summary fashion.

Now in terms of the matter of Circuit size, I believe that the most important text is the

Commentary to Recommendation 17, "The principle of each Court of Appeals should consist of a number of judges sufficient to maintain traditional access to and excellence of Federal Appellate justice but preserve judicial collegiality and consistency, coherence, and quality of Circuit precedent to facilitate effect Court administration and governance." And there is some other language about a court being a cohesive group of individuals who are familiar with ways of thinking, reacting, persuading, and being persuaded. Others have stressed that language more. The language that I stress is not so much the collegiality part, but that "the Court becomes an institution, an incorporeal body of precedent tradition, of shared experiences, and collegial feelings in which members possess a common devotion to mastering Circuit law, maintaining its coherence and consistency, thus assuring its predictability and adjudicating cases in like manner."

Now in the 3rd Circuit, we have pre-filing circulation. We read every opinion before it is filed. We comment and we catch a lot of problems and

flag time and again cases which create a problem with existing Circuit law. One matter of 3rd Circuit practice that I know the Commission is interested in and I do want to note is that our judgment order or unreasoned disposition practice. I am pleased to say that we have all but abolished that practice. When I became Chief Judge, we had a retreat and I took it up with my colleagues and judgment orders are for the most part a thing of the past in the 3rd Circuit. But in terms of being able to master Circuit law, I respectfully submit that there is no way that the judges of the 9th Circuit can do what we do. It is just too large and there are too many opinions. I just don't see how any judge of the 9th Circuit, unless he or she has a superhuman brain, can master Circuit law the way we in the 3rd Circuit or judges in other Circuits can master Circuit law. And in my view, whatever else happens, the 9th Circuit consistent with that -- I mean, to me that is the hallmark. And if the judges are not in a position to master Circuit law, and I don't mean having a staff attorney or law clerk look it up when the occasion

occurs, then I think that Circuit has to be split. And I think when that principle, which in my view is the cardinal principle governing the size of Courts of Appeals -- I submit that the 9th Circuit ought to be split and I suggested in my letter that apparently the only way to do it -- unless you -- I understand there have been some proposals to create three divisions in the 9th Circuit. To me that doesn't make any sense. If you are going to create three divisions, then create three courts or create two courts. I don't see what the sense of a division is. A court doesn't exist for administrative purposes. To be sure, the Courts of Appeals are also the administrative unit for the District Court, but there are a lot of different ways. I mean, so you administer space and you administer personnel. That doesn't have to be by Circuit. That could be by region. It could be northeast region and southeast region. You can do that. You can do that in a different way.

JUDGE RYMER: Judge Becker, if I may, how do you objectify? What kind of objective measure do you suggest that the Commission consider in deciding

whether a Circuit -- a Court of Appeals is too large to master the law of the Circuit or whatever other measure you would like to suggest?

JUDGE BECKER: Well, Judge Rymer, I have used Justice Stuart's I know it when I see it with respect to the 9th Circuit. I think I would be hard-pressed to come up with objective calipers, but I guess you could do it in terms of basically the numbers -- and I haven't tried to do any math, but I guess you could do it in terms of the number of opinions or at least the number of published or precedential opinions that a Circuit has.

JUDGE RYMER: Excuse me, Judge, but by those measures, there are several other Circuit Courts of Appeals that are not far behind.

JUDGE BECKER: Well --

JUDGE RYMER: If that is the pacing item, that is sort of the total number of opinions, then we may be in for a splitting on a fairly large scale basis (indiscernible).

JUDGE BECKER: Let me say that I was not under the impression that that was true, and I have

not made a study of it. I certainly haven't focused on it. I did look in terms of the number of opinions that came out of the 9th Circuit. I have not looked in terms of the number of opinions that have come out of other Circuits. But --

JUDGE RYMER: Well, the 11th and the 5th and the 6th are not massively far behind.

JUDGE BECKER: Are we talking about precedential opinions?

JUDGE RYMER: Well, but isn't that just sort of hail chasing because you can opt yourself for how many published opinions one does and it is perhaps not necessarily good administration of justice (indiscernible).

JUDGE BECKER: Well, the only -- I mean, in terms of our practice, and I am not familiar with the practice of other Circuits, the only opinions that we circulate are published opinions -- precedential opinions.

JUDGE RYMER: Yes.

JUDGE BECKER: And I would limit it to that. Non-precedential opinions in my view -- I mean,

they may be subject to petition for rehearing, and obviously they are the responsibility of the panel, but they are not the responsibility of the full court. So I would measure it by the volume of precedential opinions. And obviously there has got to be some flexibility or leeway.

JUDGE RYMER: Right. If the 9th Circuit were essentially the same number of public opinions as say the 7th Circuit, would you say therefore that the 7th Circuit is too large? Or would you say no because it is divided by fewer judges who sit on the panels more frequently?

JUDGE BECKER: Well, I don't think you divide it by the number of judges because theoretically all the judges are supposed to be familiar with Circuit law -- with published opinions. The 7th Circuit, as I am aware, I think publishes a far greater percentage of their opinions, I mean by an awful lot than other Circuits. And I question whether they have to publish everything they publish. Now it is also a much smaller, more cohesive Circuit in terms of geography and personnel, and therefore more of the

judges -- it is so much smaller that more of the judges are involved as panel members in more of the cases. And that, I think, dilutes the problem in some respect.

VICE CHAIR COOPER: Do you have an opinion, Judge, as to -- I think it was 1980 -- why the 5th Circuit Judges felt that it was desirable to split in the 5th and the 11th? I think this morning someone said all but one of the judges supported that, and I think that is historically accurate. Whereas it seems that certainly the majority, and maybe an overwhelming majority, of the 9th Circuit Judges feel differently with a Court that is as large or larger than the 5th Circuit. Do you have any insight into that that you can give us?

JUDGE BECKER: Well, I know there is a tremendous amount of ESPRI and ESPRI and Circuit pride. But I just wonder if they are not letting that get the better of things. The 5th Circuit now -- I mean, I know there are a couple of Circuits who don't want their size increased and some of the courts are divided. I do understand the 9th Circuit is not

monolithic on this point.

PROFESSOR MEADOR: Let me go back to back to idea that you mentioned a moment ago that was discussed this morning, and that is the idea of distinguishing between the Circuit and the Court of Appeals and the proposal would be to leave the Circuit intact but have the Court of Appeals sit and function through divisions. I thought I heard you say something to the effect that you didn't know what that would accomplish. The argument made in that direction, as I understand it, is that true you have -- when you say three divisions, you have in effect three different Courts of Appeals, but they would all be part of the same Circuit, permitting the Circuit then to maintain uniformity Circuit-wide. Whereas if you split the Circuit, you create separate Circuits with the potential for adding inter-Circuit conflict and the only way to resolve it would be the Supreme Court. So it gives the idea of a regional control over uniformity in the law while permitting the Court to function through smaller units. Do you have any observations about this?

JUDGE BECKER: Well, I mean I think it sort of sounds good, but I still don't see how that is any different -- I mean, what you are basically saying is you've still got -- you've still got one mega or one jumbo Circuit. Now it could be that there is some improvement by the fact that X number of judges will always sit together and therefore you don't have so many permutations and combinations of panel members, who in Judge Newman's universe would be strangers to each other. There might be an advantage to that. But nonetheless, you still have, from the point of uniformity, a jumbo Circuit.

I mean, I don't know if anybody has got the absolute solution for the 9th. I know it may seem somewhat radical, but on the basis of the figures I have seen, the only way you can do it is to split California. I think that the Republic would survive. The California Supreme Court now has a certification procedure. If the problem is the northern and southern Circuit predicting what California state law is, you can certify it through the California Supreme Court. There could be an embank of the two Circuits.

We believe one of the cardinal principles of long range planning was to have regional Circuits. I don't see that a Circuit that has Alaska and Arizona can in any sense be considered a regional Circuit. Idaho and Montana certainly are much more part of a region of the 10th Circuit. You are looking now at the whipping boy of the Federal Judiciary. I mean, I have managed to get everybody mad at me. I have demonstrated the value of --

VICE CHAIR COOPER: The First Amendment is a great thing, though, Judge.

JUDGE BECKER: Well, not even -- what is better is life tenure.

VICE CHAIR COOPER: I see.

JUDGE BECKER: Life tenure is better. I have got my friends in the 1st Circuit mad. My son is a law clerk on the 1st Circuit, so I hear it. I got the 2nd Circuit mad. The D.C. Circuit, I have divided, and I have got them mad and I got the 4th Circuit mad. I don't have any agenda, I assure you. I am just saying if this nightmare scenario eventuates -- and that is why I was careful to ask before I came

here to see what the projections are. Then I say the D.C. Circuit is too small, the 1st Circuit is too small. The 1st Circuit arguably should be a New England Circuit.

JUDGE RYMER: Judge Becker, given the nightmare scenario that was projected, do you see, as some have suggested, that there is a real difference in the type of cases that may comprise those numbers? In other words, a good percentage of the nightmare are prisoner pro se cases, for example, which arguably should be handled in a different way from other cases. Do you have any views on that?

JUDGE BECKER: Well, I think -- first of all, let me just say that one kind of case that I do not believe shows up in those statistics at all and it is in many respects the most onerous kind of case are the habeas corpus cases which are disposed of, most of them, by denying a certificate of appealability. That is a whole full-dressed habeas corpus case and review of a state record. So I don't think the statistics begin to show how onerous some of the pro se caseload can be. But with respect to most of the civil rights

cases, Judge Rymer, I agree with you. They are much more expeditiously handled. And I do think that you have to discount them and give them a much lower weight. But the projections are frankly a little scary and it is only for that reason that I have said that the D.C. Circuit's caseload is so much smaller. The Federal Circuit to me never made any sense from -- I mean, if you want to talk about a political compromise. You have a court that does patents and they do appeals from the Court of Veterans Appeals and then they do federal personnel appeals. The D.C. Circuit does marvelous work, but -- and let me just say that notwithstanding my every 100 years comment, I want to make perfectly clear that I am not suggesting that the Commission engage in a redrawing exercise willy nilly. As I said in my letter, I acknowledge the value of long-working institutional arrangements and the importance of the ability of lawyers and judges to rely on precedent. So a strong case has to be made for disrupting Circuit alignment. I say you've got a strong case now in the 9th, as I understand it, and you have a strong case if we are

looking ahead to the kind of hydraulic pressures that we will have in 2020 if those projections come true.

Nobody wants to change. Everybody is happy with -- you know, everybody wants to leave it the way they've got it. But the Commission's charter is what is in the nation's interest and the interest of the administration of justice.

PROFESSOR MEADOR: Let me ask a question about that. A few minutes ago, you ticked off all of the ideas about Appellate Courts that the Long Range Planning Committee rejected. It seems to me that of interest is to know what you would affirmatively recommend that the Commission recommend now. We know what the Committee rejected. Is there anything left over that you, yourself, would recommend that this Commission now recommend?

JUDGE BECKER: Well, let me go to the tail-end of that question and then come back to the middle. I mean, the Commission -- if we were directly confronted with the kind of caseload that might happen in 2020, the current Appellate structures can't handle it. I have to concede that. Now Chapter 10 of the

long range plan addresses that. There are a whole bunch of ideas there, none of which are palatable except the one idea that would do more to solve it than any other, namely cutting back on the jurisdiction of the Federal Courts -- cutting out diversity and doing things the American Bar Association would never let us get away with, namely getting rid of diversity jurisdiction, cutting back on the federalization of crime. The judges are all for that. Whether the Congress or the lawyers are for that, I don't know. If we got to that point, we would have to cut back on jurisdiction. Two judge panels -- I mean you have got to make your manpower or your personpower go further. You have cases heard by two-judge panels and then you bring in the third judge only if they divide. You would have to put on more judges. We can tolerate -- even under Judge Newman's scenario, we can tolerate some more judges and we could split up into evenly divided Circuits. We could have fewer written opinions. We could eliminate review in certain kinds of cases. There certainly would have to be much stronger administrative control.

I will tell you another issue that the Long Range Planning Committee considered was whether or not there should be a chancellor of the Federal Courts. Chief Justice Berger was big on the idea of having a chancellor of the Federal Courts. The judges were very much opposed to that. They like the current decentralized governance. But if we got into that kind of scenario, then I think you would have to have a chancellor of the Federal Courts. You would have to have a very strong central administrator who could tell a judge from Detroit that you have got to go to Pasadena next month and so forth. We certainly could do more to maximize the utilization of our judicial personpower than we do under our existing structures. Those kinds of things are not palatable.

You asked the question of what should we do now. I would say in terms of what we do now, I would say with an eye on the future -- I talked about splitting the 9th. We ought to even out the Circuits. We ought to take a look at the overall Circuit structure and consider realignments. Now I put my suggestions in a footnote. I knew I was going to get

shot at and I didn't --

PROFESSOR MEADOR: Did you think a footnote would protect you?

JUDGE BECKER: Well, it hasn't up to now. I say the Federal Judiciary is a national treasure, but Federal Judges don't like change. They like -- they think that we have got a good system and they want to keep it as it is. But I simply suggest that what we could do now is to take a look at the caseload in the projection and even out the Circuits. Even out in terms of size and workload and personnel. I am not suggesting that there wouldn't be certain disruptions. There are certain disruptions in terms of personnel and precedent and who is the next Chief Judge and that kind of thing. To me that stuff is not important -- who is the next Chief Judge. Precedent is important. But those kinds, if they were managed -- the precedent problems were managed when they split the 11th Circuit, and they certainly can be managed here. I know -- I mean, when I look -- I mean, I thought about whether to write this letter, and then I looked at the Commission's charge, which was "to report to the

President and the Congress recommendations for such changes in certain boundary structures that may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals consistent with fundamental concepts of fairness and due process." I mean, it strikes me that these kinds of realignments are at least fairly within the charter of the Commission.

VICE CHAIR COOPER: It is a pretty tough charge.

JUDGE BECKER: It is a tough charge.

VICE CHAIR COOPER: Judge, we appreciate you taking the time to be with us. Anybody have any other questions? Judge Rymer?

JUDGE RYMER: No. Thank you, Judge Becker. We appreciate it.

VICE CHAIR COOPER: Thank you so much. We appreciate you being with us and giving us your insightful comments. Our next witness is Elena Ruth Sassower. Is that the correct pronunciation?

MS. SASSOWER: Sassower.

VICE CHAIR COOPER: Sassower, okay. With

my southern accent, it sounds good either way. So, Ms. Sassower is from White Plains, New York, and she is here on behalf of the Center for Judicial Accountability.

MS. SASSOWER: With all respect, I need just a moment or so to set up.

VICE CHAIR COOPER: Sure, that is fine. You have 15 minutes once you start, but I have not started the clock on you.

MS. SASSOWER: The first order of business will be the amount of time I have for this presentation. But just one moment, please.

VICE CHAIR COOPER: All right? Are you ready?

MS. SASSOWER: Mr. Cooper, Judge Rymer, Executive Director Meador, at the outset I would like to say that I have been accorded only 15 minutes time for a presentation which is no less significant and important than any of the other presentations today or at past hearings. I have the schedule for today's hearing and every witness received a half hour. Judge Becker, who just concluded his presentation had far

more than a half an hour for his prepared statement and of course the questions. In looking back over the past hearings which are posted on the Web, I see the same. The standard time allotment is one half hour. I did not request less than what was the usual and customary time allotment, and I would request to be given the same equal treatment as has been accorded to everyone else.

I would additionally note that when I testified before the Long Range Planning Committee, which of course included Judge Becker, I was given 20 minutes, which was the equivalent amount of time to every other witness. So as a first order of business, I would request equivalent time.

VICE CHAIR COOPER: Go ahead. Your time has started running, so go ahead and start.

MS. SASSOWER: Well, you have not answered my question.

VICE CHAIR COOPER: No. I haven't answered your question because we wouldn't count questions against you. That is the reason Judge Becker -- we interrupted him a lot. If we don't

interrupt you, that might be different.

MS. SASSOWER: Be that as it may, he was given a half an hour for his presentation and every other presenter was given a half hour. I would request the same. Your hearings are scheduled to run until 4:30. You have no other scheduled witness and it is now 3:00.

VICE CHAIR COOPER: If you will proceed with your presentation, the Chair will tell you when your time is up.

MS. SASSOWER: Yes, sir. I would just like it noted that although my remarks are essentially identical to the written statement that you have, there have been some corrections and amendations. They are of a minor nature. It was not my intention to read the entirety of the statement. I would happily dispense with the statement. If there are questions, I will go to those questions directly. Otherwise, I will begin, and you can feel free to interrupt me at any time. I would say, however, that the remarks of Judge Becker today represent precisely the kind of non-probative presentations that are

passing for evidence.

The proof of the pudding is in the eating. He is in the 3rd Circuit. The issue as to how the 9th Circuit operates is one which should concern the judges of the 9th Circuit. I think that there is a standing issue here. For him to say that he doesn't see how it can be done, well he is not in the Circuit. We should hear from the judges of those Circuits. Of course, my presentation focuses on the need for this Commission to concentrate on evidence and not accept the standard premises or assumptions and claims that have been advanced by the judiciary and those who are part of the legal establishment, but which upon examination of evidentiary proof would not necessarily hold up.

My name is Elena Sassower, and I am the coordinator and co-founder of the Center for Judicial Accountability known as CJA. CJA is a national, non-partisan, non-profit citizens organization with members in 30 states. Our purpose is to safeguard the public interest in meaningful and effective processes of judicial selection and discipline so as to ensure

the integrity of the judicial process. We do this by gathering and analyzing empirical evidence. Where the evidence shows dysfunction and corruption, we provide that evidence to those in leadership positions so that they can independently verify it and take remedial action to protect the public.

It is to provide this Commission with such evidentiary proof that I am here today. At the outset an observation must be made about this Commission. It is unclear to us and to everyone else we have asked at the Commission, the administrative office, and the House and Senate Judiciary Committees, how the Commission came to be constituted as it has consisting of five members, all of whom have been appointed by the Chief Justice of the Supreme Court. The several bills introduced in the House of Representatives last year and the one ultimately passed called for a Commission with members designated by appointing authorities from the three branches of government. The same is true of the bills that were introduced in the Senate. In each of these bills, the Chief Justice's designation --

(Testimony cut off and starts again on another tape in mid-sentence.)

MS. SASSOWER: ... then you surely know what our position is. That you have to conduct your evaluation of the situation in the Federal Judiciary by examining evidence. And that consists of examining how cases are being handled through the Circuit Courts of Appeals. You can only do that not by relying on the feelings of judges who want to put forward their view of what should be done without any evidence to support it per se. But actually look at the cases themselves.

Professor Helman, who of course is one the preeminent experts in this area, has recognized that statistics alone count for very little. This is a position likewise shared by some of the other authorities in this field. Professor Richman, who has testified before you, who has stated that there is no evidentiary support for the claims that you have to keep the judiciary small because otherwise you are not going to have consistency of opinions and you are going to have discordant adjudications and you won't

have the high quality supposedly that exists today. These claims are bunk, and there is ample evidence from which you can examine that and verify that, and that is the point of the testimony that I provided today, testimony which is supported by files.

Judge Rymer, I am delighted that you are here, albeit not present. But if you had a video screen, what you would see are what I have brought, which consist of two appeals of this 2nd Circuit, the 2nd Circuit which is Judge Newman's Circuit. Judge Newman is the great proponent of keeping the Federal Judiciary small and making all sorts of claims about why you have to keep it small and why you have to keep the numbers down based upon the supposed quality and based upon the uniformity of decisions that can only be accomplished when there is a limit to the size of the judiciary. In fact, judges of this Circuit, including Judge Newman himself, engage in Appellate practice which can only be viewed as corrupt and impeachable. Judge Newman, in one of the cases that I have presented, wrote a decision which didn't refer to the record once, didn't rely on any cognizable law,

except reached out to inherent power to sustain a $100,000.00 award against civil rights plaintiffs where the record showed absolutely no factual support for such an award. Such award was the product of the virulent bias of the District Judge, which was one of the issues presented on the appeal before you.

This was a decision written by Judge Newman himself, which on its face, even without examination of the files, was abhorrent and repugnant. And yet this was a decision which none of the judges of this 2nd Circuit saw fit to grant a petition for rehearing or suggestion for rehearing embank, which particularized how utterly unfounded, violative of bedrock law of this Circuit and of the Supreme Court.

Now that is only one case. The second case --

VICE CHAIR COOPER: What does that have to do with the charge of this Commission?

MS. SASSOWER: The charge of this Commission is whether or not to meet the Appellate needs of this country by expanding the size of the Federal Judiciary.

VICE CHAIR COOPER: Right. And making structural changes. Are you recommending we file a bill of impeachment against Judge Newman?

MS. SASSOWER: I certainly believe that after you review these two files that you meet your ethical duty to take action to ensure that there is some remedy here and that Judge Newman's knowingly corrupt conduct and that of his brethren be the subject of proceedings.

VICE CHAIR COOPER: I don't think that is anywhere within the realm of the universe of the charge of this Commission.

MS. SASSOWER: Look, these cases are being presented to explode the myths about a small judiciary. Okay? Supposedly we have a small quality judiciary now. The cases that you see in front of you are of such a frightening and heinous nature, where the rule of law has been completely obliterated. There is nothing left. There is no process here.

VICE CHAIR COOPER: Let Professor Meador ask a question.

PROFESSOR MEADOR: How would a larger

judiciary meet your problem? I mean, if there were more judges, how would that cure the problem you are complaining about?

MS. SASSOWER: What I am saying is that it is no argument -- there is no argument here to oppose an expansion in the size of the Federal Judiciary -- excuse me, let me back up. I agree with the statements of Professor Richman in his extremely careful and masterful Law Review article in which he points out that the claims for restricting the size of the Federal Judiciary do not have empirical support except that he does not -- I mean, he says that there is an appearance problem with so many cases being decided without oral argument and so many cases being decided without written decision or published decision. It looks bad. It doesn't satisfy the appearance of justice. There is now developing, as he points out, a two-track system. But he accepts the premise that is advanced I think by many of the judges who have been testifying that the cases that are being routed to this second track are truly the insignificant, the unimportant, the unprecedential

cases, the open and shut cases not worthy of the time of the Court. The fact of the matter is, as represented by these two files here, cases which are getting the bum's rush are cases of profound significance, not just to the litigants but to the system of justice. The second appeal is a civil rights action where the defendants were state judges and state attorney generals sued for corruption, and that case was torpedoed by a biased District Judge and then dumped by the Circuit, which had a duty to insure the integrity. Forgetting about the underlying civil rights action, what it had before it was a record which was so appalling and so reprehensible that it had to take some immediate steps if there was any concern about the quality and integrity of justice. Because what it had before them was a non-process.

Let me just say with all respect that the last time I was in this very courtroom, 506, was on August 29, 1997, in the context of that second appeal, where I witnessed a five-minute oral argument. This is what passes for oral argument I suppose in statistics, because obviously it is a case where there

has been oral argument. You are not making any breakdown between cases that have real oral argument and cases that are given this kind of superficial oral argument. But what took place there, and it is all recorded not only in an audio transcript but in a stenographic transcript that is part of the record, is just appalling. You had Circuit Court Judges that contempted. They interrupted a 5-minute presentation of the Appellant with questions which were not only harassing but evidenced at best that they had no knowledge of the record at all. Now what kind of quality judiciary is this where at best you are saying judges coming to oral argument, where they have denied full oral argument and they have abridged it to 5 minutes, then mock the integrity of the proceedings by thwarting a presentation by the Appellant designed to bring the Court's attention to the issues, which they don't -- it is not that they didn't know, they didn't want to know about it.

PROFESSOR MEADOR: I understand your views. I understand what you are saying. You are saying the Appellate Judges are not doing their job

adequately or correctly and so on and so on.

MS. SASSOWER: Yes.

PROFESSOR MEADOR: What can this Commission recommend to Congress to do about it?

MS. SASSOWER: Well, as Professor Richman pointed out, this nation has real Appellate needs. People come to court to vindicate rights.

VICE CHAIR COOPER: But give us some specific recommendations.

MS. SASSOWER: Well, I certainly would agree that you have to meet those needs. And if that means increasing --

VICE CHAIR COOPER: So recommendation 1 is that the Courts need to meet the public needs?

MS. SASSOWER: The recommendation would be that you increase the number of Federal Judges to meet the Appellate needs and lower court needs of the nation, which is the point that is made by Professor Richman. But in doing so, obviously, you have to insure the integrity of the process of judicial selection, which as we pointed out and is the subject of evidentiary proof that I have also brought along

today, you have an appointment process and a confirmation process which is a hoax, which is despicable in every respect beyond anything that anyone has published that we have seen. And we have documented what goes on. Professor Meador, you know the Miller Report came out in May of 1996, and at the very time we were chronicling the abusive conduct of the Senate Judiciary Committee, which refused to even investigate in any respect -- interview opposition of which they were notified. They were notified of opposition to a nominee and they did not interview those who were presenting that opposition and who had been notified of that opposition. They didn't investigate it. And they were on notice more significantly. The American Bar Association had rejected that information and had rejected that information knowing that it bore adversely on a nominee that they passed on to the President for appointment and that had then come before them in the Senate. We have selection --

VICE CHAIR COOPER: So your second recommendation would be to get the politics out of

nominating judges?

MS. SASSOWER: You need to do a true investigation of what is going on because it is worse than has been appreciated up until now.

VICE CHAIR COOPER: So we need to investigate the White House and the Senate Judiciary Committee and the Senate and the American Bar?

MS. SASSOWER: I am not saying you need to investigate the White House. I am not talking about conspiracies here. I am saying that we have documented how the American Bar Association, which is utilized by the Justice Department, in two specific instances did not do its job. And in the second instance, it not only did not do its job of investigation, but it rejected and it screened out information.

PROFESSOR MEADOR: Let me see if I can summarize what you are saying and see if you have anything to add to it. As I understand you, you are saying number one that maybe some Appellate Judges are not behaving properly and doing their job. Number two, we need more judges in order to get the job done and serve the public. Number three, the nominating

and confirming process is not functioning properly as it should. The ABA Committee is not functioning properly.

MS. SASSOWER: And the Senate Judiciary Committee isn't.

PROFESSOR MEADOR: Is all of that a fair summary of what you are saying?

MS. SASSOWER: It is a small beginning. I certainly would want it emphasized that all my testimony and my statements here are based upon independently verifiable proof, which I am providing this Commission, from which it can see how dire the situation is and draw its own recommendations. They certainly would necessarily have to include -- I mean at some point we are talking about expanding the size of the Judiciary, and we don't see where there is a legitimate argument against it. We need a selection process which will give us the best judges and we need disciplinary remedies that will insure that we have mechanisms in place to deal with errant judges. And what we have documented in these two cases, and they are only representative of the much larger body of

materials that the members of CJA would be happy to provide, of a serious problem within the Judiciary of its knowing and deliberate disregard of law, its decisions which certainly in cases where it has an interest, decisions will be written that falsify the facts and that omit the facts. What is being produced is not an Appellate process worthy of our Federal Courts. And it is for you to take this important evidence.

Let me just say that this evidence -- what is so shocking here is that this evidence has been presented to the Judicial Conference, which of course has the ultimate oversight over the Federal Judiciary with all respect to the independence of the Judiciary to police itself. It has done nothing to it. It has been presented to the House Judiciary now. It has been presented to the American Bar Association. We are talking about evidence which shows a complete breakdown of anything resembling a legal judicial process. Now it certainly includes reinforcing the statutes regarding disqualification, 28 U.S.C. 144 and 455, which have been recognized to be all but

worthless.

VICE CHAIR COOPER: That would be another recommendation other than the summary Professor Meador made is to enforce the disqualification statutes?

MS. SASSOWER: Absolutely.

VICE CHAIR COOPER: Okay. Do you have any other recommendations?

MS. SASSOWER: To -- look, you are a Commission paid for by the taxpayers with resources. You can hire consultants to do an examination of this kind of case. It is our recommendation that you look -- if you want to know about the quality of justice in the Circuit Courts of Appeals and what is going on with decisions in the Circuit Courts of Appeals, that what you do is begin empirically by examining cases and appeals which have been the subject of rehearing petitions, petitions for rehearing embank. Take a look at what the lawyers are saying. Take a look at what the litigants are saying in those petitions. Take a look at 372C complaints filed against Circuit Judges. See what is being said about the quality of justice being rendered. I have to emphasize that it

was -- as I have in my statement -- that Mr. Medis from the Chicago Council of Lawyers -- I believe that is his name -- brought to your attention the survey done by the Chicago Council of Lawyers relative to the 7th Circuit. And what is said about the quality of decisions -- disregard of the facts in the record by judges. Well, how else do you decide a case if not based upon the facts?

VICE CHAIR COOPER: So another recommendation is we are to make sure that the Judge follows the record? I am just -- we have got to make specific concrete recommendations to Congress and we can't --

MS. SASSOWER: What I am saying is you've got to look at decisions. You can't look at statistics, which is what Professor Helman said. And what Professor Richman, I believe, would concur with. You've got to look at what is actually happening. Methodologically, the best way I believe for you to do that and to get a real read of what is happening on the ground is by looking at the records of cases on appeal that have been decided in all of a variety of

different ways, whether not for publication decisions or published decisions, and look and see whether in fact they were properly routed, whether proper determinations were made. I mean that is a question that others have raised. I am not the first to raise it. Except I am raising more serious issues, which is to say that not only are they not being routed right, cases are being thrown.

JUDGE MERRITT: I think there is a distinction here. The Commission may want to examine the process in that it may be related to structure, but I am quite dubious as to whether the Commission wants to get into exactly the merits of each case decision.

MS. SASSOWER: Nobody is asking you to do that.

JUDGE MERRITT: To review decisions being made on the merits.

MS. SASSOWER: You are making -- this Commission will potentially block expansion of the size of the Federal Judiciary based upon the traditional claims that we have a quality Judiciary

now that respects precedent and that decides according to the facts and the law. Well, I am telling you that that ain't so. And the only way that you can verify that that ain't so and that those claims are not necessarily true is by looking at cases and seeing how Circuits are knowingly disregarding all the law -- all the bedrock law of their Circuit, as was done by Judge Newman in his decision, to which this Circuit gave its (indiscernible), as well as in the subsequent case, which was also thrown by a sui sponte decision of a Circuit panel that never referred to the record once.

JUDGE MERRITT: Assume just hypothetically that this Commission looked into lots of cases and decided that they were decided erroneously by the Appellate Judges.

MS. SASSOWER: No. We are not talking about erroneously. We are talking about corruption. Excuse me.

JUDGE MERRITT: But suppose we found that?

MS. SASSOWER: I know the difference.

JUDGE MERRITT: Then what do we recommend to Congress?

MS. SASSOWER: What you would need to recommend is a structure which would insure that such corruption of the Appellate process was rooted out. As I have already presented -- as I presented five years ago or four years ago almost to the Long Range Planning Committee, and as is reflected in my published article,"Without merit--" I forgot what the name of it is -- "Without Merit, the Empty Promise of Judicial Business."

VICE CHAIR COOPER: Well, we appreciate your being with us here.

MS. SASSOWER: You have a --

VICE CHAIR COOPER: Hold on one second. Don't interrupt the Chair when he is speaking.

MS. SASSOWER: I am sorry.

VICE CHAIR COOPER: We will let you make a short closing statement. But if you will notice, we have given you your 30 minutes. So go ahead and conclude.

MS. SASSOWER: Yes. I appreciate that. Look, the arguments against expanding the Judiciary is that this small Judiciary respects precedent and

respects uniformity and advances quality. What I am saying to you is that those claims can be repudiated by examination of appeals which show not error -- error is good faith conduct. We are talking about bad faith conduct. We are talking about corruption. All right? Once you verify that, yes, even in Judge Newman's 2nd Circuit, in decisions he himself has authored, there is no respect for precedent. It goes out the window -- precedent of the Circuit --

VICE CHAIR COOPER: I think you are being repetitive now and we appreciate --

MS. SASSOWER: Then you can recognize --

VICE CHAIR COOPER: Excuse me. Excuse me.

MS. SASSOWER: That there is no argument against expanding the Federal Judiciary.

VICE CHAIR COOPER: Excuse me. I think your time is up. Thank you so much.

MS. SASSOWER: Thank you very much.

VICE CHAIR COOPER: We appreciate you taking time to be here and submitting a written statement.

MS. SASSOWER: Thank you.

VICE CHAIR COOPER: I think there were no witnesses who signed up. This meeting is adjourned. Thank you for joining us, Judge Rymer.

JUDGE RYMER: Thank you.

(Whereupon, the hearing was concluded.)

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