COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

ATLANTA, GEORGIA

PUBLIC HEARING

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

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

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

The purpose of the act that Congress created this Commission was to study the present division of the United States into several judicial circuits. We are also to study the structure and
alignment of the Federal Court of Appeals system, with particular reference to the 9th Circuit Court of Appeals, and we have an obligation to report to the President of the United States and Congress our recommendations for such changes in the circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of case load of the Federal Court of Appeals, consistent with the fundamental concepts of fairness and due process.

This Commission really has a broad mandate to examine the entire federal appellate system and make recommendations to strengthen and improve it.

As was stated in the Announcement of Public Hearings, the Commission is interested in obtaining views on whether each federal appellate court renders decisions that are reasonably timely, consistent among the litigants appearing before it, and are nationally uniform in their interpretation of federal law, and that they are reached through the processes that afford appeals adequate deliberative attention of judges.

The Commission has much to do within a
relative short period of time. We have public hearings also scheduled in Dallas, New York City, San Francisco and Seattle. In undertaking this important mission concerning the administration of appellate judges in this country, we welcome the views of all interested persons, either as witnesses at the hearing or in writing.

We are pleased to call as our first witness at today's hearing, and the first hearing we are having for this Commission, is the Honorable Judge Joseph Hatchett, Chief Judge of the United States Court of Appeals for the 11th Circuit. Judge, we appreciate you being with us today.

CHIEF JUDGE HATCHETT: Good morning, thank you.

Let me welcome you to the 11th Circuit, to Atlanta, and to this very historic building, the Tuttle Federal Courthouse Building.

I have previously supplied a statement with flow charts, and appendix and rules to the Commission, and, basically, what I'm going to say to you this morning has already been stated in that statement.
I was appointed to this court in 1979, and as I stand here now I remember that I haven't stood here since 1978, when I appeared before the President Carter Nominating Commission for the 5th Circuit at that time. I must have done well, because my name was submitted to the President and I stand here as the Chief Judge of the circuit today.

Let me start in and tell you where I'm going to end, really. The 11th Circuit doesn't need any splits. The 11th Circuit doesn't need any additional territory. Florida, Georgia and Alabama is just about right for this circuit.

Of course, as you recall, we started as part of the 5th Circuit, but since 1981 it seems to the court that our geography is just fine.

What I do want to talk to you about is what Chief Justice Renquist discussed at some length in his 1997 end of the year report. He talked about resources and the work load. We talked about how far from the traditional appellate process can we go, and still have a court of appeals that is doing well. How much can we delegate to law clerks, and to staff
attorneys, and how much can we fail to have oral
arguments, and how many opinions cannot be written
before a circuit is not doing a good job?

And, as you read the charge of the
Commission, there's a special portion right at the end
that you read that said that you are to ensure that
the cases are receiving the deliberate attention of
judges, not law clerks, not staff attorneys, but
judges. That's what I'm here to talk to you about
today.

Let me say right away, the hardest working
judges in this country are in the 11th Circuit. We
have the largest case load per judge, we work harder,
and the numbers that I will give you here will prove
that this is the busiest Federal Appellate Court in
the country, and we've been struggling for years now
to keep up with this blossoming and exploding case
load, and much of what we've been able to do is
attributable to former Chief Judge Gerald Tjoflat, who
served as Chief of this court for the last seven
years, and who has made every change that can possibly
be made to keep the court abreast of the case load and
still do a good job.

I want to say, as I understand what the Commission has to decide, the basic question, the question at the end will be, can a large circuit court of appeals work well? If the answer to that question comes out yes, after all of your hearings and considerations, then the appellate structure of the courts are going to look about the same, maybe with a few lines changed. But, if you answer that question no, then there are going to be all kinds of changes. Some of them that have been suggested are pretty drastic. For example, it's been suggested if a large circuit doesn't work well, have a single court of appeals for the entire nation, or have six jumbo circuits, or many, many small circuits, or even divisions within the same circuit.

I'm talking about a large court, but from all of the readings, especially from the readings and the writings of Professor Elvin (phonetic), the 11th Circuit is not now a large circuit. A large circuit, in the literature that I've read, has been defined as a circuit with more than 15 judges. This circuit now
has 12 active judges, and so it's not a large circuit at all. We have 12 active judges, we have ten senior judges, and six of those senior judges are working almost as much as an active judge, and that's how we've been able to keep up to this point with our case load.

But, we have had the same number of judges since 1981, when we split the 5th Circuit, and it was simply by chance. Twelve judges lived east of the Mississippi and 14 lived on the other side of the Mississippi, and that's how this court ended up with 12 judges. At that time, we had 16 staff attorneys. We still have the same 12 judges, and we have an authorized strength of 47 staff attorneys.

Last year, 1997, 6,102 appeals filed, that's a 30.5 percent increase since just 1991. It's a 158 percent increase since 1981, and all of that is reflected on Appendixes A and B attached to my statement. We are first in the nation on appeals per panel, 1,518 appeals per panel, that's 17.9 percent higher than the 5th Circuit with its 17 judges, and that's 600 more cases per panel than the 9th Circuit
with its 28 judges. We are first in terminations on
the merits per active judge, 792, 34 percent higher
than the 5th Circuit, which is the next highest
circuit, and 274 more than the 9th Circuit with its 28
judges. Written decisions, 25 percent per active
judge, 33 percent higher than the 5th Circuit, and you
have all of that in my statement and it's reflected in
the appendices attached to the statement.

If you were to apply the new judgeship
formula previously used by the administrative office,
and I know it's no longer used, but if you would apply
that formula this court would be entitled to 27
judges. That would be a 125 percent increase over its
current size, and I've already mentioned the 9th and
the 5th as the other very busy courts and how we stack
up with them.

What have we done to try and manage this
case load? Staff attorneys, as I said, authorized
strength 47, there are 43 on board today. They are
doing summaries of cases in some special categories,
Social Security cases, black lung cases, pro se cases,
(inaudible) guidelines cases.
We have used visiting judges, one year as many as 21, but these judges come in and they stay one week, they hear oral argument cases only, and about 20 cases per week, and then they fly back to their stations. They do not help us at all in criminal cases, capital cases. They don't help us in 70 percent of our cases, because 70 percent of our cases are not heard in oral argument. They do not help us with motions, nor with petitions for rehearing, and they miss the very important en bloc discussions as well as the actual sessions.

As to law clerks, once upon a time each judge had three law clerks, two secretaries. Most of the judges at this point in our court now have one secretary, four law clerks, and many of them are career law clerks. That's the pressure of trying to keep up with this case load by giving more and more duties to people who are not Article III judges.

What else happens when the case load goes up and you don't have judgeship power? Well, everything else is affected. For example, look at our history on oral arguments in this court. 1986, 49
percent of the cases, that's about half of the cases heard in oral argument. 1991, it had dropped to 44.4 percent. In 1997, we are down to 30 percent. This means that 70 percent of the cases are not heard in oral argument.

As judges are busier, and busier, and busier, less time is afforded for published opinions. The same history on published opinions, 1988 33 percent of the cases were published opinions, 1991 it dropped to 28 percent, in 1997 it's down to 15 percent. There are only 20 signed opinions per active judge, the national average is 50, that's the least in the country, and that's reflected in J and K of my attachments.

But, the most telling thing about all of this, and what is happening here for the life of judges, is our million disposition time. It's taking 14.1 months to dispose of a case from the Notice of Appeal to final determination, that's the longest in the Federal Circuit, and that's as to all cases, criminal cases, as well as civil cases and prisoner petitions, 14.1 months. Needless to say, that is not
in accord with the State Senate for Courts Standards, it's not in accord with the ABA Standards for Appellate Practice, that is simply too long a disposition rate, and that's the kind of pressure, and that's the result you get when there are not enough judges to handle the work that is coming across their desk.

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

Well, what's the answer to all of these problems? Well, one thing, we can limit jurisdiction. Well, that's not likely, that's been around for a long, long time, and even after the court's long-range plan has been filed, developed and studied by the
Congress and everyone else, the Congress felt it necessary to appoint this Commission. And, I recall in a hearing that I attended, along with Judge Tjoflat, when we were testifying and one of the judges at that hearing suggested that Congress should take away some of the jurisdiction.

Senator Durbin (phonetic), of that committee, said hold on one minute, Judge, it's our job to decide about jurisdiction. Tell us what resources you need to handle what we assign to you. And, I think that's going to continue to be the answer that Congress gives, and if that is true then we have to find other ways to take care of the problem that's facing us.

The importance of circuit expansion make two or three arguments that I want to comment on. Number one, increasing the number of judges leads to instability in the law, inter-circuit splits, and a higher appeal rate, that's one charge. The second, more choices destroys collegiality. Third, more judges deteriorates the quality of the bench. And, fourth, it's too costly to add judges.
I want to go through those one at a time. Instability and inter-circuit splits, there's simply no evidence to support that proposition that adding more judges will cause instability and inter-circuit splits, or confusion in the circuit's law. If that were true, then every court over 12 would have a court that is rendering instability in the law, and instable decisions, and we know that's not true.

On the other hand, if more judges, more appellate judges, create more cases, there should be a relationship between the number of judges and the rate of the appeals. There is no correlation, there is no relationship between the number of judges on a court and the rate of appeals. The rate of appeals are about the same, whether you are talking about the 9th Circuit, or the 2nd Circuit, or the 5th Circuit. We know there's a large number of criminal cases being appealed from all of the circuits. It has nothing to do with the number of judges, it has to do with the manner that most of our circuits require court-appointed lawyers to stay in the cases and to file the Notice of Appeal. It has nothing to do with the
number of judges.

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

It deteriorates the quality of the bench, is one of the things that is said. Well, the 80,000 lawyers practicing law in Florida, Georgia and Alabama, 50,000 in Florida alone, and surely you don't deteriorate the bench by selecting three lawyers from such a large number of law professors, senior partners, federal trial judges, state appellate
judges, and so I can't -- I'm sure you can't believe that that's a serious assertion that we can't find people that can do this job.

It's too costly is another statement made. Let's assume that it's $475,000.00 to $600,000.00 per year for salaries, benefits and chamber support. I say that's a good bargain for what the American people get. After all, the Federal Judiciary's budget is two tenths of one percent. The people that we bring in as law clerks are at the top of their classes. The judges who are selected to this court would be senior partners making far more money in any law firm. The staff people that we hire are above and beyond what you would find in the private sector in most areas. So, if we are spending $600,000.00 per year for chamber support, for salaries and for benefits, then it's a good deal and that should not stand in our way.

I am prepared at this time to answer any questions that you may have or to respond to any comments that you want to make, but, basically, I have two things to leave with the Commission. The 11th Circuit is not yet a large circuit, three more judges
will not render it a large circuit. The circuit needs help, and I think the figures that I have just given to you prove that point. And, the other is, the cost should not make any difference, and we are happy that you are here, and welcome you, and I welcome your questions or comments.

VICE CHAIR COOPER: Judge, thank you so much. You honor us with your presence.

Judge Rymer, do you have any questions?

JUDGE RYMER: Yes. Picking up on your last and, indeed, your first comment, Chief, you say that with the addition of three judges, which would come to a total of 15, does not yet make your circuit a large circuit, whatever that means.

But, if the rate of appeals continues to increase at the same rate that it has been, that's a drop in the bucket of what the need is or will be soon.

CHIEF JUDGE HATCHETT: Yes.

JUDGE RYMER: That being the case, you know, what would you suggest is the next step, because the need will go beyond 15 quickly.
CHIEF JUDGE HATCHETT: Yes.

JUDGE RYMER: If it isn't already.

CHIEF JUDGE HATCHETT: Right.

Well, yes, I quite agree that at some point three would not be enough. As I said, the formula would say 27, but I don't want us to jump to that number right away. I went on the 5th Circuit as one of those 12 that ran the number of to 26, and 12 of us came on at one time and it was a little chaotic, I have to admit. So, it seems to me that we should go in increments of maybe three at this time.

JUDGE RYMER: Yes, but what structures do you see as being required in order to accommodate the increasing number of judges which I think you are recognizing as kind of inevitable?

CHIEF JUDGE HATCHETT: Well, I think once you get to a large court, then there are some things that you can do, and I understand that one of them is being done in your circuit, that is, you can have -- issue analyses, where someone, or a staff of people, go in to the clerk's office and identify the cases with the very same issues, and then report to all of
the panels with cases with that issue, the fact that other panels had them, and that they should discuss the issue or at least be aware that another panel has the issue. That keeps down instability, and I understand that that's working well in the 9th Circuit.

The other is also from your circuit, the stop clock method, whereby one panel who reads an opinion that seems to be in conflict with circuit authority, simply tells the other panel, I think you are making an error before ever talking about any en bloc, and I don't know all of the details of stop clock as used in that circuit, but we have never tried that in this circuit. But, it seems to me that that would work, if this court ever became a large court.

Of course, the less than full complement en bloc court also works, I'm told, in the 9th Circuit, but I have not thought through all of these propositions because I'm not looking to make the 11th Circuit now a large circuit. Three now, maybe five years from now three or four more.

As I said at the beginning, from the case
law from the time that Judge Tjoflat became Chief, we
probably could have gone up to 21 judges on just the
case load, but we've been struggling all of these
years to keep that number down and still do the good
job. It's simply my point that at this point we need
to move forward because we are getting to the point
where we can't do the good job anymore with just 12.

But, yes, this court sooner or later is
going to be a large court, and I would hope that it
would grow in increments of three or four, rather than
12 or 13.

JUDGE RYMER: You, obviously, are concerned
about the number of cases that do not get oral
argument, since you mentioned it.

CHIEF JUDGE HATCHETT: Yes, I am.

JUDGE RYMER: If I understand it correctly,
for example, about three quarters of the criminal
cases decided on the merits do not get oral argument
in the 11th Circuit.

CHIEF JUDGE HATCHETT: That is correct.

JUDGE RYMER: And, there are also a very
high percentage of unargued cases that are disposed of
without any reasoning, I mean, without a reason and disposition.

Are you concerned that the quality of justice being administered is adversely affected by those two things, and what thoughts would you have about redressing it if you are?

CHIEF JUDGE HATCHETT: Yes, I'm concerned about both of those.

First, as to oral argument, we have been using a round robin system of sending a file to an initiating judge, who writes an opinion, sends it to the second judge, that judge either signs on or sends the case to oral argument, then to the third judge who either signs on that opinion or sends the case to oral argument. So, every case, really, has the opportunity of going to oral argument.

But, 70 percent of our cases are not going to oral argument, and I believe that oral argument is a superior way, it's the only way to decide if a case if, if everything is perfect. It's not perfect, so we have to do something less than that, but there's nothing more important than letting the lawyers state
their cases to the judges face to face, and the judges having the opportunity to inquire about what happened at the trial, as to what law applies, why the law fits these particular facts. You simply can't get that by sending a file from one office to the other.

Now, I admit that there are some cases that surely should not go to oral argument, but when it gets up to about 70 percent I start to worry that there must be some issues there that needed to be fleshed out completely and were not.

And, that's my same point as to published opinions. The lawyers in this circuit, and the lawyers everywhere, depend upon the court of appeals to state the law. This is probably the last place that any rule of law is going to be made for the average case, and if we simply say or affirm the (inaudible) rule it doesn't tell the lawyer anything about the theory that was advanced, it doesn't tell the client why the client lost, it leaves everyone in a fog, even judges on the same court. Because if I get an opinion that says affirmed from a panel, the only way I know what the issues are is to sit and get
the file and go through those issues.

It seems to me that the more we can tell lawyers, and clients, and even other judges, while we are deciding a case a certain way the better, and at some point you are not doing enough of telling the world what the law of the circuit is.

VICE CHAIR COOPER: Judge, let me ask you a question. One of the possibilities is the fact that, not limiting jurisdiction, but maybe coming up with a procedure where you might have three district judges being an intermediate appellate court to ease the work load for the Court of Appeals, or alternatively appellate commissioners which would be akin to magistrate judges at the district level. Has anybody talked about that in this circuit?

CHIEF JUDGE HATCHETT: Yes. It's been discussed, let me talk about having three district judges review a colleague's work. That will not work. That doesn't even work on a Court of Appeals.

For example, we need visiting judges. One way of getting a visiting judge is to reach down and get a senior district court judge, but what happens,
you have to move all of your cases from that district
on to another panel, and if you have a district judge
on that panel you have to move them again. In other
words, a judge from the middle district of Florida
doesn't want to sit on judges' work out of that
district. And so, it simply won't work to go into a
district and have three judges out of a five judge
district and say, why don't you tell us whether your
colleague next door decided this case correctly.

We have tried that in this court, and it
causes more confusion than anything else, because
these judges simply don't want to sit and judge their
colleagues, many of the times when they've sat at
lunch and discussed the cases while they were under
trial, not knowing that there would be any appeal at
all.

Your other was about a commissioner. No,
I think we need judges, not non-Article III personnel
doing most of this work, and we can continue to bring
in more and more paralegals, and more and more staff
attorneys, and law clerks, and commissioners, but the
people of this country, I believe, want Article III
judges making their decisions.

VICE CHAIR COOPER: You only asked for three additional judges, when under the old formula, which we know no one is using, but that's the good benchmark, you would be entitled to 27. Tell me why only three out of 27 you would be entitled to under various work loads.

CHIEF JUDGE HATCHETT: Well, three now. I agree with Judge Rymer that, yes, this court is going to keep growing, but I, as I said, my experience was going on the 5th Circuit with 11 other judges, and it didn't work very well, and we split within two years. We didn't know each other at all, never did get to know each other. The court had split before I had ever really -- well, I never sat with all of the judges from the western part of the district.

So, what I'd like to see is, let's have three judges now, let's see what we can do to keep up with the case load. The case load may level off. In fact, this year it has leveled off at 6,000 cases, rather than going on up to 7,000. But, yes, at some point we are probably going to need more, but let's
just ease along, let's not go to 12 and 13 judges on a court at one time.

VICE CHAIR COOPER: Having had, I guess, two years you've served on the 5th Circuit, how many judges is too many on a circuit?

CHIEF JUDGE HATCHETT: Well, I don't know how many are too many. Under the circumstances that prevailed in the 5th Circuit, when it got to an authorized strength of 26 with 24 on board, that was too much, in the absence, in the absence of some other changes.

No one ever thought at that time about having an en bloc court of less than the full complement, for example. Had we put that into the mix, perhaps it would have worked, but the en bloc function, the way we did it at that time, simply did not work.

The stop clock that I mentioned, that may work. We've learned a lot from the 9th Circuit, and from the other circuits who have grown large since we split the 5th Circuit, but, yes, 26 was too many the way we tried to operate the court at that time.
PROFESSOR MEADOR: Judge, let me pick up on a point that Mr. Cooper raised about the idea of some reviewing activity at the district level. What you described, as I understand it, is a situation in this Court of Appeals where there's a lack of appellate capacity.

Now, the suggestion he brought up is one that's been made, one way to increase appellate capacity in the system is to install a district level review.

Now, there are a lot of ways that can be configured. Suppose instead of having district judges from the district under review, you had two district judges from another district sitting with one circuit judge, and they would offer a first level of review for some categories of cases, if not the whole docket, at least some significant categories of cases would go there in the first instance, and take the pressure of the Court of Appeals, what would be your reaction to that idea?

CHIEF JUDGE HATCHETT: Well, that's better than simply what Mr. Cooper suggested, but the problem
there is, you are going to have your district judges recusing, being disqualified because they have the same issues pending in their court, or pending on their own dockets, and so you have that problem to worry about, recusals because of the same issues, even from judges outside the district that's under consideration.

JUDGE RYMER: But, if the review were limited to say trial errors, and not to issues of law, functional equivalence of motions for new trial.

CHIEF JUDGE HATCHETT: That probably would work, yes, if it's nothing but trial error correction, but if it's law declaring then it would not work. But, yes, if you limit it to errors, that would probably work, and would be educational for the district judges, I think.

PROFESSOR MEADOR: Let me ask a question about oral argument, is there some level -- is there a way you can know, or this Commission can know, where the right level of oral argument is? At one time you said the court here had about 50 percent of cases argued orally, now you are down to 30, where is -- is
there some optimum level of oral argument that an appellate court ought to achieve?

CHIEF JUDGE HATCHETT: Well, I don't think you can set an exact number, it will vary from district to district, and according to the kind of litigation that -- I'm sorry, from circuit to circuit, according to the types of cases.

But, surely, constitutional issues, for example, you want to hear an oral argument. Large cases on personal rights, discrimination cases, for example, oral argument is very, very helpful there.

PROFESSOR MEADOR: You say you are uneasy at 30 percent, is that -- did I understand you correctly, 30 percent is too low in your view?

CHIEF JUDGE HATCHETT: Yes, it is.

PROFESSOR MEADOR: What would make you comfortable, what is the percentage at which you would feel comfortable?

CHIEF JUDGE HATCHETT: I can't tell you an exact figure. I would guess that it would fall somewhere close to 50 percent. I just believe that there are not -- there are a large number of frivolous
cases in the system. There are a large number of easy cases, but I don't think that three fourths of them fall into those categories.

VICE CHAIR COOPER: Judge, thank you very much. We appreciate you taking the time to be with us, and your thoughts have been very helpful to the Commission.

CHIEF JUDGE HATCHETT: Thank you, sir.

VICE CHAIR COOPER: Thank you.

We have as our next witness the Honorable Gerald B. Tjoflat, who is a former Chief Judge of the Court of Appeals of the 11th Circuit, and it's nice to have you with us, and appreciate you being with us here this morning, Judge.

JUDGE TJOFLAT: Thank you, Mr. Chairman.

I haven't been in the well of this court in 30 years, and it's an awesome sight, especially when you have judges down both sides as we used to have in the 5th Circuit when we had 26.

VICE CHAIR COOPER: It's very difficult for a practicing lawyer to sit up here, I can assure you.

JUDGE TJOFLAT: Well, I hope you are
enjoying yourself up there.

I'm grateful for the opportunity to appear before this Commission. Let me say as a matter of preface that I think your coming is long overdue, that this Commission is needed, and I applaud its task, and how it is going about it.

I didn't come here prepared, although I am, to discuss the 11th Circuit as if we were appearing before the Commission for some relief for the 11th Circuit, and we are not concerned that much about the rest of the country.

Judge Hatchett and I have both testified before the Senate Subcommittee on the Oversight Hearing on the 5th and the 11th Circuits, touching on many of the questions and issues that he raised, and I hope you ask me some of the questions that you asked him, and that record is fully developed, so to some extent, with leave of the Commission, I'll submit some documentations that will touch on the question of percentages of oral argument and things of that sort, why the oral argument percentages have dropped from, say, ten years ago.
Putting that aside for the moment, I begin with the notion that the Article III Judiciary is a scarce dispute resolution resource. It is scarce under the present framework in which everybody who is a litigant in an Article III court has an appeal as a matter of right, because its size is constrained by the size of the courts of appeals.

So, given that there is a limit to which a court of appeals may grow in size, there is necessarily a limit to the number of cases under the present format of litigating cases that can be brought into the system.

I've been in this system since 1970. I was a state judge for two years and then went on the district court in 1970, and sat in the middle district of Florida and went on the 5th Circuit in 1975, and so I've seen a lot of water go over the dam as it were.

In the early days, the Federal Judiciary would -- to confront the rising case load, would simply tell the Congress that we need more bodies to throw at the problem, more Article III judges, more staff, more this, more that. And, we would create
more judgeships, and more judgeships didn't solve the
problem.

The courts of appeals, with the exception
of the old 5th and the 9th, which when I was sitting
on the old 5th at 15 they had 13, were the two large
courts. We had, in the old 5th, about almost a
quarter of the nation's business. I don't recall the
percentage of the nation's business that the 9th had,
but it wasn't far behind. The other circuits, I sat
as a district judge in 1972 in Boston, and if I
recollect at that time the 1st Circuit had three
judges so they were always sitting en bloc. Bailey
Aldridge, Judge Aldridge, was a senior judge then, and
once in a while they had senior district judge
sitting, but life was extremely simple there. And so,
it was in some of the other circuits which were
relatively small.

About five years ago, to my recollection,
the Judicial Conference formed a long-range planning
committee, and I remember meeting at the supreme court
with the other members of the conference and committee
chairs, as we undertook studying what can we do with
this branch of government. And, I remember Abner Mickla (phonetic), who was then either Chief Judge of the D.C. Circuit or he was chair of a committee, but, at any rate, we were all gathered in one of the big rooms up there at the supreme court, and this was the opening session, and he made the remark that I just made, so I got it from him, and that is that the -- this is coming from a former Congressman now -- that the Judicial Branch has been speaking out of one side of its mouth so long that all we need are more judges, that you'd have a hard sell to educate the Congress as to the problems of the Federal Judiciary, and that some things have to be done, the very sorts of things that you are going to explore during the life of your existence on this Commission to change things, because more bodies simply aren't going to solve the problem, they just make it worse.

Now, we judges on the court of appeals have two functions. One is correcting trial court error, and the other is making law. And, the more clear and the more stable the rule of law is, and the more capable the rules of pleading are of defining issues
narrowly, the greater the percentage of cases that
will be decided, not in terms of making law by the
court of appeals, but rather did the trial judge
commit reversible error in admitting or excluding
evidence or in some such fashion, or in conducting the
trial.

I highlight this point by observing that in
our circuit, for example, and this is historic, this
is nothing new, and I believe it's probably the case
in other circuits, about 95 percent of criminal
appeals, in terms of the trial, I'm putting sentence
aside, are affirmed, 95 percent, just around that
number, 94 to 96, it floats in the mid-'90s, that's a
historical fact.

Nobody has been able to tell me how it is
that a district judge who is reversing on five percent
of the criminal cases that he or she tries, some of
which last months, some of which multiple defendants,
some of which are loaded with complex allegations like
rico (phonetic) charges, can try an error-free, not
reversible error-free trial, 95 percent of the time,
and given in addition that the standard of review in
criminal case is tougher than it is in civil cases, that we'd find plain error in some criminal cases, and yet the same judge can't try half of the civil cases that come to trial before him or her without committing reversible error.

Now, our task -- the reason for that is that criminal cases are pleaded, basically, under what we used to call common law or code pleading, wherein everybody knows what is required to be stated in an indictment to make out an offense, and the issues are well joined by a not guilty plea, that's a two-word plea, and everybody knows what the jury instructions are to be, we have pattern in jury instructions in this circuit which piecemeal receive the imprimatur of the court of appeals, and so about all we review in most criminal cases is how the judge tried the case.

And, by and large, it really has to do with did the lawyers get out of hand, that's many of the cases in which we hear oral argument. But, assuming that you have an ethically tried case, then you are reviewing evidentiary errors, order of proof errors, and the records in the pretrial hearings, which are
little mini bench trials determining motions to suppress, or physical evidence seized on a search, or motions to suppress statements, but those are simple proceedings. The trial is a simple matter, and that is why 95 percent of the criminal cases are affirmed on appeal, and that is why we hear oral argument in far less criminal cases than we do, say, in civil cases.

The civil side of the docket, in which the cases are framed by what I call notice pleading, under the rules occupy the great percentage of the cases that are brought to oral argument, and that is because through our screening process the judges have a difficult time sometimes discerning precisely what it was that was tried.

By engaging in these comments, I am suggesting that one of the things that this Commission ought to do, and one of the things that should have been done a long time ago, is a reexamination of the whole body of rules pursuant to which we litigate civil cases. We have been amending civil rules in a piecemeal fashion, sort of an aspirin type relief for
a cancer, by tinkering with this rule or that rule, and all we do is produce, like with rule 11, satellite litigation.

In any event, so half of our -- one of our tasks is determining error in the litigation of a case, and I say that when the law is settled, and the pleadings well define the issues, that is a relatively simple task.

The other part of our function is lawmaking, and putting aside the notion, the acknowledgement that we do some lawmaking, even in those what I call cases that are framed in a clear way, mainly lawmaking in a procedural area, and that's another reason why a lot of these cases don't need to be published because we are simply looking -- the opinions -- we are simply looking to see whether or not there's trial court error. We publish far too many opinions as a whole, I'm talking about the system does, as it is, which complicates matters for citizens and for lawyers trying to discern what the rule of law is in the circuit.

So, now we are on the lawmaking function,
and in that regard size of a court is extremely important because the greater the number of judges you have the greater the potential that one panel's decision is going to conflict with another, and the greater --

(Whereupon, tape change.)

JUDGE TJOFLAT: -- referred to in the statement, not written by myself and by others. The more time that I've got to spend, and that's was the problem in the old 5th Circuit, you spent three quarters of a day reading slip opinions coming down by other judges, and trying to pay allegiance to the rule of law, and we did it not by having a mini en bloc court, but by having everybody sit en bloc, so it became a serious proposition, that's a painful thing for having 26 judges sitting around a conference table trying to decide cases, much less hear oral argument.

So, I conclude from having sat in en bloc courts with as little as six judges on our court when we only had nine judges, because we had three vacancies, and we had three disqualifications, we sat with six, I sat with six, every number between six and
26, and I can tell you that the problems of coming --
lawmaking increase exponentially as you increase the
size of the judges. Maybe one more judge from six to
seven, you can tell the difference, you can tell the
difference when you jump from seven to ten, and from
there on you can really tell the difference as you
keep adding people to the court.

Now, so what should be done? Well, I think
that there's no question that we have to consider
seriously realigning the circuits if we are going to
bring them into some kind of a manageable size. The
four objectives of the Commission, dispositions of
cases must be timely, smaller courts of appeals are
going to produce, assuming that the judges are
discharging their responsibility to read their
colleague's work and to maintain a clear rule of law,
disposition will be more timely. Outcomes will be
more consistent among litigants, no question.
Decisions should be uniform among circuits, and the
question, though, when you have more circuits, let's
suppose that the realignment produces more circuits,
I suggest that by having smaller courts you are going
to cut down probably on inter-circuit conflict because there will be more time for deliberate decision-making. And, the fourth objective, verbatim attention, appropriate attention is the word I think, to each appeal.

The question is, what to do with the 9th Circuit. I had the thankless responsibility of answering that question when the Full Senate Judiciary committee entertained the 9th Circuit split bill about 27 or 28 months ago, October, '95, I think it was, and one of the senators asked me what to do about the 9th Circuit, I was invited up there to testify by the committee, simply because I was the last active judge of the old 5th Circuit still kicking around, and we had wrestled with the 26 judge problem, and I said that was a parochial problem, I was from the southeast, and that was a West Coast problem, and they said, no, you've got to answer it.

The answer in my judgment is to cut California in half. Of course, the objection to that is, what about state law? Well, in our circuit we have -- each state can receive, the supreme court can
receive certified questions from the court of appeals, and that's how we follow state law in this circuit, if there's an undecided question, and it's a case -- just not an off-the-wall case that will never repeat itself -- but some case in which we don't want to get out of step with the state high court, we simply certify the question. The California law problem, in my judgment, would be resolved if the two circuits could certify California questions to the California supreme court.

Now, there are other things that need to be explored. One has to be, and some of these are exclusively congressional prerogatives, it's Congress' responsibility to decide what kinds of cases we entertain. I don't think the Judiciary and the Judicial Conference has done its best over the years to stay away from calling that shot, whether we should have Social Security cases, or FELA cases, or this case or that case, that's a congressional prerogative that we tell Congress we can't take all the cases you are giving us, then Congress has got to prioritize.

Now, Congress has acted in two respects in this area, not so much whether we'll take the case or
not, but how we'll take it, and that's the Prisoner Litigation Reform Act, which the acronym is PLRA, which is having an effect, and I suggest that the effect will really be realized, assessed at any rate, probably in this coming year, and the reason I say in the coming year is because it's taking the district courts some time to settle out how they are going to do the gatekeeping function and taking these prisoner suits, civil rights suits.

The other thing that Congress has done, and this has to do with collateral proceedings in both federal and state criminal cases, is the Anti-Terrorism and Effective Death Penalty Act, where you have to petition for a successive petition, seek leave to proceed from the court of appeals, that's another thing that doesn't cut out the right, the access of the court by the litigant, but it does act like leave to appeal, or (inaudible) or something of that sort.

So, I think the whole idea of, perhaps, in some cases limiting access to the court of appeals by leave to appeal, for example, ought to be studied, perhaps, in a pilot sort of a way, if that can be done
without violence to equal protection principles across the country, treating different litigants differently in different circuits.

We also ought to consider cost shifting measures. Now, in a way the PLRA is a cost shifting measure, by making prisoners before they bring suit against those responsible for the conditions of confinement, have to pay costs, even incrementally out of their prison accounts, that's, in a way, a cost shifting device, although other litigants have to pay those costs anyway. So, that needs to be explored.

I don't know whether we should go as far as the English system, but I think it needs to be explored.

Then finally, Congress has got to decide what other kind of resources we ought to have in addition to just more parajudicial personnel. We were a long time coming in the Federal Judiciary to achieve the amount of automation that the private sector, for example, has, and some of the other things that could make our way of operation far more efficient.

But, I'll sum up my remarks by saying that
we are a scarce resource in the critical areas in the lawmaking function, and we cannot, the courts of appeals are constrained in terms of size especially in that area.

I've thought about the idea of having appellate courts of appeals dealing in criminal cases, some in civil cases, dividing that up. I'm a strong believer in the notion that we need more generalists deciding appellate matters, rather than to have specialists deciding these things. Some things we have given to the federal circuit because they ought to be there, patent appeals and things of that nature, but I do believe strongly, and I think this would add in the recruitment of the kind of people that ought to be sitting on the courts, if you don't narrowly confine them to one kind of -- to a subject matter, such as criminal cases or something.

I'm open to questions, including why we have less oral arguments than we used to have, and things of that sort.

VICE CHAIR COOPER: Well, the question I would like to have is, you said that you were put in
a position of having to answer what to do with the 9th
Circuit, and you said you were going to put the two
districts, I guess, the two northern districts in one
circuit, and the two southern districts in another,
did you also have to state what states went with
which?

JUDGE TJOFLAT:  No. My understanding is,
California generates about 65 percent of the business
of the circuit, something like that, and I think that
one, state circuits are out, there's too much
parochialism if you have too few states, in my
judgment, in a circuit. It's good to have the
leavening effect of people from other cultures and
other ways of life.

So, California and Nevada would just be a
California circuit. So, I don't know how you would
divide it, but I think once you divided California,
then you can negotiate out where the lines ought to be
drawn.

VICE CHAIR COOPER: Let me ask you
something. Do you disagree, if I understand you, with
Judge Hatchett, that more bodies are not going to
solve the problems, that the 11th Circuit doesn't need
more bodies?

JUDGE TJOFLAT: I don't think the 11th Circuit needs more bodies. I will submit some data
that will show the following, for example, last year we ended the year with less pending appeals than we
did the year before. Given -- there are projections where over about the next four years we'll cut the
pending appeals at the end of the year in more than half.

The reason that we don't need more bodies right now, in addition to the fact that three more
judges are not going to increase the total output of the court by one third, by one quarter, if you go from
12 to 15 that's 25 percent increase, because it's going to take more time for the three judges and
everybody else to assimilate the work being done by those judges. So, you don't get three new judges, you
get less than three new judges.

The second reason is, is that because -- the reason we've been able to handle the business of
this circuit with the number of judges we had is, we
have a very stable rule of law in this circuit, in most areas.

We account for less oral argument over the years for two reasons. One is a stable rule of law, and the second is the case mix. About 60 percent, 60 to 65 percent of our appeals are either direct criminal appeals from district courts, federal criminal prosecution, or they are 2255 cases, federal habeas cases, collateral tax, or they are state habeas corpus cases, or they are suits by prisoners against their wardens and others in the institution, challenging under the 8th Amendment conditions of confinement. That's swallowing up almost two thirds of our docket, it's even greater in the 5th Circuit.

And, why is that? It's because the prison populations in our states, these three states, and the new 5th Circuit states, keep burgeoning, and so as the prison population burgeons we get more and more prisoner cases.

Now, the pleadings, because of devices we've employed in this circuit, in prisoner cases, for example, are narrow issues, in effect, departing from
the rules of procedure altogether, with the exception of rule 56, giving notice and such, has accounted for the need of argument in those cases, very few of those cases, notwithstanding the counselor appointed in every case in which argument is given receive oral argument.

Now, when you add to that body the increasing number of employment discrimination cases, again, in an area in which the law is more and more settled, with the exception of the Americans With Disability Act cases, the law in that area nationwide is bouncing around, but sex discrimination, race discrimination, ethnic discrimination, things of that sort, those cases, the lawyers and judges are fairly tuned in now to precisely how to, number one, plead those cases, so there isn't any question, notice pleading notwithstanding, in those kinds of cases everybody knows you've got a race discrimination case and it's a quid pro quo, or a case, for example, I was going to say a sex discrimination case, or a pervasive hostile environment case, the fact of the matter is, less of those cases, as the law settled, as the issues
are sharpened, receive oral argument.

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

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

JUDGE TJOFLAT: Around 12.

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

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

They acquired three or four judgeships back
in the days when we just were throwing bodies at numbers, and a Judicial Conference bill came out and in they threw three or four judgeships, and they don't need them, according to those judges. So, some circuits, a look could be taken at whether or not vacancies ought to be filled, in other words, the position turn into a temporary position.

VICE CHAIR COOPER: Judge Rymer, do you have any questions?

JUDGE RYMER: If the case load continues to go up, what alternative is there to the effective administration of justice but to increase the size of the Judiciary, without cutting more corners, like eliminating oral argument and not giving reasoned dispositions?

JUDGE TJOFLAT: Well, one is jurisdiction. Congress has got -- we've got to tell the Congress that we're a scarce resource. We simply have to tell the Congress that. We have to tell the Congress, acknowledge that we told you in years past that we just needed more judges, and it's like the little kid who thought he liked ice cream, and he went to the ice
cream store and there was a five gallon can of ice
cream and so he said, daddy, buy me the five gallon
can of ice cream, and he didn't realize how sick he
was going to get until he ate the whole five gallon
can. His experience had been with one ice cream cone,
maybe with a double dip, or even a triple, but not the
whole five gallon can.

And, I think judges will tell you across
the country, appellate judges, we didn't realize what
was going to happen internally on our court until we
got extra judges, so we've got to change the tune that
send to the Congress.

Congress has got to decide what -- for
example, whether we should, because there's more money
in the federal government, we ought to prosecute every
state criminal offense. Congress has to decide that.
It's an economic issue.

Florida, for example, hasn't got any money
to build more prisons, but the federal government has
unlimited resources, and we have a tougher sentencing
law, because Florida moderates the population, for
example, by when it gets too crowded they just open
the spigot. And so -- and the people scream about a murdered coming out in three, or four, or five, or six, or seven years, so we put them in the federal system. So, Congress, maybe they ought to give the money to the states for more institutions, whatever the case may be.

JUDGE RYMER: But, if that doesn't happen --

JUDGE TJOFLAT: If it doesn't happen?

JUDGE RYMER: -- if it doesn't happen, then what's your suggestion?

JUDGE TJOFLAT: Well, if it doesn't happen, and we can't change any of our rules under which we operate, we've got to stay exactly the way that we are, then I think that what ought to happen is we let a crisis develop. We just stand pat and say to the Congress, we can't function.

We either can make the law so garbled that our citizens don't know what rights they have anymore, that litigants file suit, somebody brings a contract action, just some simple case, worth a lot of money to the federal court, and can't be heard for some reason or another, which is the case now in many respects,
and so they water down their rights, or the defendant gets sued and has absolute bar to the suit.

So, if the law is not clear, there is no way in the world citizens can anticipate their conduct, their investments, or anything else. And, there isn't any way in the world that I can spend all day long reading my colleagues' opinions in an effort to maintain clarity of the rule of law in the 11th Circuit, which is what we all do, because when we sit en bloc we all sit in bank, and somebody who overwrites in a case faces an unpleasant experience in a collegial, cordial way, when we sit around the table and the case goes down 11 to one or some such thing, so we monitor our opinions. And, the more judges we have, and the more I've got to read, that means the less time I have on my own opinions.

There isn't any way that a judge of our court, we get 25, 30 judges, under that old number I guess one time we were entitled to 29, somebody moderated the number down to 27, why that would be a nightmare, we wouldn't get anything done.

I don't think there's any question that a
court of appeals can get so large that if you add one more judge you decrease the total number of cases decided by the court, unless the rule of law goes to blazes and you unpublish opinions when you want to skirt around precedents, you just unpublish them, or you just do a little gloss over here, and you do a little gloss over there, and that creates disrespect for the rule of law.

VICE CHAIR COOPER: Professor Meador?

PROFESSOR MEADOR: Back at the beginning of the 11th Circuit, you had 12 judges, and as I understand 16 central staff attorneys. You now still have 12 judges, but 43 central staff attorneys, which suggests they are doing a lot of things now they didn't do back then. I suppose you have a diminution in oral argument down from nearly half down to 30 percent, you've got a drop in published reasoned opinions, put all these things together, do you see in any or all of that, do you have any apprehensions over whether overall the quality of the appellate process has deteriorated in the court, that is, the cases are getting less judge attention than they should, or that
the quality of appellate justice is not what it used to be, is there anything to that at all?

JUDGE TJOFLAT: I don't think so one wit. I think we hear argument in cases in which argument would be helpful, and they are basically in cases in which we are uncertain about exactly what happened in the trial court. And the lion's share of those cases are civil cases.

When we formed this circuit, we didn't have standardized ways, for example, of processing pro se prisoner litigation. We didn't have nearly as much pro se prisoner litigation as we do now, in which staff counsel don't decide the cases in my judgement, staff counsel are extracting a record for this, or that, or the other thing and putting something in a manageable way for judges, so that the judge can make a reasoned judgment.

When I went on the district court, in prisoner cases we received prisoner petitions on letter paper, on brown paper bag paper, all sorts of ways, and I personally read every one of those, and then what you would do is, you'd get ten or 15 pages
from a prisoner, you'd read it and then we had worked
out with the Attorney General of Florida, we'd enter
an order saying the prisoner has these nine claims,
one of them has merit, the other eight don't for a
couple of sentence reasons. And, we order the Attorney
General to file an answer.

Now we have pro se counsel, who, first of
all, we have forms so that the prisoner can sort of
channel this litigation, we know whether the prisoner
has -- why is the prisoner there, what was the
conviction, et cetera, et cetera, et cetera, has it
been on appeal, all those kinds of things, which make
it easier, for example, in the district courts to
process prisoner litigation. We use staff counsel,
being better for the same reason that we did on the
district court, so the staff attorneys' increase in
size is directly related to the increase in the volume
of pro se prisoner litigation, amongst other things.

VICE CHAIR COOPER: Judge, thank you very
much. We appreciate your time and your insight into
this problem.

JUDGE TJOFLAT: Thank you very much for
inviting me to appear, and I'll submit some additional information as regards to the 11th Circuit in particular.

VICE CHAIR COOPER: Thank you.

The next witness we have is Emmet J. Bondurant, a lawyer from Atlanta, Georgia.

Emmet, thank you for being here today, appreciate it.

MR. BONDURANT: Thank you, Mr. Chairman.

Let me begin with a disclaimer, which is I am appearing as a practicing lawyer, I do not have the perspective of a judge. Judges Tjoflat and Hatchett are far better qualified than I to speak from the judicial side of some of these issues, but I do feel that I can address them from the point of view of those who appear on this side of the bench, and I think I can also address the issues from the perspective of the people whom we represent, who, after all, are the people for whom this system really exists, not for the judges, not for the lawyers, not for the Congress, but for the litigants who put their faith, their freedom and their fortunes in the hands
of the federal courts.

Before addressing the specific questions, I would like to address, perhaps, presumptuously, the broad charge of the Commission. Congress has created the Commission to "study the structure and alignment of the federal appellate system with particular reference to the 9th Circuit," and to make, "any recommendations for changes in the circuit boundaries or structures consistent with fairness and due process."

As one who is far from the 9th Circuit, but nevertheless reads many of its opinions, and the newspapers as well, it seems to me that this issue has very little to do with improving the quality of fairness of the judicial process or the administration of justice and everything to do with politics.

The proposals, at least in my view, appear to be a thinly veiled attempt by members of Congress, and most especially those from congressional districts in the 9th Circuit, to influence the decisions of the courts of appeals with which they disagree. They want to reapportion the circuits so that they will have
their own circuits controlled by judges of their own political selection, and there is a political selection of judges, with views similar to their own.

In the view of many in the Bar, and myself included, the process for nominating and confirming federal judges has already become far too political. Partisan accusations that nominees are judicial activists have tended to undermine public confidence in the Federal Judiciary as a whole. My fear is that in the present political climate, if Congress starts redrawing circuit boundaries, the process will be as principled as the process that we observe every ten years when our legislatures and congressional districts are reapportioned.

Any major restructuring of the federal circuits in the current atmosphere is likely to be highly divisive and undermine even further public confidence in the Federal Judiciary.

The creation of smaller and smaller circuits seems also undesirable from a purely policy standpoint. Federal statutes and rules of federal procedure are supposed to be uniform nationwide.
There should not be discernable differences in the way cases are decided if they are brought in a district court here in Atlanta, or in Chicago, or Boise, or San Francisco. If we look to the model of the 50 states, the 50 states have been free to adopt their own laws, they clearly have their own state court systems, but the clear trend over the last century has been strongly in the direction to greater and greater uniformity, both of state procedure and state substantive law.

The creation of additional circuits may be attractive from the standpoint of collegiality and internal judicial administration. Increase in the number of circuits, however, will inevitably lead to a greater number of conflicts as between circuits. I believe that to be unavoidable.

States like California are bigger than multi-circuits at the present time. If you start cutting circuits down, you soon are going to have as many circuits as you have states or something approximating that. That seems to me to point in the very opposite direction in which the structure of the federal courts has gone in the last century or should
go in the next.

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

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

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

One solution, and I believe the best solution, is to decide on some principle basis what case load is optimal per circuit judge, and then to ask Congress to provide that degree of judicial manpower to enable the circuits to handle their case loads. It simply is unrealistic, I believe, to believe that you can on any sensible basis confine the appellate courts to any particular size. The population of the United States has grown almost 100 million since I began practicing law in 1960. The number of federal statutes passed since 1960 must exceed 100 million, or at least seemingly so.

We are becoming a more urbanized society, as a result we are becoming a more litigious society, that is a fact of urbanization, I believe. It is simply not realistic, I believe, that the same number of judges can handle the increasing case load, or any fixed number of judges can handle it, particularly, when you increase the number of federal district judges, the federal bankruptcy judges, the federal
magistrates, all of whom are producing a judicial output that sooner or later will arrive in the court of appeals.

There are, as you have heard today, strong differences of view, not only in this circuit, but other circuits, on the benefits of adding additional judges. Those arguing, and Judge Tjoflat is among them, who believes that any increase in the size of the circuit will result in a loss of collegiality among the existing judges of the circuit.

While I have great affection for Judge Tjoflat, and great respect for him and have appeared before him on many occasions, I have to say that I disagree. Almost every three judge panel in the 11th Circuit, since the mind of man runneth not to the contrary, has had a visiting judge.

If collegiality were as important as its advocate suggest, it would seem that the goal of collegiality would be better served by filling in with permanent judges the positions which are now being occupied on these panels by visiting judges. It seems to me that is inevitably the case, how close a
colleague can one be who transfers in for a week of sitting from the 8th Circuit one week, and a different judge from the 6th Circuit the next, or from the 8th Circuit the following week and so forth.

I also believe that the price of maintaining a smaller court in the interest of collegiality has been a very high one. In the 11th Circuit, there are strict limits imposed on the lengths of the brief, while there are exceptions, those exceptions are rare, almost without regard either for the number of parties to the case, the complexity of the case, or the length of the records per load.

The 11th Circuit has strictly limited oral argument to a point where as an advocate I think one can legitimately question whether there is sufficient opportunity for more than a superficial exploration of the issues or a meaningful dialogue, either for the point of view of the court or the lawyer.

I have heard many appellate judges say they have never heard an oral argument that influenced the decision, that it has never changed -- they have never
changed their mind, and that may be the case, but I'm not sure whether that is a comment on oral argument or a comment on the judge and the process.

The vast majority of cases in this circuit, as you have heard, are now decided without oral argument, the vast majority of cases are decided without published opinions. I do not agree that unpublished opinions should -- are a good idea. Precedent is precedent, how this circuit -- how judges of this circuit view the law, even the law of contracts, is important guidance to counselors and litigants in future cases.

I can cite a case from my own experience, only in the last week, in which there is now pending in four federal district courts in the United States litigation between a major automobile manufacturer and a would-be purchaser of dealer franchises. There are four other cases pending in the state courts, involving the same parties and the same issues.

There was, early in this month, a decision out of the 11th Circuit unpublished involving some of the rights under the very formed contract which is at
issue in at least eight different jurisdictions. That
decision is unpublished, we could not find it on line,
I would not have known about it except for the pure
coincidence that I happened to have run across a
lawyer who happened to be involved in one side of that
case. That precedent will be cited by both sides one
time or another, that case should be published, it
should be on line, it should be available for
guidance, and there are many others just like it.

In short, I believe the efforts to
streamline and make the appellate process more
efficient has had an adverse effect, both on the
quality and, perhaps, more importantly on the
acceptability of decisions in the 11th Circuit and
other courts of appeals.

Those who are involved in the judicial
process on a day-to-day basis, lawyers and judges,
tend to become jaded. We view the process from our
own little corner of the world as if that process, and
our participation in it, was an end in itself. I
think in these processes we have lost sight of the
fact that these cases are more than statistics, they
involve issues that directly impact the lives of real
people who look to the federal courts, not only for
justice, but for protection as well.

Let me digress and say, for example, that
in some of the efforts about which the federal courts
complain so bitterly are the prisoner cases, those
prisoner cases, some of them have genuine merit that
involve fundamental constitutional issues. In the
state courts in this state, and in many others, you do
not have adequate counsel in state criminal trials,
including death penalty cases.

In state habeas corpus proceedings in this
state, there is no state mechanism for providing
counsel for death row inmates. There is, in this
state, a case winding its way to the state supreme
court in which a prisoner with a 70 IQ on his first
habeas petition attacking his death sentence was
forced by a state judge to go through a state habeas
petition with no counsel in which the Attorney
General's office was represented.

Whether you comply with the Anti-Terrorism
bill or not, those issues ultimately belong in the
federal courts, if they are not going to be dealt with
in the state courts, and while many of those cases are
meritless, the federal judicial system, the federal
habeas corpus power which is, after all, constitutional, was put in the Constitution for
historic reasons that still apply, require that the
federal courts be open, and whether that is
convenient, whether it is within the case loads,
whether it is within the judicial manpower of the
courts or not, those are cases for which the federal
courts exist as an imperative matter.

When we speak of unpublished opinions, and
decisions without oral argument, we lose sight of the
fact of acceptability for the litigants. It is the
responsibility, I believe, of the federal courts to
ensure that their processes convey, especially to the
litigants, but to the public as well, a sense of
confidence that the issues, whatever they were, were
considered seriously and carefully, and were not given
short shrift by the judges of the appellate court
because of case load reasons or for other reasons.

The winners, of course, will always be
happy with a process that results in a decision in
their favor. A flip of the coin would be looked on as
being a wise and learned judicial process if it comes
out in favor of my client. For a losing party to have
confidence in the decision, however, you must be able
to see from the opinion of the courts that his
arguments were fairly addressed by the appellate
court. He must also be able to understand the reasons
for the rejection of his arguments, even if he does
not agree with those reasons.

I believe, and this is based on an
experience of appearing regularly in appellate courts,
that our efforts to speed up the appellate process and
make it more efficient has caused us to lose sight of
the fact that the process is, by its very nature, a
deliberative process. The courts are deciding
individual cases, they are not engaged in the mass
production of a consumer product, and, therefore,
statistical measures and shortcuts have a real price.

This requires, in my judgment, an increase
in the number of federal appellate judges. There
simply are, in my view, no panaceas and no other
Finally, there have been questions of delay. I have a couple of modest suggestions to make. One addressing the question of appellate delay, I would suggest that the circuits consider, not by congressional legislation but by circuit rule, the adoption of a rule requiring that all cases be decided within X number of months after docketing oral argument or submission, in the absence of exceptional circumstances.

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

Since that provision has been in the Georgia constitution from 1877, no case has ever been decided because the appellate courts failed to meet
the deadline. I don't suggest that the case loads are comparable in complexity, and that one can do a statistical analysis and easily translate that experience to the federal courts, I do suggest, however, that a rule that established an expectation that a standard within a circuit would be one in which members of a circuit would be very loathe to violate, and would in most cases, if not in all, adhere to.

I would not suggest even the draconian remedy of automatic affirmance. Merely having a rule with no stated penalty would state the expectation which I think many would meet.

The Supreme Court of the United States, whose case load, of course, does not compare to any single circuit, has a tradition at least of clearing up its docket within the court year. I see no reason why the circuits could not do the same, whatever that length is as established, and certainly subject to exceptions.

Finally, I certainly share the view with Judge Tjoflat and others that Congress is in part responsible for the major problems facing the federal
courts. Congress has tribulized the federal courts by imposing jurisdiction over matters that do not require a federal court solution.

To pick only two conspicuous examples, the Honest Services Amendment to the Mail Fraud Statute overruling McNally v. United States, has brought to the federal courts as federal criminal cases conflicts of interest involving local officials, for which there were a plethora of state criminal statutes that would have served us well to prosecute those individuals, and where there is no evidence of a federal interest, and no indication, as in some civil rights cases, of a reluctance on the part of local officials to prosecute similar crimes, 18 USC Section 666 is a similar statute, making bribery of any city official, or county official, or water district official that gets in any respect any money from the federal government capable of prosecution in the federal courts as a federal offense. That makes no sense. The federal courts ought to be confined in their jurisdiction to those things that require a federal solution and those things which the Constitution
requires, such as habeas corpus, that the federal courts be open to enforce the Constitution.

The question of intra-circuit conflicts that Judge Tjoflat raises from the larger court, I would at least suggest that there is a solution. It may not be a perfect solution, but it is one that I have seen work. The 4th Circuit has had a tradition, at least for 40 years, and I'm sure it extends well beyond that, of circulating draft opinions to the entire court before they are issued. At least when I was there, and I confess that is almost 40 years ago, it was the practice of those not on the panel to read those cases and frequently comment on them in order to assure before, and not after, an opinion was issued, uniformity of approach within the circuit and to bring to the attention of the panel other issues which may not have been fully presented by the parties. That seemed to me a sound practice, and it is one that I would commend to the 11th Circuit as well.

I'll be happy to answer questions.

(Whereupon, tape change.)

MR. BONDURANT: My practice is principally
as a trial lawyer, it is overwhelmingly civil, it is overwhelmingly civil in complex cases, though I have done a great deal of other kinds of litigation, including reapportionment litigation. I have done prisoner death penalty cases. I have both a plaintiffs practice and a defendants practice, though my practice currently is predominantly on the defense side.

When asked that question, I generally say I am unprincipled, I will represent whoever will hire us.

VICE CHAIR COOPER: Well, I would (inaudible) to being unprincipled, Mr. Bondurant.

Dan, do you have any questions?

PROFESSOR MEADOR: Have you, in your experience in the 11th Circuit Court of Appeals, had cases in this court in which oral argument was denied?

MR. BONDURANT: I personally have not.

PROFESSOR MEADOR: Have you known other lawyers who have?

MR. BONDURANT: Yes, those within my office have in some cases, although they are rare. I will
mention one example of one in which a young lawyer in my office was appointed in a criminal case in the 11th Circuit. I don't frankly remember whether it is was a 2255 or a direct appeal, in which the case was decided without oral argument, and at least he believes, without addressing directly conflicting decisions from other circuits.

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

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

But, I sit through a great number of appellate arguments. There are many arguments through which I have sat in which I had genuine sympathy for the judge for having to keep awake during those arguments, and I recognize that many are poorly done
and do not help the process.

However, I think the process of oral argument is important in a case that has some substance in it, and that 15 minutes per side, which is what you have in the 11th Circuit, even when you have multi-party cases, is simply not adequate to make a meaningful contribution for either side, either the bench or the bar, in those cases.

VICE CHAIR COOPER: Mr. Bondurant, thank you so much. We appreciate your time and your thoughtful presentation.

MR. BONDURANT: Thank you.

VICE CHAIR COOPER: The next witness is Charles Carpenter, Jr., from Columbia, South Carolina.

Mr. Carpenter, thank you for traveling to be with us today.

MR. CARPENTER: Thank you for allowing me to be here. I concur in much of what I've just heard by my colleague at the Bar.

It seems to me that what we have done in the past in response to the increase in volume since the 1960s has primarily been to take concerns about
the productivity of the judges and the efficiency of 
that and rationing the resources that we have, and 
allowing those to drive the structures that we come up 
with to accommodate that volume. In my view, we've 
reached and sometimes past the limits of what that can 
do and still give us the quality that we want.

I believe that we need to add more judges, 
that we need to add a lot more of them, and I also 
believe that at the same time we need to reduce 
staffing ratios that support those chambers, and with 
that combination allow that to drive the structure, 
instead of letting productivity and efficiency drive 
the structure as we have.

There are a lot of sources of the volume of 
the increase and the loads that the appellate courts 
bear. We've heard some of them. The stress that goes 
on in the trial courts I think is one of those 
 sources, new legislation, new causes of action being 
recognized. I think more education and more 
prosperity does it as well as population, and we've 
heard about criminal rights, I think we all know, too, 
that some of the dispute resolution mechanisms that we
used to have, families, churches and neighborhoods, don't resolve disputes, and sooner or later that adds to the business of the appellate courts in the country.

The past responses to this structurally to try to deal with this volume increase, have been administrative, they've dealt with productivity concerns, they've dealt with efficiency concerns, and they include things like adding layers of courts, adding law clerks and radically converting their function, adding staff attorneys, adding conference attorneys, and the effort has been to screen, to manage, and to dismiss cases.

Another response has been rationing, we ration oral arguments, we ration briefs, we ration the attention given to briefs, we ration the conferencing that the judges do, and we ration the opinions that they write.

Some of the results that come from that are described by a lot of people as assistant judges or what we now have with law clerks. We get administrative agencies with large staff attorney
situations. We get delegated decision-making, we get filtered input, and we lose in large part the value of the adversarial system, and we lose the legitimacy that we have had in the eyes of those who consume justice.

The model that we were taught, and the model that we try to tell clients when they say, what's going to happen with this appeal, I mean, if we do this and spend this money what happens, and we try to describe for them the judges, and we try to describe for them the process that it will go through, and when we describe the judges we say that, as you would expect, we hope that they will be impartial, that they will be interested in the case, scholars in the law, independent thinkers, but open-minded, known to the Bar, we know who they are, and particularly important, experienced in life.

And, what's the process that this appeal will go through? We will take full advantage of an adversarial system, that's how we get to an answer in this country. Each side presents whatever it wants to present, and the decision-maker takes that to make the
decision. It's not inquisitorial, it's adversarial.

And, what the judges will do is read the briefs carefully, listen to the oral argument, not conduct it, consider, confer, decide the case and explain to us what they decided. That's the model we tell the clients.

But, what really goes on and what do we tell ourselves, and what do our friends on the bench tell us when we are able to have a cup of coffee and be more informal? Well, it doesn't really work like that. We often don't get oral argument, and when we do get one it's often very abbreviated, and the format of it is very inquisitorial. It is often done by people who have already made their minds up, and it's a lobbying exercise, and if we were to tell that to a client, that they are not going to be heard, or that they are going to be heard in such a perfunctory way that sometimes happens, the people that I represent I think most of the time would say to me, well, I'm sorry to know that Congress will not give us enough money and that resources are stretched that thin that the time and the value of the judges is so dear that
we can't have oral argument, that I'll tell you what, I have spent so much money on this case on more mundane aspects of it than the oral argument, that if somebody will tell me what the hourly rate is for a circuit court judge, you tell me we normally get about 30 minutes to argue our case, I'll be happy to reimburse the government for the time of three judges at whatever that rate is, because it is very important to me that I know my case gets presented to those judges, and that I get some of their personal attention. And, the only way that I really know that I get any personal attention from a member of the United States Court of Appeals is during that oral argument, that's the only way I know. And, I'd be glad to pay for that.

Now, I appreciate the fact that there may be some situations where that's not necessary and would like to have the chance maybe to waive that, but I'd like to have the choice. It's an important case to me personally.

And, if the arguments aren't going to be heard, when you tell me in your office that
conferences between partners can reduce time and get you to an answer quicker, I wonder what happens to the brief.

Well, if we are straight with them a couple of things happen. One of those things that might happen is that there may be a staff memo designed to present the case uncolored by advocacy. Well, I'm not sure that's something that's good. Another thing that may happen in connection both with oral argument, if there is one, or reading the brief, is a bench memorandum. The client says, well, what's that? Well, there are some very bright, very talented people who finished law school last year who work for the judges, and they prepare a memorandum and it includes several things. One of those is the procedural history and posture of the case, another is a statement of the issues, and another is a summary of the facts, and another is a summary of the arguments.

And, the client will say to me, well, you sent me a copy of the other side's brief, and you sent me a copy of your brief, aren't all those things in the front of those documents already, isn't that a
little redundant?

So, we might say to the client, well, there's more in that bench memorandum than that. There is the law clerk's analysis of the law and the facts. There is the law clerk's recommendation of the disposition. There is the law clerk's draft of an opinion, and the law clerk's recommendation about whether there should be an oral argument.

And, after thinking that through the response is, I don't want the law clerks doing those things. That's not only unnecessary, it's undesirable.

Well, there's something else that's in them, there are suggestions to the judge about questions and issues to consider at oral argument. That sounds very valuable and very helpful to the decision-maker.

What goes on with all of this is two things, in my view, one of them is that the case gets so filtered before it gets to a member of the court that I have grave concerns about that, because from everything I hear, and it is from inside the court as
well as outside, what happens is, we recast the facts, someone does, we don't know who they are, recast the questions presented, and recast the arguments of counsel.

Now, most of the people that I know that spend their time in appellate practice would love to have the opportunity to do that for the case, and then we delegate, the recommended decision is done, there's a draft opinion, certainly the judge makes the decision ultimately, but that is a lot of control and a lot of delegation over the decisions.

The symptoms that we are told that would bring about more judges, or a need for more judges, are denials and abbreviations of oral arguments, reducing conference time, reducing deliberation time, adding law clerks, adding staff attorneys, and reducing the amount of explanation of the decisions.

I think we are hearing those symptoms loud and clear this morning from the court. And, what I believe should happen is, we need to add more judges, first and foremost, and whatever that does to structure I would be willing to live with the
disruption. I don't have any panacea, and I don't
think anybody else does, but I think number one is, we
need more judges, and we don't need more
administrative machinery to try to increase the
productivity of those judges that we have. I think we
push them too much already.

One of the things that we can do is to
streamline the support staff, and I think that is a
desirable thing aside from the cost, but if cost is a
factor, and it always is, that can be the source of
some of the resources to do it. That not only saves
money, but it will reduce the amount of filtering that
goes on, and it will reduce the amount of delegation
that goes on.

I would keep one law clerk per judge. I
would keep the conference attorneys that are doing
mediations. Most of my practice is in the 4th
Circuit, that is new and seems to be successful. I
have had that experience in the state system with a
different format some years ago and it was not very
successful, but I don't think it got nearly the
resources and the attention, nor the mediation
experience, that we have now.

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

One thing that -- and I'm about concluded -- but one thing that I heard this morning, that illustrated my idea, and I'd like to spend just a moment on it because I was not aware of these figures, and it, I think, bolsters what I'm saying even more than I expected, when I heard the numbers about the 11th Circuit, I've only appeared before this circuit once, as I say, most of my practice is in the 4th Circuit, 12 members of the court, ten senior judges, 22, a visiting judge on every panel, that's not a 12 judge court, it's about a 30 judge court already. Four law clerks per judge, now I don't know if that includes senior judges, but if there are ten permanent members and ten senior members that's 22 judges, that's 88 law clerks. Authorized to have 47 staff attorneys, that's 135 lawyers that are not judges, and
if we add visiting judges that's about ten more, that's 145. That's an awful lot of machinery that are not Article III judges deciding these cases.

If we kept about half of that and used it for judges and law clerks, I think it would save a tremendous amount of cost, and it would give us judges who probably can go through cases faster than that staff, who certainly can do it with the experience of life and the wisdom that we expect them to bring to the case.

I'm not sure what's the most efficient way to deal with the kinds of cases that we all intuitively feel like are clogging things up a little bit. I would have thought that that would best go to some of the staff machinery that we seem to have. I know at least one member of one of the federal circuit courts who does it the other way around, and does not allow law clerks to screen the prisoner in pro se cases, because that judge thinks they are too slow, don't have the experience, and the judge can go through those much more rapidly. I'm not recommending that. What I am saying is, an experienced federal
judge can certainly move much faster than somebody who is new who is on a staff, and those people are expensive.

If, instead of adding more and more staff, we reduce some of that, and to relieve the burden that the judges we already have too much of, I think the answer is more judges, and based on the numbers I've heard here with the 11th Circuit, I don't know what the number ought to be, but I'm not thinking in terms of three, I'm thinking in terms of 20 to 25.

I think more than half of that number is already there by substitution, by bringing in visiting judges, by using senior judges. I think we need enough so that we can go back to something that roughly approximates that model, and we get oral argument, and we get some of the personal time with the members of the bench, and we get, not somebody who is 25 years old, but somebody who has got that much of life's experience looking at the case to give us a wise decision.

From the standpoint of the consumers of justice, I think that instability within the circuit
and some of those concerns is a little over rated, and what is under rated is deliberate, wise decision-making by the appropriate people for the disputes the citizens have.

I appreciate the opportunity the opportunity to be here.

VICE CHAIR COOPER: Mr. Carpenter, thank you for being here.

Judge Rymer, do you have any questions?

JUDGE RYMER: Yes, I have a couple.

I'd appreciate again just a very brief description of the nature of your practice.

MR. CARPENTER: My practice is almost exclusively appeals, unless somebody drags me in to something else. Probably two thirds in the state court, we have an intermediate appellate court, we have had since 1983 in South Carolina, and a state supreme court, and the 4th Circuit is most of the rest of that practice.

JUDGE RYMER: Most of your concern centers on the lack, I think, of oral argument and the exchange, the visibility of the judge being part of
the decision-making process. You said the 4th Circuit
has a very high percentage of -- 89 percent of its
dispositions are unpublished, although reasoned. Does
that cause you any concern, or are you satisfied with
the unpublished reasoned disposition if you've had an
opportunity for oral argument?

MR. CARPENTER: Well, the oral argument
situation in the 4th Circuit is in pretty good shape,
much better than what we see in the state court system
and what I understand prevails elsewhere.

The unpublished opinions raise a whole
other concern, and I have been asked in another forum
to participate in that in a few months. My own view
of it is that, given the advantages and disadvantages
of each side of that, I don't like unpublished
opinions because I don't think they really exist that
way. They are sort of semi-published, and there is
certain access, as Mr. Bondurant described. I see
rules against citations that people cite, judges cite
unpublished opinions, lawyers cite unpublished
opinions. If you have other good law then nobody
wants to be fooling around with that, but usually when
you are reaching for them you don't have anything better to use. And, if that's the case, it ought to be published.

I think the down side is the inundation of information, and I know there's concern from the bench about the care that ought to go with crafting those, but I think the final answer I have to give is one Mr. Bondurant gave, that is the common law, what the facts were, and what the court did is something that the rest of us will want and need to know.

And, I would say my concern is not just with oral argument, it is with the briefs and the amount of filtering that happens to those before they get who knows where. There is sometimes the perception that you mail your case off to some big black box somewhere and you get an answer back, and you don't really know if anybody other than this very bright, capable staff ever saw the thing. And, if they did, did they see what the advocates set forth or did they see somebody else's interpretation and summarizing and changing the question presented and that sort of thing.
VICE CHAIR COOPER: Dan?

PROFESSOR MEADOR: On your point about adding judges, is there some point where you think a court of appeals is too large so you could not add more judges?

MR. CARPENTER: I think 11 is a good number, that's, you know, I think once you get past that, then you start running into, well, how far do we go before it's time to do something to divide that up, because I think you don't want to divide at that point, but I think that starts to stretch what can happen in an in bank consideration.

PROFESSOR MEADOR: But then, what would you do after that point, restructure the circuits, create smaller circuits?

MR. CARPENTER: I'm not sure I have a preference. I think that except for what one of our judicial speakers pointed out as the leavening and cross pollinization effect, small circuits I think would be fine. I'm afraid of that in some other ways, perhaps, districts within the circuit is better.

PROFESSOR MEADOR: Were you here earlier
when there was some discussion about creating a reviewing entity at the district level as a way of relieving pressure on the court of appeals, and, therefore, not having to add judges at the appellate level. What would be your reaction to that idea, a district level reviewing entity of some sort. I mean, there are various ways it might be constituted.

MR. CARPENTER: I was here when that question was asked and responded to, and I think that I agree with the judge on that.

District court judges sitting on district court judges' cases, I don't think gives the same scrutiny of review that you get when it happens at the appellate court level. That's my biggest concern with it.

VICE CHAIR COOPER: All right, thank you, Mr. Carpenter.

We are going to take a break and be back at ten after 11:00. We'll reconvene at ten after 11:00. The hearing is adjourned.

(Whereupon, a recess until 11:10 a.m.)

VICE CHAIR COOPER: -- say earlier, but
everyone needs to be aware of the fact that these proceedings today will be made available to the other three Commissioners. It's a five member Commission.

And now, we are pleased to hear from Deborah Barrow, a lawyer in Atlanta, Georgia.

MS. BARROW: Honorable members of the Commission, I am Deborah Barrow. I am here by invitation and appreciate the opportunity to share with you some of my past judicial research efforts on judicial reform and institutional change in the federal courts.

Currently, I'm an associate with the law firm of McKee & Barge (phonetic), however, I am a brand new attorney so I must issue the disclaimer that, not only do I not have judicial experience, I have very little legal experience at this point.

However, I was a Professor of Political Science for 13 years prior to joining this profession, and during that career I co-authored a couple of books, and I assume that's why in large part I was invited today.

The first of these books is called or
entitled, "A Court Divided," it's the politics of judicial reform dealing with the division of the 5th Circuit Court of Appeals. It chronicles their immediate political and administrative problems during the 20 year debate, nearly 20 year debate on whether and how to divide the 5th Circuit.

More recently, though, I co-authored a book entitled, "The Federal Judiciary and Institutional Change." This work was funded by the National Science Foundation, it took eight years from beginning to end, and in many respects this research or the findings in it speak more directly to some of the issues that we are discussing today, and provide, in my humble opinion, a good backdrop against which to evaluate some of these alternatives.

First, let me say at the outset that both books, or the research in both of those books, counsels against the continued increase in additional judgeships. The addition of the judgeship positions, according to these studies, has been used as a politically expedient tool by many in each of the branches. It has been used to patch over structural
and administrative needs, where compromise on solution cannot be reached, namely, the expansion of the old 5th Circuit Court of Appeals. It has been employed by Congress and the Executive Branch, where only compromise drives the effort to dole out political patronage regardless of the necessity or timing required for creating the positions.

I would like to present a statistical backdrop for this position. In the book, "The Federal Judiciary and Institutional Change," we looked at how the federal bench had evolved since 1869. The most striking change was the growth of the institution, not only in sheer numbers, but the rate of bench expansion. That stood out as well.

For example, just anecdotal, the southern district of New York now, as you might expect, is almost the size of the entire Federal Judiciary in 1868. The growth is striking, though, even when you compare it to other institutions. A judiciary that was 21 percent the size of Congress in 1868 is now 50 percent larger or almost double the size of the U.S. Congress.
Historically, nearly one out of every three appointments is made to fill new seats. The proportion of appointments going to new seats has climbed steadily to 33.8 percent. This is only part of the picture, though. The data show an institution that has doubled in size every 30 years, this from an institution already approaching 900 members.

This picture of bench expansion is so pronounced that we referred to it in these studies as a steady-step level increase. A view of the figures in our book, and I have attached that as an appendix to my statement, take on this stairstep image.

The politics of bench expansion is, and has been, so popular with members of Congress, that some members have referred to the ominous judgeship bills as Christmas trees adorned with judicial positions, or flat out, judicial pork barrel.

The rate of expansion is high, and much of the infusion of new seats comes in jolts from these kinds of bills. Such infusions of new members in any institution begins to take its toll on the existing membership's ability to acculturate that many new
members in that kind of expansion.

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

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

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

In the post-1969 period that we studied, the mean age of judges leaving the bench dropped from 72 to 67 years of age, and average years of service
dropped from 18 to 15 years. These are large decreases for mean figures.

This leaving pattern not only creates problems from rapid turnover, but the politics of filling vacancies, which as of late has been quite pronounced. For example, it is at least inefficient government, in my opinion, to leave open ten percent of the institution's positions, but it seems nearly unconscionable that any circuit would be left with barely more than one half of its complement of authorized judgeships because of the politics of divided government.

The delay in filling vacancies, coupled with the record number of judges leaving the bench, is a signal that some procedures, especially with respect to timing, similar to those imposed in the federal budgetary process, may need to be considered for the confirmation process.

The rate of bench expansion has its cost for the decision-making process itself. Collegial decision-making is not the art of making legislation where a word here or there can be hammered out and
compromise language than can prevail. Deliberative decision-making in a collegial setting requires a degree of interaction that is more suited to small and medium-sized groups. It is consensus building among equals, very similar to the faculty meetings that I sat through for years.

Generally, without a consensus no decision is made, and if one is made without a solid consensus the ensuing outcome is a fragmented and splintered one.

In the court context, a larger number of judges translates into a greater propensity to dissent and concur. When judges and scholars warn of a lack of clarity of opinions, it is not just a muddled opinion that is at stake, although those, too, appear, they are more likely warning that a multiplicity of issues, sub-issues and viewpoints may become an institutional pattern of decision-making.

On the latter point, I heard from judge after judge on the old 5th Circuit about the nightmarish decision-making process that besieged the court in its final expanded size of 26. Almost
everyone with whom I spoke was very unsatisfied with
the large group deliberation.

At the risk of not taking too much time, I
would like to just read one excerpt from what happened
after the first full in bank of 26 judges. "The oral
argument session in open court went reasonably well.
The 24 judges were perched, as Judge Coleman described
the scene, on a two-tiered bench to accommodate their
number. The court had agreed to limit questioning of
the attorneys, so that the session would not
degenerate into a questioning riot, and so that the
attorneys would be able to complete at least a portion
of their prepared remarks without interruption. Once
the judges retired to the conference room, however,
the defects in the system became readily apparent.
The first case required, by various judges' estimates,
a total of four to five hours to go around the table
and obtain each judge's initial impressions. I was
climbing the walls, Judge Reeley recalled, describing
the deliberations as a very unsatisfactory judicial
experience. To arrive at a decision in one case
required two days of deliberations. Peter Fey
reported the first case took hours and hours. I think
it took two hours to decide what questions we were
going to vote on. We took the first vote and it was
12/12, from then on it was downhill. Right after that
in bank, you could just feel it, every judge in the
court knew it was not going to work. We couldn't even
decide where to go to lunch."

Those are just some anecdotal comments, but
I think are very telling of what goes on when we start
down the road expanding the collegial atmosphere or
the decision-making process into a number that exceeds
where we are now with the 11th Circuit.

Proposals are a dime a dozen these days,
but I would offer these thoughts, at the risk of
adding to the confusion. Before we reach a bench of
1,000, perhaps, by the year 2000, there needs to be an
appreciation of the landscape and the reasons for its
formation. In particular, there are three areas in my
opinion that are in need of serious scrutiny.

First, some are concerned about the ominous
judgeship approach that jolts the system with a large
infusion of new members. Enlarging courts in such
fits and starts, rather than through an orderly process of planned change, cannot help but undermine the possibility for paced evolution, socialization and exacerbate institutional stress that already exists. This, again, is especially acute when coupled with the recent acceleration of volunteer departures. The Federal Judiciary appears to be in need of a more stable considered pattern of growth, either a set number could be arrived for the institution, or a limit set for the number of judges that could be added over a certain period. Perhaps, filling a vacancy needs to be justified with case load, rather than filled under the presumption that it is tied permanently to a particular court.

Second, the delays in filling vacancies due to excessively -- the excessively politicized confirmation process should be reexamined. Here procedures that control the timing and stages of decisions, similar to those used in the budgetary process or those that we use in rules of civil procedure might prove helpful in reducing the delay in filling vacancies. This delay has burdened and does
burden the active judges, and it can create morale
problems. Whether filling a vacant seat or a new
seat, new judges need the opportunity to become
acculturated to their new colleagues and
administrative staffs, and to develop productive
routines and relationships.

The court, in turn, requires a certain
amount of time to teach new members their
responsibilities and rules for maintaining the
organization. Thus, even after the appointment of a
new or a replacement judge, the full complement of
judges is not up and running immediately.

Finally, I believe that there needs to be
an assessment of internal court administrative
procedures, that conducting that rather than turning
to the external alternatives of expanding the bench
would be a better solution. For example, some
circuits are staying abreast of heavy case loads. I
think a view of the standardized work load per circuit
indicator, which is terminations on the merits per
panel, shows that the 11th Circuit is handling the
heaviest production of business in the country. I
think the administration of justice may be well served by examining some of the means used by the top producing courts to determine whether there are internal methods or organization of staff and work that could be adopted by other courts to reduce the pressure to add judges. That simply is a solution that needs to stop.

Additional staff and advanced technology could serve as alternatives to adding judges, and thereby not expand an institution that's already strained by phenomenal growth in recent years. It simply seems to make good sense, good business sense, to try these less intrusive means before passing another ominous judgeship bill.

I thank you for the opportunity, those are brief comments, but those are the issues that I've dealt with and feel confident to speak on.

VICE CHAIR COOPER: Why do you think so many judges are leaving the bench at an early age?

MS. BARROW: I think there's a morale problem with -- in my work I've seen that it is very much related to case load factors. I think there is
a crushing case load.

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

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

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

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

MS. BARROW: Uh-huh, maybe put their feet to the fire like, you know, everyone else's, and just ask them -- ask them to follow a timing, an outline, a guideline, in very similar ways that we had to
impose that kind of process on the budgetary process, the federal budgetary process, to get anything done.

VICE CHAIR COOPER: Judge Rymer?

JUDGE RYMER: Did your research into the old 5th shed any light on its experience with administrative divisions?

MS. BARROW: With administrative what, I'm sorry?

JUDGE RYMER: Divisions.

MS. BARROW: Divisions? They did use the administrative units, I think for a little while towards the end. I don't think they were very happy with that. From what I heard, it was already dividing the circuit, they felt as if they were already one 5th and one the 11th.

JUDGE RYMER: Oh, so your research would suggest that it was a -- splitting of the circuit was essentially fait accompli by the time the administrative division concept merged, and that was just an easy way to transist (phonetic).

MS. BARROW: That is correct.

JUDGE RYMER: Did your research then, or
has it since, shown anything about the utility of a
different or limited in bank system for resolving a
law of the circuit, rather than the 27 in bank?

MS. BARROW: No. I did not do any research
in that particular area. I do know that the 9th
Circuit has experimented with that, but I don't know
what they may feel has worked or hasn't worked with
that.

JUDGE RYMER: Just one final question, in
the research that you did at the time, did it suggest
anything about thinking that went on with respect to
the composition of the three new circuits, or was that
just primarily a function of easy geography?

MS. BARROW: With what, would you repeat
that, I'm sorry?

JUDGE RYMER: Of how the circuit was going
to divide itself, did your research shed any light on
whether there was any consideration given to the
appropriateness of the reconfiguration, or in the case
of the old 5th, was it just kind of a simple function
of geography that was obvious to everyone at the time?

MS. BARROW: No, as a matter of fact, that
was the debate, the debate centered on that for about 20 years, whether to break off Texas and Louisiana to a circuit which would be a more parochial circuit, and at that point it was felt to have an adverse impact on the civil rights decisions that had been made.

By the time this ultimately was decided, most of the judges who had had that concern were no longer concerned with the divisions, the geographical division's impact on any particular set of cases, but rather, went with the balance, the population balance between the two circuits, and putting Mississippi with Texas and Louisiana as a more three/three balance, better balance.

But, those decisions were made internally and not until the judges could arrive, the two sides could arrive at a consensus, was the bottleneck to the legislation opened. That is a decision that I really believe when you are talking about structural alterations in the court, if the judges aren't of one mind, or of a strong consensus on how to do it, I don't think you are going to have a very successful split. I think that has to happen. The so-called
"prayer meeting" that took place in the late Judge Vance's office in Birmingham, which brought the two sides together of the old 5th Circuit, was a critical meeting, and it was not until that meeting that all the judges felt comfortable then going to Congress and saying, this is what we want, and this is the way we want it.

VICE CHAIR COOPER: Professor Meador?

PROFESSOR MEADOR: Yes. Assuming the volume of appeals continues to grow, even though modestly --

(Whereupon, tape change.)

PROFESSOR MEADOR: -- I gather you are reluctant to add judges, what would you suggest for the Commission that it ought to consider on what to do about this problem?

MS. BARROW: I think ultimately, far down the road, maybe 30 or 40 years, we may have to consider redrawing boundary lines across the country. I don't think we are at that point yet.

Where I think that we should look is to limiting the size of the institution and trying to
deal with as much work as possible through internal organization of work load, technology. Technology, I don't think has really hit the courts the way it has other institutions, or has had an impact in the federal court system the way it probably should.

If we can make some advances in those directions, I think that we can go a long ways towards not adding new members and changing, altering the structure that way.

And, ultimately, I think that we have to point the finger at Congress and ask Congress to begin to streamline some of the jurisdiction of the federal courts. I don't think the federal courts can function in the special capacity that they are supposed to constitutionally if we continue to take everything there, every issue there.

PROFESSOR MEADOR: The question of dividing the circuit, you mentioned the idea of the judges of the circuit being unanimous on the dividing point, and obviously if that occurred it would make it easier to do, but why is it you say that all the judges of a circuit must concur on the division before Congress
can enact a statute dividing it?

MS. BARROW: I wouldn't say that they have
to all agree before Congress can act, I don't think it
that's the way it happened in the 5th Circuit, I do
think that it is, those judges are the judges who have
to function and may implement that plan, and make the
circuits work, and if you alienate a group of judges,
or you make them feel that they are being separated
off for one reason or the other that's political, then
I believe that you are going to have probably a mass
exodus for one thing on the court, but also it's just
not good business to go in -- for any institution to
go in and tell another institution this is the way you
are going to do your internal business, without any
regard for the way they want to work out the political
solutions.

And, very specifically, I think that the
9th Circuit issue is probably going to have to involve
a couple of other circuits before you can diffuse the
politics that are preventing any kind of structural
alteration there.

PROFESSOR MEADOR: What structure do you
have in mind with the others?

MS. BARROW: Perhaps, the 10th, maybe realigning the west, redrawing boundary lines for those circuits, perhaps, the 8th, 9th and 10th Circuits, so that you can diffuse the politics at that point by adding another circuit into the configuration of states.

JUDGE RYMER: What basis -- you are suggesting, I think, that you think that the 9th Circuit should be reconfigured.

MS. BARROW: I don't know how that a circuit, given what I've heard and what I learned from the internal decision-making process on the 5th Circuit, when it reached the point of 26, I don't know how the 9th Circuit can continue to exist and have any kind of coherent law.

JUDGE RYMER: Well, is that based on any continuing research or familiarity with things like the in bank procedure that the 9th Circuit has got to solve the problem of the 27 judge in bank?

MS. BARROW: No, it is not based on any current research, it is simply a matter of having seen
and heard what went on with the 26 judge in bank with the 5th Circuit, and the lack of collegiality and interaction.

VICE CHAIR COOPER: Thank you so much. We appreciate your presentation.

MS. BARROW: Thank you.

VICE CHAIR COOPER: Our next witness is Laurie Webb Daniel, a lawyer from Atlanta, Georgia.

Ms. Daniel, good to have you with us.

MS. DANIEL: Thank you. I'm very happy to be here.

Initially, I'd like to give you a little background about my practice and the basis for my remarks, so that you have some context, and the interest that I have in being here.

I am Chair of the Appellate Practice Group of Holland & Knight (phonetic). We have a firm-wide appellate group, Holland & Knight believes that appellate practice is a specialty area, and we treat it very seriously. We have a number of practitioners in our firm who do nothing but appellate work. Collectively, we've handled matters in all of the
federal courts of appeals.

Our appellate practice group includes three
former appellate judges, state court judges, but they
have had that experience of judging at the appellate
level.

Another interest that I have is that I am
co-chair of an ABA subcommittee, part of the Appellate
Practice Committee of the Litigation Section. My
subcommittee is appointed to address the appellate
rules, issues that come up.

In preparing for this hearing, I thought it
might be advisable to discuss the issues raised by the
Commission's notice with some other people, to get a
sounding board for my own ideas, as well as to see
what other people were thinking about these issues.

I did not have a lot of notice, I really
did not realize I would be here until last week, but
during that time I have been able to talk to a number
of people within my firm, as well as some people
outside of the firm who were involved in the different
professional organizations that I've been involved in,
a couple of law professors, and some others. And,
I've formulated my statement in writing, which, of course, you have.

What I'd like to do now would be to run through, hit on some of the points that I've made in my written statement in response to the issues posed by the Commission's notice.

First of all, I might add that while our firm has handled and does handle matters throughout all of the federal courts of appeals, my personal practice has primarily been in the 11th Circuit. I have had some experience in some of the other circuits, but my personal perspective is primarily with respect to this circuit.

The general consensus is, I think, that the 11th Circuit is really doing pretty well, but there are some things that need to be addressed. There are some concerns.

On the timeliness issue, a lot of people feel like things are not too bad here, but I have to say that my personal experience has been otherwise. I have had to wait two, three years on a number of occasions to get a decision from the 11th Circuit.
Now, my practice tends to be commercial, fairly complex commercial litigation, and I think as a result it would involve more time just to process, to deal with than certain other types of cases. Certainly, the criminal cases will get preference, and would not have the same perspective as I have.

Another concern, and I've heard this expressed here today earlier, and it's one that comes off my lips whenever I've been asked about this subject in the past, and a number of other people have expressed it, and that's the extent of the use of visiting judges in the 11th Circuit, the district court judges who come in and sit by designation, and the visiting senior judges who come in.

I think that there are a couple of concerns there. One is that the use of visiting judges impedes the timeliness of rendering decisions, because the senior judges do not have, they are not equipped with the same staff as the active judges, and the district court judges that come in tend to have their own dockets and other priorities to deal with. When the judges come in as visiting judges, the priorities are
just not the same, they are just not geared up to be handling the 11th Circuit cases.

I think there's also another perception, particularly with respect to the use of district judges on appellate cases, and there may not be any substantive basis for this, but I think from the litigant's standpoint, when their case goes up on appeal, they want to have an appellate judge deciding the case. District court, there are many, many very fine district court judges, but this is a perception from the litigant's point of view, that they are entitled to a judge who is used to the appellate process, is used to dealing with judging from the appellate standpoint, which is a slightly different perspective from a trial judge's perspective.

I would echo the comments that have been made this morning on oral argument. I've heard a number of people express concern over the court's limiting oral argument in cases. I personally have not had that experience, but, apparently, other people are having that experience.

One view was mentioned to me that the
denial of oral argument actually does not necessarily, or may not necessarily speed up the process, because just the nature of having the oral argument be set for calendar forces the judges to get together and decide a case, and if it's not put on an oral argument calendar it may -- the judges may not be as diligent about having the conferences that are necessary to render an opinion.

One of my -- well, actually, two of my partners in Washington, D.C., made a comment about a procedure that is intended to be an expediting procedure in the D.C. Circuit, which they felt actually backfires, and that is the procedure for summary affirmments. They said they've had the experience where that procedure has actually added at least a year on to the time it took to a process a case, that the chances of getting summary affirmments were very slim, but it takes a while to deal with the summary affirmments procedure, then when it's denied the case goes back and starts over with the full briefing schedule and has to then run its course. And, they felt that that procedure was not being
effectively used.

Another procedure that I have found personally to add some time to the processing of an appeal is the procedure of carrying with the case jurisdictional issues that are raised initially. This has happened to me several times in more than one circuit, where a jurisdictional issue was raised initially, the parties briefed it, we got an order saying that it would -- the jurisdictional issue would be carried with the case, we went through full briefing, including then an oral argument schedule, and then the case was disposed on the initial jurisdictional issue that was briefed long before the merits.

When that happens, it just strikes the litigants as being a waste of time, why wasn't this issue decided initially if it was going to be the dispositive issue in the case.

On the question of internal consistency, I would again echo Emmet Bondurant's comments about the unpublished 11th Circuit decisions. What is different about the 5th Circuit, at least from some circuits
like the 9th Circuit, we not only have a large number of unpublished opinions, in fact, I think that the local rule states that decisions will be unpublished unless a majority of the panel votes to publish. But, the decisions are not only unpublished, they are not available on any publicly available electronic computer base, data base. You cannot get them on Weslaw (phonetic) or Lexus (phonetic), so you just don't know what's there.

I personally don't know if the judges know. I don't know what their procedures are for circulating opinions, but the public doesn't know. And, I don't know, I mean, there could be a lot more inconsistency in the 11th Circuit than anyone really knows about. I don't want to call it secret law, but it's frustrating sometimes, and I've had the experience that Emmet Bondurant mentioned today, of just learning about a case that is very relevant, very similar to a case I was handling, and it was just chance that I learned about it either from meeting someone who was involved in it, or sometimes you'll have a published district court opinion, in which case you know about
-- you see from the table that there was some action taken, and then you can get the opinion from the 11th Circuit.

But, if the district court case was not published, there's no way to even know about it, unless it's by chance. And, I think that's a disservice. I think that it would promote consistency to have the unpublished opinions available to the public, if they are not deemed to be significant enough to be considered binding authority, they nonetheless have the status of persuasive authority and could provide guidance to litigants and judges as to the results in similar cases.

I know I personally had the experience of having a decision in a case that was unpublished. I felt that it was quite inconsistent with one of the published opinions. There wasn't any basis for me to seek in bank review, because it was unpublished, and I was a little frustrated but then I realized, well, at least this way no one will know I lost the case, so it had that benefit at least.

But, I think overall it would be better to
have those unpublished opinions on line.

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

There is a law professor, Gregory Sisk (phonetic), who has written an article on this, and I have it mentioned in the written statement, where he's gone into great depth to analyze the problems of the lack of uniformity in local rules. He calls it the bulcanization of appellate justice. They are a nuisance. I mean, you can learn the local rules
usually by really doing your research, although some of them are not easy to figure out, I do think there are some that are unwritten.

To the extent that these local rules deviate from the federal rules of appellate procedure, I think that the issue could fall within the scope of the Commission. It's not the uniform application of federal law, at least not the federal standards in the processing of appeals, and as a practical matter, it is a problem for the practitioners. I think it does create extra expense and adds to the bureaucratic nature of the federal appellate courts.

On the issue of the extent of the deliberative attention of judges, I have heard the concern expressed by some people that the courts are relying more and more on law clerks and staff attorneys. And, the concern -- well, the concern is that they are relying on these non-judges more and more for screenings and to make the initial -- some initial decisions about the case that go on and really impact the disposition. The concern, one person in particular expressed a concern that the law clerks are
not -- well, they are out of law school usually, and that they don't have the experience that judges or even experienced lawyers would have on these issues.

The cutting back on oral argument ties in with this issue, and I think bears the thought that if the judges do not have oral argument they are missing a step in the deliberative process, and that the oral argument process is very valuable, and people would like to see that kept in place.

Now, on the request for suggestions for measures to ameliorate the problems, that's where it really gets interesting, because there are all kinds of divergent views that were coming to me from practitioners, even just within my firm. One of my partners is a former appellate judge in Miami, and he was in the state court system down there, and he was very adamant, he agrees with the article that Harvey Wilkinson (phonetic) had in the Wall Street Journal, we don't need more federal judges. I mean, he was just agreeing with it all the way down the line, from his perspective.

On the other hand, a lot of other people
that I've talked to within and outside of my firm have felt that we could use some more judges in the 11th Circuit.

Now, we have recently gotten a couple of new judges in the 11th Circuit, and that may help some, but I have to say with my personal experience, and the delays that I've experienced in the cases, I think, perhaps, maybe a few more could also help.

I don't believe that an artificial limit on the number is a good idea. I think that there needs to be some flexibility. On the other hand, obviously, there's going to be a point where there are just too many judges to make it manageable to operate a circuit, and the in bank review problem is the one that is the obvious one, what do you do when you want the law of the circuit.

This morning, I spoke to Judge Dorothy Beasley (phonetic), who is on our Georgia Court of Appeals. She was Chief Judge of the Georgia Court of Appeals a couple of years ago, when this issue really came into focus here in Georgia in our state court system, and she was quite happy to share with me her
ideas and what she was thinking about at the time when she was dealing with that problem. And, her solution, which has now been adopted in Georgia by statute, was to have less than all the judges participate in the decision that would establish the law of the case, and I cannot remember how Judge Rymer characterized the process, but in Georgia the court of appeals panels are three judge panels, and the way it works here, if there's one dissent, traditionally then it would go to the full court, so we would have uniformity of decisions, to make sure that you didn't -- it wasn't so much the luck of the draw, what, you know, judges you happened to get on a particular panel.

We have ten judges on our court of appeals. That wasn't working, the Georgia Court of Appeals has a tremendous case load per capita, and we also have, as Emmet Bondurant mentioned, this two term rule where decisions have to be processed within two terms.

So, to deal with this, the state has now a procedure where if there is the need for the law of the court, where it comes up where there's a conflict with a prior panel decision, a seven judge court will
hear the case. What they do is, they take the next three judge panel that is in line, they have a rotating panel system, they take the next panel, put it on the case, and then they add one judge. I think maybe the Chief Judge is the one they add, and then they have another method of designating that seventh judge, but they then get seven judges to decide the issue, and then that becomes the law.

And, there are times when all judges on the Georgia Court of Appeals will decide a case, but they are rare, there are a couple of exceptions for that, and the idea is that most of the time if you have a conflict then it will be decided by a seven judge court, rather than every judge sitting on the Georgia Court of Appeals.

Judge Beasley said this procedure has been in effect about a year now, and she's quite pleased with it, and says that she'd be happy to share her experiences and talk further about the experiences of the Georgia Court of Appeals on that procedure.

I would like to add a few comments on the issue of growth, just as kind of a personal
perspective. Modern day brings all kinds of changes, and it's startling. Four years ago, I was in a law firm that had seven lawyers, and we merged with Holland & Knight in 1994, all of a sudden I was in a firm that had over 400 lawyers. We now have over 600 lawyers. We have experienced tremendous growth, and have encountered some problems that are different from those encountered by the judiciary, but some similarities, and on the conflict issue, for example, one concern I have is that our lawyers do not take inconsistent positions or have positional conflicts on matters we are arguing in the courts. We need to be sure we are advocating fairly consistent positions. We can't get in court one day and argue one position, and then for the very next day arguing against ourselves.

And, the ways of dealing with that, and the technology has helped an awful lot, our firm is spread out. We have offices now -- well, Florida, Georgia, Washington, D.C., Virginia, New York and also in San Francisco, in California. We are all hooked up on the same telephone system, we just dial four digits, we speak to each other. We have E-mails, and we really,
I think, overall communicate pretty well, and when people ask me, you know, what was it like going from a small firm to such a big firm, and didn't you lose the sense of collegiality and all of that, the fact of the matter is, I feel like there's more collegiality in a larger firm than in a smaller firm, because if you have a smaller entity and you've got some discord, it's felt a lot more than if you have a larger entity and ways of dealing with the issues that have come up, and have structure and process for dealing with things.

So, frankly, the size that I've found this growth has not been a problem, it's been exciting, and there has been a lot of positive and addition of diversity and new ideas that I would not have encountered if I had been stayed in a smaller environment. So, there are some pluses with growth that come with the additional diversity and perspectives when you get more people involved in the process.

It's not hard to talk to people in other states, and in other cities, and there are ways of
communicating and having a sense of collegiality, even when we are forced to grow.

A couple of other thoughts on things that might help deal with the case load, the heavy case load that the federal courts of appeals have, and one is technological advance and is fairly new, but one of my partners in New York recently filed an appellate brief using the CD ROM method, and he loved it, and apparently the judges have had cases where there have been the CD ROM filings, are very happy with it. It's bound to cut out a lot of processing time, if all you have to do to look at the case, the cases that are cited, the record citations, is to just click on the little pyramid in your computer and it pulls it all up right there, you don't have to dig through papers, mounds of papers, you don't have to go down the hall to the library to get the cases.

And, another thing is, that shifts -- the cost of that is on the parties to put the thing together. There would be some initial costs to have the hardware available, but the parties would put together the cost, and in a complex case where you
have a lot of paper that's the kind of case where iteally could help out and I think alleviate some of
the time it takes to analyze those complex cases.

Another thing that I think could help deal
with the case load, and I think it already is doing a
good job in some places and maybe could be expanded,
and that is the mediation programs. The 11th Circuit
has an excellent mediation program. It's very user
friendly. I understand they are getting ready to open
up some more branch offices. It's currently based
here in Atlanta, but the mediators go all through the
circuit and mediating cases.

Steve Kenard (phonetic) is the person who
started that program here. They've added some
mediators. In addition, I'm spoken to him at length
about it, and my personal experience has been very
positive with this, and the litigants that I know who
have been involved in this process like it very much.
I've never heard a negative thing about it. It's
worked well for me. I'm trying to think, it may not
have settled every case, but we've had some real good
results, and Steve says that they actually target the
complex commercial cases that are the ones that seem
to drain the most judicial resources, the most time
and the most difficult to deal with, to process, and
the normal judicial process, those are the ones that
the program goes for and tries to get involved. They
stick with these cases and their success is, I think,
50 percent, which is not bad for a mandatory program,
but he says they tend to affect global settlement, so
there is often times related litigation in the
district courts that gets settled as well. So, it
eliminates future appeals from cases that are settled
through the 11th Circuit mediation.

I think it's a great program. I understand
-- I think all of the federal courts of appeals have
some sort of program but, perhaps, not as extensive as
the one here, and I think that's something that could
be a good project to focus in on and may have some
very good practical results.

VICE CHAIR COOPER: I hate to interrupt
you, but I want to see if someone has some questions.

MS. DANIEL: Yes, I'm through anyway.

VICE CHAIR COOPER: Your time is up, but I
haven't been flashing lights at you.

    MS. DANIEL: Well, I could -- you know, I
can't tell when I start talking, there are no lights,
I'm used to that.

    VICE CHAIR COOPER: That's all right, I
understand. Well, it's very informative, and we
appreciate the effort of surveying your partners.

    Judge Rymer, do you have any questions?

    Dan, do you have any?

    PROFESSOR MEADOR: No thanks.

    VICE CHAIR COOPER: All right.

    Thank you so much. We appreciate the
effort that you did, of making the presentation to us,
and, particularly, getting the views of your other
partners.

    MS. DANIEL: Thank you.

    VICE CHAIR COOPER: Our next witness is
Judge John Godbold, former Chief Judge of the 5th and
the 11th Circuit Court of Appeals.

    Judge Godbold, it's a real pleasure to have
you, and you certainly honor us by your presence by
being here today. Thank you so much.
JUDGE GODBOLD: Thank you very much.

You can tell I'm an old time courtroom lawyer, because I'm talking from my yellow pad.

Let me first address some of the specific questions that the Commission asked us to comment upon. Timeliness, this is a big problem, I think it's the greatest problem that faces my court. This is a function, as I see it, of cases and the judges, and the attitude of judges. A court can encourage timeliness.

In the old 5th, we had a rule that a judge who had had an opinion under submission to him to write for more than six months was removed from the bench until he circulated the opinion.

To my great surprise, after trying that out for a year, the judges themselves suggested that the six months be dropped to three months, and that was a rule we were operating under at the time the division occurred. I think our then Chief, or the Chief for most of that time, never had to remove a judge but once, but he did, and it really produced timeliness.

The 11th, I'm sorry, doesn't have that
rule, I preach about it once in a while, but the newer judges have not succumbed to it yet.

A court needs rules of timeliness, and they need rules of timeliness that have teeth. It is not enough to say I consider first of all the opinions written by other judges, or I get my work out in 60 days. These platitudes do not produce the firm compliance with time that is necessary.

Judges have a funny way sometimes of handling decisions. A judge is assigned an opinion, it might even be me, and I put it over on the back burner and I'm doing something else and I say I'll get to that when I can. Well, if it takes five days to write an opinion, it takes five days now or it takes five days three months from now. The problem is not so much -- or it's not only volume, it is time, selecting time, when does one deal with a case. Does he put it off or does he get on with it as fast as he can and move it through the pipeline.

Oral argument, there's been a lot of dialogue about that. There are varying views. There's a certain amount of mythology tied up with
oral argument, mythology and history. The spokesperson is trying to persuade judges of something. Well, his brief may be a much better persuader than his voice, and often is, and I agree that -- I'm of the opinion that 15 minutes in my court is not quite enough. We begin in the 11th with 20 minutes standard time, 30 if you have a really tough case. Later they dropped it to 15, which I thought was too short. There's a psychological difference, and there are practical differences between 15 and 20. The guy with 15 gets 20 anyhow, usually. So, that's pretty short.

Do visiting judges help, and do they harm? Indeed, they do help, but there's a great mythology about this that is not backed up by statistics. In the 11th last year, the visiting judges filled six percent of our judge slots. Senior judges from within the circuit filled ten percent. Well, one of those six percent figures has got to be pretty powerful to have much effect on a decision of this circuit.

Since I took senior status, I have sat on ten of the 11 numbered circuits, and my approach, and
I think it's the general approach, is that on a matter of the law and practice of that circuit, that I wouldn't think about interfering with it. I may argue the point, and I'll get pretty vociferous, once in a while I might even dissent, though I can think of only one occasion, largely I depend upon the local judges to take the lead, and then I contribute to that dialogue, and decision as I can.

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

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

I recall one time when a visiting judge wrote a bitter dissent in this circuit, saying he disagreed with the law of the circuit, thought it was
all wrong, well that seemed to me totally inappropriate. He was never invited back.

Opinions, a writer of our country has said that the worst writing in America is done by judges and sports writers. There's some truth in that.

However, the grand manner opinion that Professor Henry Hart (phonetic) sold to the Bar of this country is gone. Professor Hart had served on as law clerk on the supreme court, and when he went back to his work, when he went to his work at Harvard he carried with him the idea that every opinion, no matter what court it came out of, should be written in the grand manner, which means using the predicate of the opinion as a predicate to talk about everything.

Well, the grand manner opinion is pretty well gone. I suspect a circuit judge now writes one or two a year and that's all, and the rest of the time he's writing to tell the parties how the case came out and why.

Tied into that is timeliness, opinion writing, structure of the court, I thought I'd duck the characterization but I won't, are entangled with
the ego of judges. Most judges in the federal system are well educated, with good practice backgrounds, they are by and large capable and they know it so well that they come to confuse a function. Judges don't own the court, a lot of them think they do, they are trustees for the people of this country, and the primary question is not what makes judges happy, but what are the needs to be served and how should they be served.

Consistency -- let me go back just a minute, in the matter of ego of judges, it surfaces at many points, it particularly surfaces in desire for in banks, and my court has too many, in which the demand for an in bank and the argument at an in bank often is the ego of the demanding judge, and the ego may be important, but it should not be commanding.

Some judges need to school themselves against the feeling that the law has to be padded and molded in the precise form that he wishes. Well, I doubt that our country put him in office for that purpose. This is a decisional court, a dispute-deciding court, and changes in the law flow from that,
not as a primary objective.

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

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

It was Cardoza, I think, who said that in appeals in the federal system in 90 percent of the cases the result is for (inaudible), nothing anybody can do, say, write, orally argue is going to deviate
from, or is going to depart from that sort of expectation.

Besides any experience, an appellate lawyer will tell you that dispositive issues are highly predictable. What that means is that the court often can get down very quickly, not only to decision, but as to what the issues are. Excuse me for being personal, but when I was a boy judge I sat out in Houston with Judge Hutchison (phonetic), who at that time was the longest tenured federal judge in America. I sent him a draft opinion, which I dealt with every issue that had been raised, he came down the hall to talk to me and said --

(Whereupon, tape change.)

JUDGE GODBOLD: -- lawyers can think up, and it was a wonderful lesson, because I've tried to focus on what needs to be decided and written on and what does not.

The 11th has a two-channel system of oral argument and non-argument. It works, we think, well, though we are working on it now trying to polish it up. There have been some expressions that the lawyers
don't like it. At first they didn't like it, because
we inherited this from the old 5th and they did a
lousy job of, they just put it into effect, didn't
talk to the bar, didn't say anything, didn't explain.
Once it is explained to lawyers, and they understand
how it operates, at least that far they feel better
about it.

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

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

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

We are doing too much, both in numbers and substantively, the courts are not necessarily the best place to deal with some of the problems of the social order, but we do get the problem of an orderly society given to us because we are in place, and working and generally well regarded.

I would say to the Congress, please, no more jurisdiction of crimes that the states ought to handle, and civil remedies that the state can handle as good or better than we can. At least take another look at diversity, at least to the extent of making it available to only the non-resident. The origin of diversity was that the non-resident was prejudiced. Well, let's leave that on effect, but it was never intended originally to be a refuge for the resident.

Next, what can be done with respect to congressional changing of the review process in administrative agencies. The big bear in this is Social Security. A Social Security case, and the process that's being handled, may get the attention of as many as 13 different readers. The ALJ decides it,
it goes to a board in Washington where there are three
people. It comes back to the district judge, he sends
it to the magistrate, who sends it to his law clerk to
give him a recommendation. The law clerk sends it
back to the magistrate. The magistrate sends it to
the district judge, who sends it to his law clerk, and
then it comes back to the district judge. And, when
all these get through they send it to the court of
appeals, where it gets looked at by three judges.

Now, these cases are not that difficult,
and this is appeal gone wild. And, we could turn this
over to an administrative agency.

Staff attorneys, they are useful but they
are risky. It is very easy to use the talents of
staff attorneys so much that we slide into letting
them do things that judges ought to do. Twice I
tested before committees of Congress that were
concerned about staff attorneys, and they brought to
light what I had not caught on the 5th Circuit, staff
attorneys were writing what was called suggested
opinions, and the congressmen thought that was wrong,
and I thought it was wrong. So, they don't write
suggested opinions, they write memoranda. I can take
that memorandum, to the extent I agree with it, and I
can use it in writing an opinion, but the law clerk
does not produce an opinion.

In my chambers, my law clerk writes an
opinion occasionally, but she does so after I have sat
down and said there are four issues, here's what we
are going to decide on issue one, here's number two,
here's number three and number four forget about, we
are not going to address that at all, and she goes off
and writes under my direction.

Judgeships, how many, I doubt if -- I don't
agree with Judge Tjoflat, and I suspect he didn't tell
you the whole story, after a good many years of
arguing about it, the 11th opted to go for 15 judges
instead of 12, three new ones, and I was able to get
that adopted with the help of some others, then I went
to the Federal Judicial Center and as soon as I got
out of town they revoked it, and there it stands at
12.

Well, I've been on a court of nine, a court
of 12, a court of 13, a court of 15, and there's not
a heck of a lot of difference. And, I was on a court with 26 actives and ten seniors, 36 judges, and that makes a big difference.

In addition to the problems that you may have specifically addressed, there's an underlying problem, which to me may be the biggest one. As the court gets too big, the nature of the process changes. In smaller and moderate size courts, judges are operating as individuals, though they may be in a panel or they may be in an in bank court, but they are speaking and thinking as individuals. This is an individualized process, in which everybody contributes.

When the court became too large, it became like a legislative body. It formed cliques and groups, and even in some instances it was decided who would speak for the group, and there were shifts between groups that were tradeoffs. And, I discovered one time to my outrage that one of the groups had even had a meeting ahead of the in bank to decide what they would do. Now, this is the antithesis of the judging process, but it's endemic to a group that is too large
for individualized thought.

I believe I'll stop there and if you have any questions.

Oh, excuse me, may I mention one other thing that Judge Rymer brought up?

VICE CHAIR COOPER: Yes, sir, go ahead.

JUDGE GODBOLD: You asked one of the spokespersons about the use of administrative units. This was a creation of statute. Quite frankly, it was a political maneuver to give us some time to try to get the ultimate division done. So, with the help of then Attorney General the court was divided into unit A and unit B, and operated in that fashion until almost a year later the legislation was adopted that made a formal split. It was a disaster, a necessary item, but it was -- well, maybe that overstates it, it was awfully hard to handle.

Assigning judges to new cases is easy, but you've got to devote a couple of years to deciding the old circuit cases by judges who may now be in different units. You've got the old circuit cases carried forward. So, we had unit A cases and unit B
cases, and mixed cases, and each unit had an in bank and then you had an in bank over the in banks. It was not a happy experience to try to run disputes over personnel, do you work for unit A or do you work for unit B, or do you work for both of them? It was not for us a very successful event.

One last comment. The last speaker referred to the history of the division, which did take 20 years to ultimately get everybody persuaded. Two things broke the ice, it stayed in the deep freeze, and probably would be there now but for two things. The groups who had felt that it would create a magnolia court, as they called it in the southeast, that was not sensitive to civil rights, and the second one was which way did Mississippi go, and the Mississippi judges, the Mississippi Bar, the Mississippi people, all wanted to go to the east because this was where they were naturally allied by history, temperament, industry and so on.

Senator Eastland (phonetic) was Chairman of the Judiciary Committee, and no split was going to occur unless Mississippi went to the east, so
everything was frozen for months and months.

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

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

Can I answer any questions now?

VICE CHAIR COOPER: Yes, sir.

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

JUDGE GODBOLD: Well, Mr. Chairman, I hoped I could come and share my views and experience with
you without having to vote on the 9th Circuit.

VICE CHAIR COOPER: Judge, you certainly
don't have to say anything you don't want to, I can
assure you. I just was curious if you had any views,
and if you don't want to express them that's fine.

JUDGE GODBOLD: Well, I guess I'm -- my
position goes back to what I said earlier, I've been
little, I've been moderate, and I've been big, and
little is best. Little is best. But, it's not easy
to do, and it takes -- well, there are two or three
things that tie into it.

In a great big group, one loses his sense
of I am responsible. In the great big group, I'm
thinking now about our 36 judge court, everybody
thinks somebody else is responsible, and I go back
again to what I said, that I don't know what the
nature of the process is in the 9th Circuit exactly,
but I can tell you that in general a great big group
loses a lot of its character as a court.

Can I help any further?

VICE CHAIR COOPER: Judge Rymer?

JUDGE RYMER: If the case load continues to
increase, and if, in your view, you know, a large
court is not optimally effective, then what does one
do?

JUDGE GODBOLD: Well, I think we are going
to do what we have continued to do for a long time,
which is do the best we can with the immediate problem
at hand.

You see, the approach very often is, when
you assemble a group like this, is everything is
discussed in plenary fashion. We are going to devise
a plan for the future. What's the best way of handling
this? And, you've done that in questions you ask.

But, I am afraid our decisions are going to
be in the future made ad hoc, circuit by circuit, as
the need arises. I think politically that's the only
way we are going to be able to do it.

It's hard enough to decide how to
reconstitute one circuit, than to reconstitute all of
them. You know, the commission in the early 1980s,
chaired by the Senator from Nebraska, Dan, do you
remember his name?

PROFESSOR MEADOR: Ruska (phonetic).
JUDGE GODBOLD: Yes, explored the reconstitution of several courts and he didn't get very far. I think he got to maybe one or two circuits at a time, and if the court has too many cases just wrestle with it, do whatever you've got to do about it, you can't make the cases go away.

In redoing the 2nd and the 5th, we thought that Arkansas would happily join a circuit composed of Louisiana, Texas and Arkansas, that would have solved the Mississippi problem. Well, what's a more natural prediction than Arkansas, it's a long way from the northern boundary of Louisiana to the Canadian border, which is bound to the 8th, and Arkansas is a state that's not typical of any of the others in the group, but we are negotiating with the people in Arkansas, and the judges said no, the political figures said no, and the population said no. So, it's not easy to reform.

We conferred with New Mexico, and they said, nope, we are mountain state, we are not interested in you farmers.

JUDGE RYMER: Other than the art of the
political possibilities --

JUDGE GODBOLD: I beg your pardon?

JUDGE RYMER: -- other than art of what is possible politically, which is sort of what you are suggesting in those comments, what criteria or what measuring rod would you suggest for configuring circuits in general?

JUDGE GODBOLD: I would -- I would work at changing opinion among lawyers, among the Bar, although the Bar usually will follow the leadership of the judge, to train people, or to educate would be a better word, that division is necessary, and they ought not to be opposed because of the individual feelings of judges. That's what we had to do for 20 years, not quite 20, I was there for 15 of them, is we had to change the views of a substantial part of our population, and we had to change the views of over half of our judges, and with that in hand we had to go to Washington and convince Congress. And, I'm afraid there's no substitute for that.

VICE CHAIR COOPER: Dan?

PROFESSOR MEADOR: Let me ask a question
about the internal processes of the 11th Circuit.

As you probably know, we have encountered what I would call a perception problem on behalf of a lot of lawyers and so on. It may or may not be reality, but a perception that a case that goes through the process without oral argument, without an elaborated opinion of some sort, that there's no confidence, at least in some quarters, that any judge has really looked at it seriously. And, there is an argument that no case should go through without either oral argument or a reasoned opinion, some view that one or the other might satisfy that viewpoint, but the absence of both is said to raise great doubts about the process. What are your comments about that perception?

JUDGE GODBOLD: Well, Professor, by hypothesis an oral argument, a non-oral argument case is perceived by the judges as a case in which oral argument won't help anybody. It may help the academics with something to talk about in the classroom, but as far as the judicial process is concerned it's a simple direct case.
And, I pointed out to you the figures indicating that several years ago the lawyers didn't feel badly about it, the lawyers as a group. I expect an individual lawyer does.

So, if you are going to have decisions without opinions, and we do have those, our rule permits affirments without opinion in a case that has no precedential value and no interest so forth, and the opinion, or you call it an opinion, just as affirmacy rule 36.1, and that ruling can be only for the appellee, it can't be affirmed for the appellate.

The non-argument procedure gets very good attention, I'll tell you quickly what happens, Dan. I'm the originating judge of a panel of three who sit together on this task for a year. The briefs and records come to me. I study the case, if I think it can be decided without oral argument I write a suggested proposed result, maybe an opinion, and send it to judge two. It does the same thing, he sends it to judge three.

If any judge thinks the case -- any of the
three judges thinks the case deserves oral argument,
he simply checks a little block, there's no discussion
or dialogue, it goes to the clerk and switches to the
oral argument track.

If all three judges agree that it doesn't
deserve oral argument, they agree with the result, and
they agree with an opinion a written, then it goes to
the clerk as an opinion.

Now, when you explain this to lawyers, they
begin to feel somewhat better about it, if you have
the view that there has to be an opinion in every
case, then the courts of appeal can't do this, most of
them can't.

Publication is another matter that I won't
get into, that gets awfully convoluted as to what's
going to be published and what's not.

Does that help any?

VICE CHAIR COOPER: Judge, thank you for
today and for your service to the country in so many
different capacities. We certainly appreciate the
effort that you did by coming here today and your past
service to the Federal Judiciary all these many years.
Thank you so much.

JUDGE GODBOLD: Thank you.

VICE CHAIR COOPER: We have one more
witness, and it's Peggy Zemetronack (phonetic), did I
pronounce that correctly?

MS. ZEMETRONACK: Yes, thank you.

VICE CHAIR COOPER: All right. She's with
Citizens for Honesty in Government.

And, since you weren't a scheduled speaker,
there will be a five minute time limit, so just use
your time wisely, Ms. Zemetronack.

MS. ZEMETRONACK: Thank you very much.

Thank you for the opportunity to speak to
this honorable Commission this morning. My name is
Peggy Zemetronack Dadik (phonetic), and this is my
husband, Michael. I am the President of Citizens for
Honesty in Government. You have a number of citizens
from different groups here from Florida, and also from
Atlanta, from the Atlanta area, and from other areas
in Georgia.

I would like to address some key issues.

We have not, of course, had sufficient notice to
really prepare a lot for this morning, but we represent, really, a new group of citizens. We are pro se litigants, but we are not the typical pro se litigants who do not understand the mechanisms of the courts.

We were thrown in the court system unwantingly back in 1991. My husband and I have been to over 700 hearings in our own cases. We prevailed in the 3rd Circuit last spring. So, we are pro se litigants who have been recognized by the courts as credible.

I would like to say that I believe we can provide a good deal of input to this committee. We would like the opportunity to do some of that in writing.

But, part of what we've heard here today confirms what we have believed are serious problems in our federal court system. You see, part of the problem with staff attorneys is that judges don't read pro se briefs, and this is the reason. The staff attorneys look at the briefs that come in from opposing counsel. Opposing counsel is less than
ethical on many occasions, and what they say in their briefs is, these are pro se litigants and they don't know what they are doing. So, no one reads that non-credible brief, and the pro se litigant loses.

Unlike the attorneys who came here and said they have no problem reaching oral argument, we have consistently been denied, in the 11th Circuit, oral argument since 1994.

We, as citizens, and I speak for many citizens, because I teach pro se litigants how to do legal research, how to be credible and not waste the judges' times across the country. I teach seminars. And, we citizens feel that we pay plenty of taxes, and in return for that we deserve access to an impartial judiciary, not to their staff, not to people who are easily reachable by less than credible attorneys, and they are out there.

We've also had problems in the clerks' offices, and no one will do anything about it. Here in the 11th Circuit, we have absolute evidence that our documents have been tampered with. We sent letters, motions to the Chief Judge here before it was
Judge Hatchett and it was ignored. No one would do anything about the tampering with the files, and we're speaking about a federal felony. This is a serious problem.

We are on our way after this hearing over to the U.S. Attorney's office in hopes that they will do something of it, because we have certified copies of documents showing that documents were removed from our files so that by the time it got to the appellate panel the meaningful documents were gone. And, we have proof that this is happening across the country to pro se litigants. It's a very serious situation. We need to make Congress aware of it.

The lack of ethics, which we all know is there, is just being ignored. We don't know the answer, we hope Congress will come up with an answer, but most of our laws have been based on attorneys, like the attorneys we have heard speak here this morning, who are credible, honest, who bring honor to their profession, judges like the judges that we heard speak here, like Judge Hatchett and Judge Godbold, who are to be respected.
That's the way I was raised, that's the way my peers were raised. We want to be able to maintain that respect in the judiciary, and if we are going to be able to do that we have to recognize that middle America cannot always afford an attorney. There are times when they have to come into court on their own, because they just ran out of money, paying it to attorneys who weren't doing what they were paid to do.

For example, in our own situation, it was over $200,000.00 and our attorneys were losing when we said, well, we can't do any worse.

The lack of security in the clerk's office is a major problem. Anyone can go in to any federal clerk's office, ask for a file, and it is handed to them across the counter. There are no security cameras, there is no one watching. They say, take the file over to that bench and you can look through it. A dishonest opponent can easily go with a briefcase which he has in his hand, pull documents out of the file, slip it into his briefcase, and your records are gone. And, when the appellate panel looks at it, your arguments are not there.
And, when they think it's a pro se litigant, who doesn't know what he's doing, it's a major problem. That pro se litigant is prevented from having justice.

I was very shocked to hear Judge Hatchett say here this morning that it's staff attorneys who are dealing with the pro se cases. The pro ses have an equal right to have justice by an Article III judge. They deserve it, the people who try so hard, my husband and I spend an average of 17 hours a day working on our legal problems. We have had to give up our lives to do this, but we feel that what we are working for will change what's happening in our court system for other Americans, because the one thing we have learned since 1991 is that we have a terrific judicial system. We have good judges, who are just not getting the documents that people are filing, when they are not represented by attorneys.

And, we talked about egos here this morning, and part of it is the attorney ego that creates that, because an attorney who is losing to a pro se litigant, who knows what he's doing, just can't
take it, and he will absolutely pull out the plugs and
do anything to ensure that he doesn't lose against
that non-trained person who is coming in armed with
the law and armed with honesty, and because pro ses,
of course, cannot succeed unless they come in on the
basis of honesty and understanding the law.

I would like the opportunity to submit some
other suggestions to this Commission, and I certainly
appreciate the opportunity to speak this morning.
There is a gentleman here, who mistakenly was thought
to be in our group also, his name is Johnny O'Daniel
(phonic), and he's with a group from the Florida
Keys called the Florida Key Residents for Ethics in
Government. I don't know if you'd be able to hear him
for a few minutes, but I will certainly be glad to
step back if you can give him a few minutes also.

VICE CHAIR COOPER: Sure, that will be
fine.

You can come forward.

Thank you so much, and we'll be glad to
take any written submission you would like to submit.

MS. ZEMETRONACK: Thank you so much.
VICE CHAIR COOPER: Yes, sir, can you identify yourself? There was some confusion, that maybe you were both with the same group, but come forward and we'll give you a few minutes.

MR. O'DANIEL: Yes, sir. My name is Johnny O'Daniel, and we just drove up from the most southern part of the 11th District, the Florida Keys. This is a very serious and very close to the heart problem with me and a lot of the people down there.

We have a bad problem in the 11th Circuit. Right now, litigant pro ses win only three percent of the cases, not a very fair balance.

Now, as Peggy just spoke of, we have a bad problem in the 11th Circuit with court documents and court records disappearing. I would like to suggest to this panel here today that when a person views court files, court dockets, that they must show an ID and sign in.

Pro ses are, like I say, considered the bottom of the totem pole.

I would like to comment on Judge Hatchett's here today speech, I'm very proud we have judges like
that today, but on thing did bother me, last year, I'm going to give you a one for incident, we had a case where a judge refused to correct a court document. We filed 5,200 372s against that judge, 5,200, that's probably more than the rest of the judges in the United States combined together. Yet, what did this judge do? He dismissed them.

This judge stood up here today and told you that he's in the business of making laws, that's a bad problem. Our courts today are here to determine the laws, not make them, to uphold John Q. Public's constitutional right. If it means setting up in a court where litigant pro ses are not held to the same standards as attorneys, fine, let's do it, let's see that all persons' constitutional rights are upheld.

Being a litigant pro se, I should not have to know the approximately 7 million laws on the books today, it's an impossible task. I don't need to know them to have my constitutional rights upheld, that's what we pay judges to do, to interpret the Constitution, to interpret rights.

That's all I'm asking that happens in the
11th Circuit today, you know, it hasn't always happened. I'm ashamed of our judicial system, but I'm proud that we have people like Judge Hatchett, you know, come up here and says, yes, I have a problem with my court, oral argument is very important, and it is very, very important to pro ses. Pro ses must have and must be guaranteed a right to oral argument.

Thank you.

VICE CHAIR COOPER: Thank you for taking your time.

This hearing is now adjourned.

(Whereupon, the hearing was concluded.)