TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PUBLIC HEARING ON PROPOSED)
AMENDMENTS TO THE FEDERAL)
RULES OF APPELLATE PROCEDURE)
AND OFFICIAL FORMS)
)
JUDICIAL CONFERENCE ADVISORY)
COMMITTEE ON APPELLATE RULES)

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ADMINISTRATIVE OFFICE OF
THE U.S. COURTS

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COMMITTEE ON APPELLATE RULES)

Mecham Center
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C.

Wednesday,
April 1, 2015

The parties met, pursuant to the notice, at 10:04 a.m.

ATTENDEES:

HON. STEVEN M. COLLOTON, Chair
HON. MICHAEL A. CHAGARES
HON. ALLISON H. EID (By Video Conference)
HON. PETER T. FAY (By Teleconference)
HON. RICHARD G. TARANTO
PROF. AMY CONEY BARRETT (By Video Conference)
PROF. CATHERINE T. STRUVE, Reporter
GREGORY G. GARRE, ESQ.
GREGORY G. KATSAS, ESQ.
DOUGLAS LETTER, ESQ.
KEVIN C. NEWSOM, ESQ. (By Teleconference)
CHARLES A. BIRD, ESQ., Witness
CYNTHIA KEELY TIMMS, ESQ., Witness
JAMES PEW, ESQ., Witness
DAVID H. TENNANT, ESQ., Witness

I N D E X

P R O C E E D I N G S

(10:04 a.m.)

JUDGE COLLOTON: Good morning. This is a public hearing on proposed amendments to the Federal Rules of Appellate Procedure that were published in August 2014. The proposed amendments would affect Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and new Form 7.

By subject matter, the proposed rules concern the following: 1) inmate filings, Rules 4(C)(I) and 25(A)(ii)(c), along with Forms 1 and 5 and new Form 7; 2) tolling motions, Rule 4(A)(iv); 3) length limits, Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6; 4) amicus filings in connection with rehearing petitions, Rule 29; and 5) the so-called three-day rule, Rule 26(C).

The advisory committee has received written comments on the proposed amendments and will give those comments careful consideration before determining how to proceed with proposed amendments. In addition, four witnesses have or four commenters have requested to testify about the proposed amendments, and that is the reason for our hearing today.

Nine of the 10 members of the advisory committee are participating in the hearing. Here in

Washington we have Judge Chagares, Judge Taranto, Mr. Katsas, the Solicitor General's representative, Mr. Letter, and I, Judge Colloton. Also here are the committee's reporter, Professor Struve, and the committee's liaison from the Committee on Rules of Practice and Procedure, Mr. Garre.

Participating by teleconference are advisory committee members Judge Fay and Mr. Newsom. Participating by video conference are advisory committee members Justice Eid and Professor Barrett. The tenth member of the committee, Mr. Katyal, is unavailable and he will receive a transcript of the proceedings.

As I understand it, each of the four witnesses wishes to testify concerning the rules governing length limits, and one witness also wishes to testify concerning the three-day rule. The Chair has allotted up to 15 minutes per witness for prepared testimony.

We will hear from the four witnesses in the order of their requests to testify and we will hear from each witness first. Then we will have time for any questions that may come from the members of the advisory committee and the others who are here at the table this morning.

So, with that, we will hear testimony first

from you, Mr. Bird.

MR. BIRD: Thank you, Judge Colloton. A central point of the American Academy's written comment is --

JUDGE COLLOTON: Is your -- make sure your microphone's on and the --

MR. BIRD: I see the green light.

JUDGE COLLOTON: All right. Now it's --

MALE VOICE: There you go.

JUDGE COLLOTON: That's better. Thank you.

MR. BIRD: Thank you. I'll begin again. Thank you, Judge Colloton. A central point of the American Academy's written comment is that complex cases require the existing 14,000 words. I'm very happy to have had that confirmed in part by the Sisk and Heise article which was published essentially at the time of our first attempt to convene this hearing.

I am also happy that over the time after the American Academy's comments we have had comments from across the nation in which experienced practitioners have anecdotally validated the same point, practitioners from California and Texas, and then essentially on the day that we were snowed out before, a series of comments from the appellate departments of the elite firms here in Washington, D.C., whose practices are characterized by lots of Supreme Court

opinions, many Federal Circuit opinions, and D.C. Circuit appearances as well.

I also take the Solicitor General's comments at the core to validate the same point. That is, when the Solicitor General says that in complex cases 12,500 words just would not be enough fairly to present the government's position, the Solicitor General is saying the same thing we are.

But the Solicitor General offers a different solution. The Solicitor General's solution is to adopt yet another rule which would essentially overrule or preempt all Circuit rules and say, well, we never actually grant additional space and rather institute a principle of liberal construction based on a case-by-case analysis of requests to file over length briefs, a different solution, by the way, for which I have no enthusiasm since I do not represent the federal government, and I do not think private practitioners would be likely to get the same liberal construction or deference in a process of asking for a discretionary addition to the length of a brief.

The panel has both the Academy's written comments and my outline. Just as with an appellate argument, I certainly do not propose to read my outline or cover it word for word. I hope to be somewhat spontaneous in discussing the issue before us

today.

One of my real hopes behind requesting personal appearance for this is that the panel will have questions when we are all finished. All of us who will testify today are in one way or another engaged in the practice of law for private parties, either in the law firm context or an organizational context. We are the people who would be affected by these rules, and there's a lot we can say about the day-to-day consequences of reducing the brief limits.

I don't propose to tell war stories, but what I would like to go to is what obviously the American Academy and most of the commentators have considered to be what must be the real reason for proposing this rule. It can't be just because there was an administrative mistake 14 years ago. There must be a concern by someone that briefs are too long and it would be nice to shorten them.

As a very broad summary, I would say the American Academy's comments and certainly our discussions anecdotally about what we should be saying here today recognize that the Federal Courts of Appeal are entitled to better lawyers and are entitled to better briefs. The question to us is whether we can help you get there and, if so, how.

We plainly think from our written comments

that adopting a one size fits all rule, shortening briefs by 10 percent, 1,500 words or whatever you call it, is not a solution.

But we, as much as speaking from the perspective from time to time of the appellee, we are as much infected as the Courts with lawyers who can't write, with lawyers who don't understand how to advocate in Appellate Courts, with lawyers who might have had a pretty good idea how to advocate in Appellate Courts 20 years ago but haven't yet used a computer and are still typing their briefs on Underwoods, do not understand the ongoing development of technology and how that affects how Judges read briefs and where Judges read briefs, and even to the point of how they scan pages, and have never thought about that might affect how we write briefs.

Also, many of those lawyers have great difficulty deselecting issues and arguments. That is a process that takes great courage because we don't know when we write the brief exactly what the Court will consider to be the most critical issue or the most critical cluster of issues. Wish we did, but we don't get to have a conference with you in advance to try to figure that out.

So it takes a great deal of experience and a lot of courage to tell a client even though your trial

lawyer did a great job of framing this in the District Court, we really shouldn't argue it in the Court of Appeal because the standard of review is against us and we need to stick with this or that legal issue.

And then we have to deal with clients who think they know something about Appellate Courts and appellate briefing and who really don't and who will take what obviously all of us would consider to be a beautifully written draft and tell us to drop a footnote in it, add an argument, raise an issue that wasn't perfected in the District Court, and generally cause havoc with the production of a brief that we think would be a winner for that client and would be useful to you.

We have to deal with all of those things, and we think there are a number of things that can be done about them, and we would like to have this be a cooperative process between bench and bar rather than bench versus bar over brief length.

I also recognize in saying that that many of the things that are in my outline and I will mention briefly today are things that can't be done by this rule committee, so only to a limited extent do I envision that rules as such will improve the quality of advocacy in the Court of Appeal.

I think you've seen many comments here that

a rule shortening a brief will simply get you the same bad brief, only 1,500 words less. And I would like to think that most appellate Judges, having read 12,500 words into an incomprehensible brief, put it down and find some other way to understand the case rather than slogging through the last 1,500 words.

But in any event, one thing I will mention that's come up amongst some of us who testify, and it's a very active idea in a number of Courts, is a concept for training lawyers to write better briefs when they're writing briefs.

One of the great problems with continuing legal education is we can put on marvelous programs for people and appellate practitioners come to it and experienced practitioners may get two or three great ideas in the course of five hours of seminar, and the people who are writing you lousy briefs aren't there.

So what would be wrong with having on each Court's website the equivalent of YouTube, what I personally call just in time training, so that a lawyer who is embarking on writing an appellant's opening brief can click a five-minute, seven-minute, no more than 10-minute -- they probably have short attention spans -- YouTube that will get to the essentials of how to write a decent brief, including the notion that every brief has a right length and

that right length is as short as you can possibly make it, while being candid to the Court about the facts, while being candid to the Court about where and how an issue was preserved, while being candid to the Court about the standard of review, and while developing your argument with cases cited that mean what you say they mean and that are discussed enough so the Court can tell that you understand and are advocating for the holding of the case, not just the stray piece of language that you put in a parenthetical after the citation.

I think that could be very useful, and it's the kind of thing in which practitioners can be very helpful to the Court because we can do those videos from our experience. Everybody in this room has taught that kind of seminar and could condense that kind of work circuit by circuit into something of appropriate length.

I also think that the Courts should consider certifying federal appellate specialists as the states do. Who should actually do that? Well, we have Circuit Bar associations in the Third, Fifth, Seventh, Eighth, and Federal Circuits. Those are organizations that are capable of being invented in other Circuits and upgraded to an official status in the Circuits where they already exist. They are capable of taking

the certification tests that are used in states now to certify specialists, modifying them to take into account federal practice and procedure.

And certifying appellate specialists. Why do that? Certification is one indication to a client looking for an appellate lawyer that somebody knows where the courthouse is, knows what an appellate brief looks like, actually can follow the rules and produce a basic quality work product.

It's not a top specialist certification, but it is some guarantee to the Court that, to the client first, that a person potentially to be hired as an appellate lawyer knows what he or she is doing.

It is also a piece of leverage if someone who is certified performs defectively because certification is something that could be withdrawn if a person persistently behaves in inappropriate ways, including filing briefs out of conformance with the rule and the like. This committee can't do that, but it's the kind of dialogue I think is appropriate for how you get both better lawyers and better briefs.

There are other things that are discussed in my outline that I think I'll skip here to make sure that I don't run over time and everybody else gets time, but there are things that the Courts can do. I think having more oral arguments in counseled cases

gives lawyers feedback about their briefs.

I'm not suggesting that oral argument should be a time for a Judge to lean back in the chair and discuss better briefing strategies, but simply by going to a day of argument, including one in which I have briefed the case, I always learn something about appellate practice.

And my number of arguments is well in three figures. I learn from the bench every time that I interact with you when you are doing your job. And any decent lawyer who expects to do a second appeal will do the same thing simply by showing up and paying attention at oral argument.

I want to get into one final point that's at the end of my outline, the subject of fluctuating limits for appellate briefs. We have had active front end case management in the United States District Courts since the '70s and it was revolutionized by the role of Magistrate Judges.

If there really is a problem with length of briefs, with quality of briefing, with how cases are managed in the Court of Appeal to get to the point of going to a panel in a comprehensible way, why don't we at least consider some kind of front end management in the Appellate Courts?

Courts that have Circuit mediation programs

do this to some extent de facto because the Circuit mediators are great educators to people about issues that may work and may not work simply by discussing the cases.

I'm not suggesting a mediator should become, in addition, a case manager should become someone who decides that your case is of the most complex quality and even 14,000 words for your brief may not be enough, whereas your case is a very simple potential error by the District Court in a one issue motion to dismiss. And on a case-by-case basis we could even brief that, we think anybody could brief that, in 7,000 words.

But I think there are processes that could be experimented with Circuit by Circuit for front end case management that would give you the equivalent of this rule, but do it on a sensitive case-by-case basis instead of a one size fits all, which I think in the end will just cause a great deal of friction.

Thank you very much for your time. I hope there are questions at the end.

JUDGE COLLOTON: Thank you, Mr. Bird. Before we go to the next witness, I neglected to introduce Rebecca Womeldorf and Bridget Healy from the rules committee support office who are also attending here at the table this morning.

Ms. Timms, we'll hear from you.

MS. TIMMS: Thank you. Is my mic on?

MALE VOICE: Not yet.

MS. TIMMS: Thank you. My name is Cynthia Timms and I'm here on behalf of the appellate section of the State Bar of Texas. This issue came to our attention last fall, and as chair of the appellate section this year I wanted to look into it, and so I started with this committee's report or memorandum that it filed with its suggested rule changes. I also then read through the minutes of the April 2014 meeting and felt that I had a decent grasp based on those things of why we were doing this.

What this committee said was that while the estimate used in 1998 of 26 lines per page appeared to be sound, the research had indicated that the estimate of 280 words per page is too high. It then also said a study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark. And then they attached the memo.

I became curious about that and so I happened to have an old brief that we had worked on very, very hard back in 1996 and I took that brief, turned it into a .pdf, converted it to Word, and counted the words. And there were 281 words per page, which piqued my interest, and so I started working

with other members of the appellate section of the State Bar to gather as many briefs as I could to study how many words were fitted, fit in per page.

And I will tell you that was a difficult process because I was looking for briefs that were a minimum of 17 years old. Essentially you have to try to reach out, identify the hoarders that you know, contact them and see what they can do for you.

I was able to gather a number of briefs, about 16, 17, 18, something like that. They're listed out in Exhibit A. I will admit that I was a partial hoarder also. But my study was interesting because there was not one brief that I studied that was as low as 250 words per page.

If we all recall, the font size could be much smaller then. It could go down to 11 points on the font. The smallest font that anyone used in these briefs was 11.5 and it went up to 13 point font. But the number of words per page went up to, went as high as 336 words per page. The lowest was 263 words per page. The overall average exceeded 290 words per page.

I will tell this group I used every brief that I could get my hands on except for one in which that particular brief author had inserted very odd page breaks that would make a word-per-page analysis

extremely difficult without breaking the brief down into various sections.

We also had access -- because Texas only recently had gone to a Word system within its State Court system, and that happened in 2012. And so at the time that we made that conversion we were at 13 point font and 50 pages. And so, as Exhibit B to my study, you will see that, or Exhibit B to my paper, you will see that study, and it is a much more thorough study because it was contemporaneous with the briefs that were being produced at the time.

It's a study of 63 briefs. They mostly studied the shorter briefs that were being filed. We have a petition for review system, which is like a petition for certiorari system, which your initial brief is fairly short. It also included motions for rehearing, that type of thing. It studied 63 briefs. It also, even though the 13 point font was used in all those briefs, the average exceeded 290 words per page.

There were only four briefs out of the 63 that had fewer than 250 words per page. There were 28 that exceeded 300 words per page. And ultimately the Texas Supreme Court decided to adopt a conversion rate of 300 words per page when it converted the page system to the Word system.

I want to share with you a recent experience

that we had at my law firm, and this was on a motion that had to be filed in the Fifth Circuit. So obviously we're under a 14 point system now, 20 pages. And the case was rather intense in terms of there's a lot at stake. It was an injunction that was issued by the Trial Court in which the Trial Court stayed only a tiny portion of the injunction. The appellant was naturally moving for a stay of the rest of the injunction. It was a two-week trial, antitrust, Lanham Act, injunction, high damages.

And so we decided to oppose the stay of the remaining portion of the injunction, which was most of it, and we knew that we had a very high burden because I would think if I were on the Court that what I would tend to do is say let's expedite, but let's go ahead and stay this injunction.

It was an affirmative injunction. It forced people to go out and do things and write letters and post things on their website that would not normally be there. It was not an injunction that just kept things as they were.

So we worked very hard to try to tell the entirety of our story as best as we could in those 20 pages, the background of the case, the facts, and everything else. And we used every ounce, every little square bit of those 20 pages to tell our story.

Just as an aside, that particular document, we fit 290 words per page.

The point is this. It worked. The Fifth Circuit refused to stay the injunction. Had we had less space, less words available to us, I don't think we would have pulled it off. We were surprised as is that we did pull it off. So that's just a little bit of a war story here for you to think about.

I want to go back to your original memorandum because I'm a little bit bothered by what might have become a process problem. And what struck me, yesterday and last night I read every comment that was filed with this brief, and the comments almost seemed to accept the fact that this really cannot be based on the 1993 study that was done, that there has to be something else at issue, that it must be because the Judges perceived briefs as being poorly written, too long, improper, bad advocacy, that that must be the source of the problem. And that's what most of the comments addressed. It made me feel that our comments had almost become quaint and that we had taken the report at its word and had studied that.

But it seems to me that what the report did, what this committee did in its report was it acted entirely properly in a general sense in that it identified a problem and then it identified a

solution. The problem was that maybe we were wrong in the initial conversion rate. What's the solution? Let's adjust it.

But there also seems to be in the comments generally that there's an acceptance that that's not what the problem was, that there's a general acceptance that, yeah, briefs might have been longer than 250 words per page back then. But the debate has become about the solution and other possible reasons to have the solution and what the solution might actually be addressing.

And I think that's where we hit the process problem. I think that it is far better once we realize that the original problem may have been something else, maybe that what we identified as the problem was not really the problem, to just stop and just go back to the outset and say what is the problem, what are the problems that we are trying to address.

We may come back to this solution someday, but let's go back to the problem, let's identify the problem, let's identify all the possible solutions, and then this committee needs to ask itself which of the solutions are actually rule-based. Maybe there are other solutions that are not rule-based, and I think that Mr. Bird was talking about some of those.

But that way I think the process will work a lot better. I realize that at the end of the day what we're doing is we're issuing rules. People are going to have to live by rules. That's all it is. But I think that on every single process that occurs, if the process is worked right, you'll have buy in and people will be a lot happier living even with rules that maybe they don't like.

And so those are my comments. I'm turning back in some extra time so we can move forward. Thank you.

JUDGE COLLOTON: Very well. Thank you for your testimony.

Mr. Tennant, we'll hear from you next.

MR. TENNANT: Thank you, Judge Colloton. I assume my -- yes, it is working. Good morning. It's my honor to be appearing before this advisory committee on behalf of the Council of Appellate Lawyers within the Judicial Division of the American Bar Association. And with me today is Deena Jo Schneider, who is co-chair with me of the Appellate Rules Committee of the Council of Appellate Lawyers.

My comments, I'd like to basically cover three different areas. One is a little bit of a view from the trenches. I mean, we all are in the trenches in one respect or another, but from the perspective as

chair of my firm's appellate team and co-chair of our Indian law and gaming team and how those two things come together, talk a little bit about why anecdotal experience that I will tell you about first maybe isn't the best guide for figuring out what to do here, and then wrap up with a discussion about what would the world look like with reduced word count and subject to motion practice to expand the length of briefs.

So just a little bit on the collaborative side of the Council of Appellate Lawyers and what we do with the Judges. We are the only national bench Bar appellate organization in the country and we work closely with federal Judges and State Court Judges in doing CLE programming and putting on the Appellate Judges Education Institute in the fall every year.

I would support certainly Mr. Bird's comments and those of the American Academy of Appellate Lawyers with respect to the opportunities for there to be further collaboration on improving brief writing for lawyers appearing in our Federal Circuit Courts.

So what does it mean to kind of have a practice that is in Indian law and appellate law? It means four trips to the U.S. Supreme Court, only one of which, because it's 40 years of practice, only one

of which I had the honor to be part of. And in terms of that practice, 40 years of interpreting the 18th century treaties, going to the National Archives to look at underlying documents, presenting everything by way of motion, and never a trial in 40 years. So that's kind of one end of the spectrum.

And not surprisingly, those kinds of cases dealing with constitutional issues, what does it mean to be a sovereign, how do regulatory issues work out, how do ancient Indian land claims pan out in today's world, all of those are highly complex matters that take up a lot of pages, and Courts are very receptive to expanding to allow the necessary briefing to occur there.

So that's kind of one end of the spectrum where you're really looking at robust appellate briefing. You have every time up and down, the case history, the procedural history, kind of its accretion, and you get more and more and more, and every time there's just kind of another layer of complication that you have to explain on the way up and then on the way back down.

My most recent appeal in the Second Circuit, the arguing Bay 4, very different. It's a person in my firm who tried a one-week long employment discrimination case. Very little in the way of motion

practice, although there were some pretrial motions. But it's really, you know, a trial record, and with an appellant -- our client was given a defense verdict, a no cause verdict, so the plaintiff's lawyer is appealing and submitted actually an undersized brief filled with seven partially articulated grounds for reversal, with a almost random selection of standards of review and applying none of them to any of the arguments.

So, as the appellee, that kind of brief requires almost a law clerk-like response where you're helping the Court. You're trying to untangle the arguments, you're trying to actually give them some kind of context, and to actually do the standard of review analysis that was missing in the appellant's opening brief.

In order to do that I came up to 13,997 words, you know. And it was, you know, cutting and just trying to get it there. And again, one of the issues was the plaintiff's counsel attacked essentially the District Court Judge, saying that they were deprived of a fair trial, so I was trying to support the good name of the District Court Judge and trying to -- when people can pick out, cherry pick, well, he said these things in a sidebar conference and, you realize, well, that's after the plaintiff's

lawyer was reprimanded 10 different times on the same issue and persisted in that lawyer's conduct.

So, you know, the comment is it's easy to tell a lie or, you know, it's hard to disprove it or, you know, the idea that there are essentially crimes of omission as apart to commission where people are leaving out critical facts, leaving out critical cases. And basically I've been there as a law clerk, having to do all the running to make up for what wasn't in the papers.

And I think it's our job as lawyers in private practice representing fee paying clients to make sure that we are presenting the best case that we can to the Court, fully understanding that less is more in most cases, but understanding that we can be a great service to the Court by basically doing the fixer, fixing up of whatever is defective in the other party's brief.

And it really does take two to tango to have a kind of efficient briefing. I have not had the pleasure of working with Mr. Bird or Ms. Timms on the other side of the case, but I'm sure we would easily fit within, you know, the kinds of parameters that are available for word count in whatever Court because we would be fully understanding of the need that Judges will often turn off, right, if you write too long.

It's kind of self-policing, that you don't want to write more than you think is necessary.

So, I mean, I think there's a lot that is just kind of not broken about the process, and actually, given the room, the 14,000 word cap room that presently exists, we can do a lot to actually facilitate the efficient resolution of appeals with counsel who maybe don't have the experience and aren't in a position to do that themselves.

Okay. So that's a whole bunch of anecdotal evidence from me that I'm now going to say, well, that only makes sense so much because we each have our own experience and maybe it squares with that or not. I think it's fair to say that word count, the length of a brief is both, you know, it's a underinclusive and overinclusive kind of limit because you can have repetitive, poorly written briefs that are 10,000 words or 5,000 words. It all depends what is this brief covering and do you need the words, do you need the space to actually address it. So I think it's just kind of a, it's a very crude measure of some type of quality of briefing.

I would point out that former Chief Judge Dennis Jacobs from the Second Circuit, he was on an appellate CLE program that I happened to be the program co-chair. And Judge Jacobs' comment when we

were talking about, you know, should this word count rule be changed, his comment was he never complained about the length of an interesting brief. He's a terrific brief writer who's in private practice, and he holds himself out as being really a consummate opinion writer.

And at the end of the day, is the brief well-written, conveying the points that need to be conveyed, and otherwise kind of hitting its mark. And word count, it's not quite arbitrary, but it's certainly a very rough measure of anything about quality. Of course the Heise and Sisk study suggests at least for appellants there is a strong causal correlation between the length of an appellant's opening brief and the possibility of a reversal.

And that brings me to what else can we be doing in the way of empirical studies to take us out of the context of one talking head or another talking, you know, about their experience. And I think that there's actually a lot that we can look at. We respectfully suggest that a study could be undertaken of actual practices of granting motions for oversized briefs. What is the current practice in the different Circuits? How frequently are motions being made? How frequently are they being granted? And what kinds of judgments are being made about the need for oversized

briefs in that context?

The I guess complaints about overly prolix briefs is that are there any patterns? Are they coming in criminal cases? Are they coming in civil cases? Are they immigration cases? Are they employment discrimination cases? Are they coming out of trials? Are they coming out of motion practice?

It's basically, you know, areas where there's settled law. Are these lengthy briefs coming kind of in what I call cookie cutter appeals and people just aren't understanding that there's a whole body of law that is basically determinative and that they're resulting in summary opinions where basically the Court is saying there's really nothing here to be decided, this was all kind of right down the middle, decide, you know, within existing precedent.

Are the briefs that are deemed kind of overly long, are they in multiparty cases? Are they in where there are too many issues being raised? Is it because lawyers at that kind of fundamental framing point are just throwing in too many issues and that leads them to actually generate a brief that is too long?

You know, and I think everybody who has served as a law clerk or as a Judge and read lots of briefs have read briefs that make you snooze or make

you angry or make you whatever. You're not persuaded, and there are a lot of things that can do that.

And from my clerking days, what I remember most are the ones where I had to go do the legal research and go back to the record because people hadn't done their job. They hadn't actually given the Court the facts and the law that were needed in order to decide the issue.

And so maybe I err on the side of wanting to be more complete, but I think there's a lot to be said for making a presentation that is reasonably complete, understanding that at the end of the day, if you err on the side of overcompletion, busy Judges will punish you by putting your brief down before they get to the end of it. But it really is, I think, a judgment that experienced appellate counsel are in a position to make, subject to all of the real world practical impacts and forces that Mr. Bird was talking about with clients who make all kinds of real world demands, and you're just, you're trying to do the best.

And I think it's significant that it's almost universal. I think the comments are almost universal from lawyers in private practice who have fee paying clients that this is, you know, important to have the room, the flexibility to be able to go to 14,000 words without having to make a motion.

And that brings me to the whole issue of what would it be like in a world where there's 12,500 words as the limitation and you have to make a motion every time you want to go beyond that. Well, of course it potentially adds costs, a motion practice, it adds uncertainty, and it's injecting inefficiency into the process.

I mean, if you're trying to look at it from a process standpoint, you would never want to go from a certain 14,000 to a 12,500 uncertain rule in terms of saving resources of the parties and the Court. But more than that, it's kind of, I don't know if it's the case in all Federal Circuits, but, you know, by local rule I think most of the Circuits, I believe the Fifth Circuit anyway, requires you to present your proposed oversized brief two weeks before the filing date.

Now just imagine you're in the Fifth Circuit dealing with the governor as your client, the attorney general of the state as your client, and the solicitor general of the State of Texas, and you're having to get everybody to sign off on that brief two weeks before the due date. You're talking having to get your brief done a month, six weeks before the due date. I mean, there are just those kinds of real world timelines that make those kinds of local rule restrictions or requirements for almost a prefiling

motion to go over a very challenging rule to meet.

I would just conclude by saying that we've had a, I've counted 15, 16, 17 years, something of real world experience with the 14,000 word limit, and we believe it's working well, isn't broken, and should be maintained. And if this committee were inclined to look at it further, it would be to do the kind of empirical study that gets past anecdotal views of what may or may not be an over-length brief. Thank you.

JUDGE COLLOTON: Thank you, Mr. Tennant.

Mr. Pew, we'll hear from you if you can get that one to work.

MR. PEW: Well, thanks very much for the chance to testify. I am the one person, I think, who submitted testimony both on the word limits and the three-day rule, but in the interest of being brief I will just address the brief limits. And of course I'm happy to answer questions on the three-day rule as well.

Just to introduce myself a little bit, and my experience I think is relevant to this question, most of my practice is in the D.C. Circuit. I've practiced predominantly in the D.C. Circuit for the last 17 years. My law firm has a number of cases in Circuits all over the country, but my particular work deals with a particular kind of case that goes to the

D.C. Circuit, which is judicial review of a federal agency action.

And a number of federal statutes send review cases directly to the D.C. Circuit or to other Courts of Appeals, and so these are actually the -- in these cases, the Court of Appeals is the first and usually the only Court that hears the case. And I think that, you know, these are unusual for a number of reasons.

One aspect of my work in the D.C. Circuit that I think is relevant is that a lot of these judicial review cases are multiparty cases. So the government rule might be challenged both by industry petitioners who think the rule is too stringent and by environmental petitioners who think the rule is insufficiently stringent.

And often in most cases what the D.C. Circuit does is shorten the word lengths already from 14,000 words to 12,500 or even 10,000 words, and so I have a lot of experience in dealing with shorter word limits and what effect that has on the cases. And the effect it has in my experience is to force petitioners to drop valid claims or take the risk of trying to brief those valid claims in such a summary brief format that they risk either losing or making bad law or both.

Now part of what makes these cases different

is that judicial review cases involve, will result in a decision that does not just affect the litigants. Now obviously any appeals case in a sense is precedent, so it affects more than the litigants, but these cases literally affect more than the litigants. They're cases that pass judgment on the validity of a rule that affects the public at large.

And so a decision to not raise a potentially valid claim means that a rule that may be unlawful will go into effect. And judicial review is the only mechanism by which federal rules are held accountable. It's the only check on federal agencies' authority. There is no, apart from judicial review by citizens or state governments or local governments or organizations, there is no check on the federal government's rules other than judicial review.

So, you know, if bad law is made because a brief is not long enough to explain the issue thoroughly or if an issue has been dropped, that issue, that aspect, unlawful, arbitrary, or otherwise, will go into effect and affect the public at large for a long time to come.

Another aspect I think of these judicial review cases that is unusual is their complexity. The idea behind -- I think the concept underlying word limits on appellate briefs is that there has been a

District Court trial that has narrowed the issues, and I think the concept behind the statutes that send judicial review cases directly to the D.C. Circuit is that the agency, the administrative process, will serve the same function and narrow the issues for judicial review.

In practice, that's not what happens. The administrative process, you know, certainly can, you know, can theoretically lead to a result that's either satisfactory for the party who's been before the agency, and essentially they comment on the rules and rule changes to their satisfaction and they don't need to bring a case, or it could conceivably lead to a situation where the agency explains its rationale more thoroughly and the party may still be dissatisfied with the agency rule but comes to the conclusion that it's not worth bringing the case.

However, in my experience, there are often many, many issues in the rules that are still deserving of judicial review. And this is not a situation where it's simply good enough to ask a Court to throw out the decision of the Trial Court or throw out the decision of the agency because often what petitioners need from an appellate decision in judicial review cases is not simply vacatur of the action by the agency but review of each of the

unlawful aspects and a remand for the agency to fix those specific defects.

So simply picking your best argument, limiting your challenges and making your best argument in the hope of getting the rule overthrown isn't a tactic that works in these judicial review cases because what may happen after all this, conceivably, you may end up with a result you don't want, which is a rule that is good in some aspects and bad in other aspects being thrown out, or you may end up with a judgment that simply doesn't cover some of the illegal or arbitrary aspects of the rule that's being challenged.

Another aspect of judicial review cases that I think is important is the degree of deference that is given to agency actions. I'm not suggesting that there shouldn't be deference given to agency actions, but that's simply the way it is. Agency statutory interpretations are reviewed under Chevron, which is a case that indicates that as long as the agency's interpretation of a statute is not unlawful or unreasonable it gets deference. Agency actions are reviewed under State Farm, which holds that as long as an agency action isn't arbitrary it gets upheld.

I'm not addressing the merits of those review standards, but for a Court to really exercise

review under those standards it needs to be able to thoroughly understand what a petitioner thinks is wrong with the rule. And when there is an extensive administrative record, as there often is in these cases -- administrative records may go thousands of pages -- it simply is impossible to do that in the shortened word format.

A couple other things I think that are particularly relevant in these cases. One is that it's not just the opening brief that matters but the reply brief, especially in this kind of case, because often the issues that are fundamental or key to deciding the case come up for the first time in a respondent's brief. Issues like standing or jurisdiction, for example, may not be raised until they're raised in a respondent's brief or in a respondent-intervenor's brief so that the reply, which is half the length of the opening brief, has to cover not just all of the merits issues but also a bunch of new issues.

In my experience, I've often been forced to dedicate half of my reply brief or even more of that to addressing these kinds of new issues, which makes obviously the words that are available for addressing the merits issues shorter.

I guess the last point I'd like to make is

that the D.C. Circuit, as I mentioned before, already does shorten the word limits on a regular basis. There are really two pieces of this that I think are relevant. One is I think it shows that the Courts, the Appellate Courts are perfectly capable already of making decisions about what length of brief they want and tailoring those decisions to the cases in front of them. We're not always happy with the Court's decisions to shorten word lengths in our briefs, in our proving our cases, but it's clear that the D.C. Circuit at least does it on a regular basis and it has the process for doing that.

The other is that shortening the default word limit to 12,500 words is unlikely to prevent the Court from or individual Courts from shortening word lengths further in multiparty cases. The rationale for shortening word lengths in multiparty cases isn't that briefs are too long or too wordy. They may well be, but that's not the rationale. The rationale is simply that the Court is getting more briefs. The total number of words that are going before the Court is greater because there are more parties. And to address that extra resource stream, the Court is shortening the word lengths, the briefs for all the parties. That same impetus would still be there if the default word length were shortened. We're

concerned that briefs would be shortened even further if the word length is shortened for the ordinary briefs. With that, I'll stop. Thank you.

JUDGE COLLOTON: Well, thank you, Mr. Pew, and thank you all for your testimony. We have time now for some questions or discussion by the advisory committee members. Maybe I'll ask one or two to start the discussion, and then I'm sure my colleagues will likely wish to chime in.

By way of background, this matter came to the attention of the committee because we had a suggestion to change rules that are currently expressed in page limits to word limits. That required the committee to consider what is the appropriate conversion ratio. And in the course of that discussion, as you know from the materials, the committee thought that 280 words was not the appropriate ratio to use for the new conversions, and the question then arose whether we should revisit the conversion ratio for the brief rule which was changed in 1998. The other rules were not changed and they remained in page limits.

Now Ms. Timms talked about the history of the rule and the committee's conclusion that the equivalence ratio was mistaken, and I think Mr. Tennant mentioned that in his written testimony,

although not today, and Mr. Bird's organization wrote about it. So all of you have commented on that I think. Maybe not Mr. Pew.

So let me mention some of the history that was before the committee and give you a chance to comment on that as you'd like. In 1993, the D.C. Circuit advisory committee on rules did a review or a study of appellate briefs and concluded that, based on their review of briefs, the average page, average per page word count was 250 words. And the D.C. Circuit on that basis adopted a local rule before the federal rule was changed that limited briefs to 12,500 words.

And I believe, Mr. Tennant, in your written testimony you acknowledged that a typewritten brief before the age of computers likely would have included approximately 12,500 words.

MR. TENNANT: Or it could have in the amount of space, Courier type font.

JUDGE COLLOTON: All right. And then, when the rules committees looked at this in the '90s, by September of '97 a report of the standing committee on rules said that new computer software programs made it possible to create briefs that complied with the 50-page limit but contained up to 40 percent more material than a normal brief.

So this committee had our clerk's

representative conduct a study of briefs filed in the Courts of Appeals. These were filed in the Eighth Circuit because the clerk's representative is from the Eighth Circuit. And the clerk's representative took 210 briefs, randomly selected, filed in the Eighth Circuit by attorneys from 1995 through 1998. And even with this potential for an increase of up to 40 percent more material that the standing committee referred to for the use of computers in that era, the clerk's study found an average of 259 words per page or 12,950 words for 50 pages.

Then Judge Easterbrook's comment to our committee on the proposed amendments said that he had conducted a word count process on 50 briefs filed by law firms without printing at around this time and found an average of about 13,000 words for 50 pages.

When Rule 32 was amended in 1998, however, the advisory committee note says that 14,000 words approximates the current 50-page limit. And when the standing committee reported Rule 32 to the Judicial Conference, its report said that it established length limitations of 14,000 words or 1,300 lines of monospaced typeface, which equates roughly to the traditional 50 pages.

So I wanted to give that information for the record because of what Ms. Timms said and what the

others have said in their written comments, and I'd invite you to comment if you wish on why you think the committee was mistaken to think that 14,000 words was not the right equivalence for a traditional 50-page brief. Ms. Timms, would you care to speak to that?

MS. TIMMS: As I understand the question, it is why it is -- the question is why we think that 14,00 words is not the right equivalent for a 50-page brief. Is that the question?

JUDGE COLLOTON: No. I thought you were criticizing the committee's conclusion that 14,000 words was not the correct equivalence.

MS. TIMMS: I see. I understand.

JUDGE COLLOTON: And I'm giving you some material that was, at least some of it, the clerk's study and the D.C. Circuit study, was the basis for the committee's conclusion, and asking whether you wish to comment on that since your testimony was, I thought, today suggesting that the committee's conclusion was incorrect.

MS. TIMMS: You know, my guess is that -- let's go back and look at my study, the briefs I was able to gather from the 19, the pre-1998 change. These are briefs that people hung on to for some reason for 17 years or more. My guess is that they were briefs in very complicated cases. That's

certainly what I hung on to. These cases tended to be in the environmental area, oil and gas, accounting malpractice. They were complicated cases.

So I think what I tended to look at in my briefs, whether, and it certainly was not intentional, was these upper end cases that we've been referring to, the cases where you would have to go and ask for more words, the ones where, even though most lawyers, most good lawyers in a typical case might have filed a brief that was 10,000 words, 12,000 words, whatever, in these cases, these cases required more.

My guess is that the Texas Supreme Court study maybe was something of a reflection of the same thing. These are shorter -- these are petitions for review and you're trying to attract the Court's attention. You have 15 pages, and so it's extremely important to those litigants to try to get as much of their story as they can on that piece of paper. Same thing for our motion that we filed.

I will tell you that there is, so far this year there is exactly one brief that I have filed, and it was the response to the motion to stay the injunction, in which I've pushed the limits. Everything else I've come in at half, maybe two-thirds. And that's typical, but it's those tough cases, the tough ones, where you're pushing those

limits. And I think that that may be a difference. It may be something of a sampling difference. If I just went out and just went to the Fifth Circuit, maybe, and I could access their old records and pulled in briefs and started counting them, I think that people wouldn't have been pushing the word limits as hard.

MR. BIRD: May I comment?

MR. KATSAS: Sorry. Can I just ask a question? I'm not sure I follow the reasoning, which is you're saying that your sample for your study may have been skewed to the extent you're tending to get the more complicated cases and that might explain why those briefs on average are longer, but I'm not sure why it affects the number of words per page in your sample as opposed to the ones the committee is relying on.

MS. TIMMS: It's when you're trying to -- it's several things. First of all, at the time, you had the option of reducing the font size, so at 50 pages it starts to be a problem, you go down to 12 point, you go down to 11 and a half. So that's going to affect your number of words per page.

Secondly, when you're up against a 50-page limit and you have a certain amount of information that you need to convey, literally, you start making

choices like I don't want to use the long, Latin-based word, I want to use the short, dramatic based word so that you can get more pages.

And it's also paragraphs. You know the paragraph that carries over by a word? You're not going to have that. You're going to kill off something that will pull that paragraph back out. So there are ways to pull off increased number of words.

JUDGE COLLOTON: Mr. Bird?

MR. BIRD: Thank you, Judge Colloton. The American Academy's written comment criticizes the historical approach as a reason to change the conversion ratio. The basic position is if it's worked, ain't broke, don't fix it. Someone else said that here.

We briefly observed Judge Easterbrook's comments that were posted on the website, but we didn't attempt to go into our own review, and I can tell the panel why, and I think this is important in understanding anybody's study of anything that was done in the page limits states.

Because of the nature of our membership process, most of the members of the American Academy were around doing appellate work before the current rule system was adopted. And I can tell you that adopting the 14,000 word limit was a great relief to

us because the system that existed before of page limits in a world of computerized word processing had absolutely no integrity whatsoever.

So you could -- and perhaps in a large enough study this could be adequately randomized that you could get a meaningful number. I'm not sure that's true. Judge Kozinski's rather famous article about how to lose an appeal from the *Utah Law Review* discusses manipulation of word limits.

But we used to see supposedly 50-page briefs that if you did a cut-and-paste job, probably 30 pages were single-spaced text, whether they were indented quotations or they were in footnotes. And that was done not because those things ought to be single-spaced or there ought to be that many footnotes. It was done to get, who knows, maybe 17,000 words into a brief.

Those were ugly. They were manipulations. They were literally permitted by the rather primitive typography rules at the time. And as a result of that, you know, our position has been it would be a good thing for -- the original principle of the committee's proposal to change all page limits to word limits, it would be a good thing to adopt that.

We think the 250 word conversion ratio is a bad decision because it would -- we've gone over the

briefs on other kinds of documents like motions, as Ms. Timms discussed -- it would be too restrictive.

We think there is one kind of filing on which the rules already are too short, and that is a brief in support of a petition for rehearing, an amicus brief in support of a petition for rehearing en banc. We think that requires some separate attention. I think Mr. Samp's comment on the website goes into that one specifically.

But our personal history as practitioners is that we don't trust anything statistical that comes out of the bad old days of the unprincipled, if not downright unethical, manipulation of word limits to file briefs of essentially any length.

JUDGE COLLOTON: Okay. Did you want to comment, Mr. Tennant?

MR. TENNANT: Just briefly. Thank you. In our comments we do address the analysis that was set forth in the October 3, 2014 memorandum prepared by the committee. It's called a short history of the 1998 amendment to Rule 32. And just point out, obviously we're not typographers. There actually is within the Council of Appellate Lawyers, there's a son of a typographer. And he talks about, you know, if you really go back to this, it may be some confusion about Microsoft double-spacing versus -- you know,

leading is the white spacing between lines, and you can manipulate up and down within some common understanding of double-spacing that's different from Microsoft double-spacing.

At the end of the day, you know, I think Judge Easterbrook, who was there, certainly by virtue of the information that's been disclosed by the committee seems to have correctly summarized that 280 was the number picked based upon professionally printed briefs in the supreme Court and that that number fits within the range that -- I guess Microsoft representatives came in to the committee, along with a professional printer, and they talked about how many words can be on a page, from 250 to, I don't know, 340, and 280 was kind of in the middle.

At the end of the day, it's kind of what makes sense. We are 17 years past the 1998 amendment. We're trying to figure out what makes sense in today's practice given the needs of practitioners today. And who's got the better argument about the conversion rate seems to basically be looking for some technical correction that isn't in sync with kind of the larger picture of what makes sense in order to give litigants their opportunity to have their day in Court.

And just on that note, in a world where there's declining oral argument, where we're all

feeling really sprint, we might get five, six minutes at a podium, briefing is becoming more and more the only way that a litigant feels that they have a day in Court. And for our business clients and other clients who are paying our time to go in to advocate on their behalf on matters that are extremely important to them, there's kind of a core integrity issue about, you know, the appearance of justice and are we getting our day in Court.

And so on that note I will leave, with a request obviously, that the 14,000 word count limit be left in place in order to preserve that ability to articulate claims on behalf of our clients.

JUDGE COLLOTON: All right. Well, that's a good segue then to a different topic. Let me ask one more question. Then I'll let my colleagues have at it.

We have four appellate lawyers here today who all oppose the proposed amendment. We've had comments of course from Judges who favor it and from some lawyers who favor it, though not as many as lawyers who oppose it. So let me give you one example of the reasoning that some favor it not on historical grounds but on modern day grounds you might say and let you respond to that.

There was published, and it caught my eye, a

piece in the *Journal of Appellate Practice and Process*, Spring 2014, Volume 15, a book review by an appellate lawyer named Carl Kaplan. You may have seen it. Mr. Kaplan interestingly says he's a former journalist, and in that context, he learned that editors impose tough word counts from above, and he says that's the best way to shape, sharpen, and focus a writer's work. In this book review he makes a suggestion to improve lawyers' written work, namely, enforce shorter briefs.

He quotes the late Judge Aldisert, saying that he'd read some 630,000 pages of appellate briefs during his career and that, according to the Judge, probably about 400,000 of those were unnecessary. He quotes the late Judge Gee as saying that the most common literary disease afflicting legal writers is the bewildering inability to winnow important from unimportant facts.

And then he continues as follows. Of course both Judges were right. Shorter briefs gain in clarity and force to meet a work limit. When there's no chance of filing a longer brief, the author must drop secondary issues, improve organization, toss extraneous detail, refrain from overanalysis of cases, and lift fogginess.

But unable to resist the attraction of the

immaterial, many lawyers and Judges fail to write tight. Continuing, the author says I'm as guilty as anyone. My appeal briefs sometimes run the patience trying 50 or 60 pages. I know better, yet the counterforces to brevity are strong. Supervisors, clients, and colleagues often suggest or even insist that I add arguments that are just strong enough to pass the laugh test, so I give in.

And sometimes when I'm on a tight deadline I won't have time to write short. And the author then ultimately concludes the Federal Courts of Appeals currently have a 14,000 word limit on main briefs. This is too generous a limit.

That's roughly an example of some of the arguments that were made by commentators who support the proposal, and so I invite you to react to that thesis if you wish and particularly if you want to comment on what he says are the salutary effects of tighter limits and the counterforces to brevity that you encounter as lawyers and whether those are reasons to allow longer briefs or reasons to consider tightening them.

MR. BIRD: Judge Colloton, I'd ask the privilege of going first on this. Many things you said made me smile for reasons that I'll disclose. I too am a former journalist. It did not become my

profession. It was what got me through undergraduate school. I love editors, and the comment about good editing is spot on. In fact, almost every book about good brief writing talks about the value of editing and talks about the value if you don't have an editor of being able to put a brief down for a period of time and self-edit after you've forgotten exactly what it was you wrote and you can look at the brief with somewhat fresh eyes.

I'm saddened to say that after the Great Recession and after the many changes of attorney-client relationships that occurred during the Great Recession, clients won't pay for it anymore. It's much more difficult to bill and collect editing time, and that is a disincentive to writing short that is not within Your Honor's list.

I think the disincentives to writing short that Your Honor cited are accurate. They definitely exist. I think it's our job to resist them as well as possible. Again I'll go back to the process of getting you better lawyers by encouraging specialization.

A good appellate lawyer -- we can all get bombed by a record we didn't expect for two months and it comes in from the court reporter and now we've got completely inconsistent deadlines and maybe expedited

cases, of course, that won't get extensions of time, but experienced lawyers try to keep a docket in order and try to do, to use a construction industry term -- this is my words, others use different words -- try to create a critical path from how do I get from never having seen this case before to having the record read, to having an outline of a brief, ultimately to having a brief.

Inexperienced lawyers I think suffer -- by inexperience, I'm referring to appellate practice -- I think suffer more from the disincentives that Your Honor recited than do experienced practitioners. I think we can do a somewhat better job of managing time so that we can manage against those disincentives.

In my opening comments I spoke about the problems of clients, particularly assistant and associate general counsels who get an appeal before they went in-house and think they know how to write a brief and love to tell appellate lawyers what that is.

I will add one note of encouragement. I happen to be a fan of the program that's been out for a couple of years called WordRake. WordRake will not help people eliminate from briefs the arguments that shouldn't be in there, but within an argument WordRake is the equivalent of my old city editor, Mel Bennett, with his chin on my shoulder at 6:30 in the morning

after he had his anchovy omelette telling me I really can't strike these off my Underwood, these words off my Underwood.

And speaking for the considered comments of the American Academy, I've tried to avoid personal comments, but one thing that made me smile here is I can't -- well, two things. One, all of these things about how to write like a lawyer or a better appellate lawyer I think in training we should replace by how not to write like a lawyer. My goal for the first maybe seven years of practice was to learn to write like a lawyer, and ever since then it's been to learn to write like John McPhee. And I think that's a much better goal in the end. And I would love to teach that to practitioners all over the country who would like to come to your Courts. I think they would write you briefs that at least through the statement of fact you would find more interesting.

And one source of personal pride that made me smile in Your Honor's comments, I cannot think of a brief that I have written in the last decade that went up for review that came back with a suggestion to make it shorter. They always come back, whether it's the client, whether it's a trial lawyer, whoever referred it to me, they always come back with proposals for putting in more words. And I always try to resist,

but I am not always successful.

JUDGE COLLOTON: Does anyone else wish to comment on that matter? Mr. Tennant?

MR. TENNANT: Well, I think it comes back to the issue of kind of individual experiences versus some type of empirical study. I don't know Carl Kaplan and I don't know his practice. In terms of the lawyers from the elite appellate firms in Washington, D.C. who put in their joint statement, I do know many of them.

I do think, though, it would be good to get past kind of the more generalized comments about, you know, less is more. I agree a shorter brief is generally better than a longer brief, except when it's not, when you need the space. And it's all about the individual judgments of lawyers who have the experience, the writing ability, and the fine control to basically be able to put in a brief that is of an appropriate limit.

And as I said before, word count is basically almost unrelated to the quality of briefing and it's a rough measure that penalizes, we believe, a lot of very good lawyers who are doing the right thing not only for their clients but also for the Court.

JUDGE COLLOTON: Any other comments? All right. Any other -- Judge Chagares?

MR. PEW: I had a --

JUDGE COLLOTON: Oh, Mr. Pew, go ahead, and then Judge Chagares.

MR. PEW: Really, a couple of comments, one which I think is sort of similar to Mr. Tennant's, which is that although there is certainly the potential for over-length briefs, the solution, the one size sort of fits all solution of shortening all briefs to 12,500 words doesn't seem like it makes very much sense.

The reason for that is that an appeal, an appellate brief might address one simple issue or it might address five very complicated issues. The brief with one simple issue that's 14,000 words might be over-length. It might be that that brief very well could have been written more succinctly. The brief that addresses five complicated issues might be hard put even if at its most succinct to come in under 14,000 words.

So trying to address the problem, or I think really what the, the suggested rule change is trying to address the first problem, it would actually do a lot of damage to briefs that have to address more complicated issues. And that actually goes to one of the comments from I think Kaplan's article about secondary issues or secondary arguments.

This change wouldn't force people to not include secondary arguments that aren't worth hearing. It would actually include litigants to drop valid claims to a whole different aspect of a rule, leaving serious defects in a rule that was going to affect the entire public, which could go to health, safety, or other important issues with the public cases.

The other point I'd like to make is that without any change to the federal rules, I mentioned this before, Courts are perfectly capable of deciding on a case-by-case basis and a Circuit-by-Circuit basis if they want shorter briefs in a given case.

JUDGE COLLOTON: How can a Court do that under the current rule, other than in a multiparty case?

MR. PEW: Well, the D.C. Circuit has shown that it's willing to do so in other cases. I mean, the D.C. Circuit hasn't said we're shortening, it hasn't indicated that its authority to shorten word lengths is limited to situations where there are multiparty cases. It simply exercises its discretion to shorten briefs. And, you know, whether or not you believe that's appropriate or not, that's simply what happens.

And I think that leads to a last point, because one suggestion I think, that I think came from

the Solicitor General's Office is that the situation could simply be reversed where you have a default brief of 12,500 words in length but perhaps loosened requirements for extending the briefs.

Now I know that the D.C. Circuit's current rules on brief extensions are very tight and are effectively a prohibition on lengthening briefs. What rule, D.C. Circuit Rule 28(E)(1) says is if the Court disfavors motions to exceed limits, such motions will be granted only for extraordinarily compelling reasons.

I believe that even if that rule was changed the Court's disinclination to grant extended brief lengths would still be there and that that would probably affect different parties differently. That is, whereas the Solicitor General or the government might get more deference in a request for extended briefs, I doubt that private litigants would get that kind of deference.

JUDGE COLLOTON: Just one comment on Rule 32. As currently written, it requires a Court of Appeals to accept a brief that complies with the rules, and so a 14,000 word brief must be accepted. I don't think personally that the Court has authority to reduce the limit outside of maybe the multiparty context. Judge Chagares has a question.

Judge?

JUDGE CHAGARES: Actually you, Mr. Pew, just hit on it, but actually Mr. Bird first mentioned it, about the making a motion for extension. Apparently, I mean, from your comment, it was brief, you stated that you probably would not be able to get extensions. Could you just expand on that a little bit?

And I wonder, why is it the government would? Why would they get more -- I mean, I'd like to think the Courts would consider each motion on the merits, you know, if it's a complex case as you've talked about. I mean, I'd like to think the Court would take that seriously.

MR. BIRD: Your Honor, I think it varies a great deal from Circuit to Circuit. Mr. Pew read the D.C. Circuit rule. I think the Fifth Circuit has a rule that's very, very similar to that. I think if we were to look at the actual practices on a Circuit-by-Circuit basis there would be a lot of differences as there are in many other things on a Circuit-by-Circuit basis.

The comment about the government, I think when the United States in a Federal Court takes the position, whether it's on the merits or whether it's about a procedural issue, that it's an important matter of public policy, that an argument needs to get

to the Court, that the government should be allowed to file a brief, take part in a particular way.

I think federal Judges, including Circuit Judges, are much more inclined to go along with granting that kind of request. I think I have a relatively recent experience involving international arbitration and sanctions against Iran resulted in a published opinion of the Ninth Circuit where, after full briefing and oral argument that went over time, the panel was so concerned about potential foreign policy impacts of ruling in the case either way that it did not submit the matter but went out of its way to ask the government to file a brief.

I am not complaining about that. If the United States Government says that there's an important matter of public policy involved in a case and it wants to present a position, whether it's by over-length brief, filing a brief as amicus, or whatever, I think the Federal Courts should hear it.

And I do think that when I say the same thing on behalf of a private party that's profoundly potentially affected by a decision in the case, the Court is going to look at that from the standpoint of this is a private party with a commercial interest, we have a different balance here than whether it makes a difference to all the citizens of the United States as

carried out through foreign policy, tax policy, or anything else.

So I don't mean to be deprecating of either the government or the Judges. It's just the fact that there are magic words that the government can say that justify allowing kinds of participation, assertion of arguments, whatever, that I can't say. Or no matter how important my position may be to a client or an industry, we'll be heard differently.

JUDGE CHAGARES: So you're worried about -- can I -- could I just --

JUDGE COLLOTON: Go ahead, and then Judge Taranto next.

JUDGE CHAGARES: So you're concerned about different treatment depending on which Circuit you would appear in.

MR. BIRD: If we're talking about whether a given Circuit would grant relief from page limit or from word limits for a particular brief or other document, yes. As a matter of principle, I don't like the Solicitor General's proposal as an alternative to what Mr. Pew I think accurately calls a default.

Instead of 14,000 words certain, we have 12,500 words uncertain. I don't like that because I think it would have a disparate impact. So that's how it relates to what's before the committee.

JUDGE CHAGARES: I just had one other very quick thing. I think that we all agree that better written briefs help everybody, helps our system of justice. Did I hear correctly that the American Academy of Appellate Lawyers is willing to do a YouTube video for all Courts to help people do better briefs?

MR. BIRD: I can make that happen.

JUDGE CHAGARES: All right. I don't know how logistically that works, but thank you.

MR. TENNANT: I think the ABA Council of Appellate Lawyers would be willing to elaborate.

MR. BIRD: We'd love to do it collectively, too.

JUDGE COLLOTON: Judge Taranto?

JUDGE TARANTO: I'd like to get some more information from you about what range of practices there are for consideration on a case-specific basis of requests to exceed whatever the default rule is. Somebody mentioned -- you did, I think, Mr. Tennant -- the Fifth Circuit requirement of submitting the over-length brief two weeks ahead of the deadline.

Because one of the real concerns, certainly in my mind, keyed off the submission of the Justice Department, is that if the default length is lower there ought to be a greater liberality in granting

extra words. And then I start to wonder what that process looks like, thinking in particular that it would seem to have to be a process that involves judicial decisionmaking before the Court knows anything about the case.

MR. TENNANT: Thank you for your question. I mean, I think it's an interesting issue in terms of how, if you move to a 12,500 word limit, at least presumptively, what could you do to kind of make up for that through motion practice? Or I think Mr. Bird mentioned the possibility of early conferencing on a case so that you could have something in the way of a process.

You know, we have the CAMP conferences in the Second Circuit where, you know, it would be possible for a knowledgeable person within the Court system to sit down with the lawyers and have them talk about what their needs are and to try to tailor at that point what would be an acceptable briefing length for each side for multiple parties, for all the parties. I mean, you could do something like that.

What I think we're all concerned about is that --

JUDGE TARANTO: I'm sorry. You called it -- I didn't hear the word -- a camp process?

MR. TENNANT: CAMP conference.

JUDGE TARANTO: Conference.

MR. TENNANT: It's Civil Appeals Management -- come on. Help me. P.

FEMALE VOICE: I always thought it was process, but --

MALE VOICE: Plan.

MR. TENNANT: Plan.

MALE VOICE: Plan.

MR. TENNANT: Thank you. Right. So anyway, in the Second Circuit you can have these. You know, they typically have somebody in the clerk's office trying to see if there's some way to mediate the case, and, you know, sometimes the different Circuits, the Third Circuit, you know, try to leverage a little bit and say this is how we think the Court will come out on your appeal, maybe you want to think about settling. But there's at least some opportunity for the Court at the front end early in the process to have a conversation with the parties where they're able to think about for this particular case what would be an appropriate brief length.

JUDGE TARANTO: Does that occur for all cases or only a small subset of the cases? Because I'm curious about resources and that kind of thing.

MR. TENNANT: It doesn't happen in all cases. I'm not sure what cases they choose to use it

in. For example, the Indian law cases that have gone up and down to the Supreme Court, you know, they have no interest in trying to see if that's going to be, you know, could be settled by the clerk's office intervening. But I really don't know kind of what the mechanics are for identifying the cases that go into that CAMP conference, but you could have, from a structural standpoint, a conversation early on, maybe call it CAMP or not, where there is essentially a negotiated briefing length for the case.

JUDGE TARANTO: All right.

MR. PEW: May I make one other point to your question about resources? If the underlying concern is with the expenditure of the Court's resources on reading over-length briefs, I wonder if the solution of, the suggested solution of having a default shorter brief length with a more liberal extension wouldn't, you know, actually consume more resources or at least even out, because there would be extensive motions practice over brief lengths.

JUDGE COLLOTON: Sometimes -- I was going to see, do you want to comment, Mr. Bird?

MR. BIRD: If I may, Judge Colloton.

JUDGE COLLOTON: I just want to make sure that you have a chance to hear whatever questions the committee has, but if you want to add on this, please

do.

MR. BIRD: Absolutely. I want to say Judge Taranto raises a valid question about predeciding issues because in order to file an over-length brief in any Circuit I have to file some form of a motion. It may be handled by a Judge. Other Circuits use different approaches.

But in making my case for filing an over-length brief I have to say why, which inevitably discusses the merits. I need this space because I need to make this constitutional argument.

And it does create at least the possibility that whoever is ruling on that motion will decide I do or I don't or the Court does or it does not want to hear that argument. I don't care if he wants to raise it, we're going to have a 12,500 word brief, and if he wants to stick that in in 500 words, let him do it.

I have no reason to believe that any Circuit Judge deciding these anyplace does that, but as a principal issue of risks of predeciding cases, it's a valid point, Your Honor.

JUDGE COLLOTON: Sometimes it's hard to interject in a meeting like this from a remote location, so I want to check whether anybody, first of all participating by telephone, Mr. Newsom or Judge Fay, has anything either of them wants to ask.

Gentlemen?

JUDGE FAY: No. I think it's been covered adequately as far as I'm concerned, Judge. Thank you very much. Some of the questions I would have asked have already been asked.

JUDGE COLLOTON: All right. Mr. Newsom, anything from you?

MR. NEWSOM: (No response.)

JUDGE COLLOTON: We may have lost Mr. Newsom.

FEMALE VOICE: We just did.

JUDGE COLLOTON: All right. And then Justice Eid and Professor Barrett are on video. Either of you have anything you wish to raise?

JUSTICE EID: I don't. This is Justice Eid. I don't.

PROF. BARRETT: This is Amy Barrett. I don't either.

JUDGE COLLOTON: Mr. Letter?

MR. LETTER: I just had one question that Judge Taranto and I both had. Mr. Pew, I think, I don't know whether we heard you correctly or not. This is a factual question. Did you say that in the D.C. Circuit in non-multiparty cases, so with just an appellant and an appellee and nobody else, the D.C. Circuit sometimes tells the litigants they have to

file briefs less than 14,000 words?

MR. PEW: I think what I meant to say is that the rationale, as far as I can tell, the rationale for cutting multiparty briefs would apply equally to single party briefs. I can't think of an example where a single party brief is less than 14,000 words, although there may be. But I would say that I'm not sure why the rationale would apply just to multiparty briefs and not single party briefs. I don't believe the rule makes that distinction.

MR. LETTER: Again, though, just to make sure we heard you correct. You're not saying the D.C. Circuit actually provides in non-multiparty cases for briefs less than 14,000.

MR. PEW: I couldn't say for sure one way or the other on that.

JUDGE COLLOTON: Mr. Garre?

MR. GARRE: First of all, thank you for your testimony. It was really informative and helpful. I had a question going back to your experience, since all of you have so much experience, about how the rules operated before 1998. I know there were concerns expressed about manipulation, but putting that to one side -- and I'm assuming that this is the best group to engage in that -- do the 50-page limits address the sorts of concerns that have been raised

today about being able to address the issues in the case or deal with the complexity of the case in your judgment, or were there concerns that existed then about even a 50-page limit not being sufficient to address those concerns?

MS. TIMMS: I'm just going to take this first just because we had 50-page limits for much longer in Texas than in the Federal Courts. I will tell everyone here that I have never once over the entirety of my career asked for extra pages or extra words, but I have been dealing with what is now, by comparison, a more liberal standard.

The 50 pages I always found a way to live with, and the 14,000 words, I always found a way to live with that. Sometimes it's very difficult. The brief that I had kept from before the rule change, it was a Federal Court brief and that brief had started out at 80 pages. And it took a solid month of editing to get it down, but we could live with 50 pages. I don't think I could have lived with 40.

And so the nice thing about the rules as they exist now is I do think, following up on what Mr. Pew has said, it's cut back dramatically on the number of motions that you see for over-length briefs. People feel like this is generally a fair standard. I should be able to live within these limits. You can

use it as a method to control your client, frankly.

But if you start having a system where people routinely ask for extra words, it's going to really upset that system that's been in place, and I think that that may have unfortunate unforeseen consequences.

MR. BIRD: Responding directly to your question, the 50-page limit was an issue in complex cases more so than 14,000 words. And as I commented earlier, it resulted in far more self-help than motions. So I think the pressure valve against motions to file over-length briefs back then was the extent to which manipulation could be used, and some of it could be done in ways that were not noticeably lacking in integrity.

MS. TIMMS: Let me follow up for just a second. The brief that I have kept in its initial form was rejected by the Fifth Circuit. We were working with someone who could not drop arguments, a client, and loved footnotes. The Fifth Circuit was very nice at working with us to get us to be able to file a acceptable brief, but it was a challenge.

JUDGE COLLOTON: Is Mr. Newsom on the line?

MR. NEWSOM: Yeah, Judge. I'm so sorry. When you called on me, rather than unmuting myself, I cut myself off.

JUDGE COLLOTON: Well, I just wanted to see if you had anything you wished to raise with the witnesses.

MR. NEWSOM: No. No. Listen, I'd like to express my appreciation for all of the testimony, and especially after the questions asked by the other lawyers, I feel like that I've got full information.

JUDGE COLLOTON: Very well. Thank you.

Greg, did you have anything?

MR. KATSAS: (Nonverbal response.)

JUDGE COLLOTON: Professor Struve, you may ask a question.

PROF. STRUVE: Well, this will seem very mundane after the large issue on which you've rightly focused. I wanted to join in the thanks others have expressed for the care you've taken in submitting comments and testimony and coming, making preparations to come multiple times for our rescheduled hearing.

A technical point. One of the commenters, Mr. Finell, has pointed out the potentially extraneous nature of the line limits, especially in the proposed limits for documents other than briefs. Everyone's been focusing on word limits. I presume that's because that's what people use.

Would there be any downside in your view if the typed volume limits for documents other than

briefs are formulated only in terms of word limits, and we delete the line limit feature of those provisions?

MR. TENNANT: My understanding is that is a technical kind of omission or correction that Mr. Finell correctly pointed out. I haven't personally studied it, but I believe his comment is well-taken.

PROF. STRUVE: So?

MR. TENNANT: So that the, as I understand it, the line limitation would come out and it would only be a word count for all.

PROF. STRUVE: Exactly. And my question is would lawyers miss having the line limit option as an option for compliance?

MR. TENNANT: Not to my understanding.

MS. TIMMS: I was going to say I have never seen anyone turn in a certificate of compliance that listed the number of lines.

PROF. STRUVE: Thank you.

MR. BIRD: And I'll reiterate the American Academy's position that everything should be word limits.

JUDGE COLLOTON: Say in 2013 you probably know Rule 28 was amended to remove the requirement of a separate statement of the case and a separate statement of the facts. The committee was concerned

that those had generated confusion and redundancy.

Since we have you here, I'd be interested in your thoughts on whether that rule has helped eliminate redundancy and, insofar as it might be relevant to our current discussion, whether it's allowed lawyers to prepare an equivalent brief in fewer words because there's no requirement of a separate statement. Mr. Tennant?

MR. TENNANT: Yeah. Judge Colloton, I think that was a helpful change. I think we're in a struggle to understand kind of what to put under nature of case and what's redundancy. One of the comments that we made in our written submission was that there might be other opportunities to think about changing the content and format of briefs to try to make them shorter and less repetitive.

One of the things that often, and it's in my writing too, you know, there's an optional preliminary statement, introduction, something that's just trying to explain something snappy about the case that sets the hook that's kind of there, but that by nature is an opportunity to inject some merit discussion.

I mean, you have to, well, why this is an important case and why we should win in some pithy presentation. So that's already anticipating. You have the summary of argument, and then you have the

argument. Then you have the statement of facts.

So there are lots of ways in which briefs can for one reason or another wind up -- you know, things are getting carried forward in a way that may be fine from some type of educational standpoint, but to the reader, you know, it's kind like I've read this before.

So again, I'd be interested in what all the people who have such great experiences on both sides, you know, as practitioners, as Judges, and seeing the work product, if there are other ways where briefs could be made essentially more reader-friendly that avoid -- you know, somebody was talking, I guess Carl Kaplan, the attraction to the immaterial.

I think it's the attraction to the repetition. That's where I see a lot of briefing that, you know, potentially could be trimmed up, but it's kind of how do you do that. And I think it's a very skilled process of editing and trying to figure out ultimately how can I make this brief sing or at least, you know, half squawk and have, you know, some type of persuasive force.

And, you know, there's intention in the kind of, yes, we're telling you this, we're going to tell you what we're going to tell you, now we told you, and now we're going to say what we told you. And that

kind of educational process can wear thin obviously.

MS. TIMMS: Just quickly also, my answer to your question is I don't think that there's a substantial savings of words in that change that was made. I think you still cover the same information. It's not like you covered more information before, you just had to categorize it, and so all of those things you still put in your brief. If it was important enough to be in there before, it still goes in. The only savings is the extra heading.

MR. BIRD: A good lead, whether it's in a print newspaper or a blog, is still one paragraph that has the four Ws in it. Writing a word, a rule compliant brief under the Federal Rules of Appellate Procedure, we can't do that.

I think there's a lot that could be said about modifying the federal rules on brief structure that would make briefs shorter and easier to read at least for Judges who haven't already developed a process of, for example, first I look at the table of contents, then I look at the summary of argument.

I know many Judges do have a variety of ways of approaching briefs to get to what is this case about rather than reading it sequentially. I'd love to be able to write briefs sequentially to make sense like they were McPhee stories or newspaper articles,

and I can do that in State Court in most states, but that's not --

JUDGE COLLOTON: What specifically do you have in mind? What change to the structure of the federal appellate brief do you recommend in light of how you file briefs in State Court?

MR. BIRD: A short, agenda-setting introduction would be very useful instead of starting an appellant's brief with a statement of jurisdiction or an appellee's brief with an agreement with the statement of jurisdiction.

I do like what was done with Rule 28 so that the order of the proceedings below and the facts, at least counsel gets to choose that, because sometimes it's all about the procedure and sometimes it's all about the underlying story. And I'm glad at least at that level we get the choice now, but we use it wisely.

This is a subject on which we could go on for a long time, and I would enjoy that. It's not Your Honor's agenda today --

JUDGE COLLOTON: Right. Fair.

MR. BIRD: -- and so I don't want to take up that kind of time, but there's a lot that could be done.

JUDGE COLLOTON: All right. Thank you.

Any other? Greg, you're good?

MR. KATSAS: No, I'm good.

JUDGE COLLOTON: Well, any comments or questions from our remote participants? Otherwise, I don't --

MALE VOICE: No. Not me.

JUDGE COLLOTON: All right. Well, I see no others from the group here. I don't know that we need closing statements. I think we've heard and read what you have to say about the rules, so we want to thank you again on behalf of the committee for taking the time and effort to come here and to share your views and to answer our questions today, particularly in light of the disruption with the weather on the first hearing. We're appreciative of your time and efforts. And unless someone is urgently wishing to say something more -- I'll give you five seconds to raise your hand.

MR. TENNANT: Can we say thank you?

JUDGE COLLOTON: Well --

MR. TENNANT: Yeah. We'd really like to thank the advisory committee for allowing us the opportunity to appear here. And the talk has been a very useful exchange, so thank you.

JUDGE COLLOTON: Good. Well, with that, the hearing is adjourned, and the committee will be

meeting later in April to consider the proposed amendments and proceed from there, so thank you very much.

(Whereupon, at 11:57 a.m., the hearing in the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

CASE TITLE: Public Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure and Official Forms

HEARING DATE: April 1, 2015

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: April 1, 2015

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