JUDGE GERALD B. TJOFLAT ORAL HISTORY PROJECT

Michael T. Morley Interview

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Interview Transcript

Judge Gerald B. Tjoflat: With me today is former law clerk Michael Morley, who came to me from Yale Law School in 2003 and clerked for a year, and now he's a professor of law at Florida State University School of Law. I'm delighted to see you, Michael.

Prof. Michael T. Morley: Judge, it's great to see you.

Judge Gerald B. Tjoflat: Good fond memories of years ago, almost 20. Can you believe that?

Prof. Michael T. Morley: I tell you, it's still one of the best years of my life, Judge.

Judge Gerald B. Tjoflat: Well, we're going to talk about the split of the Fifth Circuit in this session. Back in the old days, the Fifth Circuit had probably somewhere between a fifth and a quarter of the appellate business in the federal courts of the United States. It was huge, and so I thought maybe we'd start off, and I'd just give a little sketch of how the Fifth Circuit got to the size that required a split. We'll start with January 1954. This is the year of *Brown I* , the school desegregation case, and the Court of Appeals, the Fifth Circuit, had six states, six judges, and by February of that same year, they went to seven. Two or three years went by and in 1961, they got two more making nine and then we go from 1961 to 1966 and now we have 13.

We have four more judges and two years later, in 1968, we went to 15, and that's where the court was when I joined it in 1975. We were very busy, and to give you some idea of the size of the other courts of appeals, back then the Ninth Circuit had 13 active judges. We had 15, two circuits had 11, two circuits had 10, and two circuits had nine, and then you had the first second, which is small and the 10th circuit. Anyway, so what was going on during that period of time to cause the courts to have to be increased, of course was school desegregation cases, civil rights litigation, which was very heavy in the six states of the Fifth Circuit. By 1971, when the judiciary was canvassing the courts for the need for more judges, the Fifth Circuit said unanimously just no more judges.

You can split us or do something else with us, but no more judges. So, there was a federal study commission to study court realignment, court of appeals realignment in 1973, and they decided that the Fifth Circuit and the Ninth Circuit needed to be divided in some fashion. They issued a report, and they decided that the Fifth Circuit should be divided in one of three ways. They had three alternatives. One is

that Florida, Georgia, and Alabama would be the Fifth Circuit, and Texas, Louisiana, Mississippi be the Eleventh Circuit. The second alternative was Mississippi would join Florida, Georgia, and Alabama in the Fifth Circuit, and you have Texas, Louisiana, and Arkansas coming down out of the Eighth Circuit, and that would form the Eleventh Circuit along with the canal zone. We were still doing business in the canal zone, in Panama then. And the third alternative was the Fifth Circuit would be Mississippi, Florida, Georgia, Alabama, and just Louisiana and Texas in the Eleventh Circuit, a two-state circuit.

There were three bills introduced in 1974, one in the Senate, one for each of those three propositions. There it sat. Nothing happened. Three years went by and no activity in the Congress, and our caseload is zooming, as it were. We're doing the best we can. Then 1977, a bill was introduced in the Senate to split the Fifth Circuit and it would have Mississippi, Alabama, Florida, Georgia in the Fifth, in the new Fifth Circuit and Texas and Louisiana in the new Eleventh Circuit. That was May of 1977. So now the circuit split is in the wind, and Chief Judge John R. Brown of our court decided he was against dividing the Fifth Circuit. We could operate with 15 judges notwithstanding the case load.

The rest of us, I will say 10 out or 12 out of the 15 altogether 12 judges in the majority, we decided we needed to split. We didn't want the chief judge in Washington, D.C. arguing with the House and the Senate people telling them we don't need to split this Fifth Circuit. We've got to do something. So, we met in New Orleans on the 5th of July in 1977. I remember it like it was yesterday. We had a court meeting, and we said to the chief judge, you can be chief judge of the Eleventh Circuit, and you could have all of your authority, but there's one thing you can't represent, and that is that you're representing the Fifth Circuit on the issue of circuit split. So, the judges decided on Judge John Godbold and myself as the spokesperson for the split issues.

And so, there we were in July of '77, and there's this bill in the Senate which would put Mississippi, Florida, Georgia, and Alabama in one circuit, in the Fifth Circuit and two states — Louisiana and Texas — in the other one. So, there we were, and a hearing was set for September the 20th, I think it was, or the 21st of 1977. I presented a position of the court. What I did was I had to convince this committee that we had to divide. So, I had somebody run calculations on the number of panel possibilities for an appeal. If we had 15 judges, there were a number of panel possibilities. If we added 11 or 12, what would the panel possibilities be? If we added senior judges in deciding the number of panels available to hear an appeal, then ultimately you get to over 7,000 panel possibilities.

Prof. Michael T. Morley: Wow.

Judge Gerald B. Tjoflat: If you had an appeal and your client says, "Let's appeal." There are over 7,000 possibilities of who would be on the panel. So that was sort of where we were there.

Prof. Michael T. Morley: By that point, even before the further expansion of the court, you had already come out in favor of splitting the Fifth Circuit. You had already seen the need to break it up.

Judge Gerald B. Tjoflat: But we were not telling the Congress where to split it. The fact of the matter is that about 49% of the business of the court came out of Florida, Georgia, and Alabama, and about 51% — it was almost half and half — came from Texas, Louisiana, and Mississippi.

Prof. Michael T. Morley: What were your experiences judging on the court at the time, back when it was 15 with so many colleagues?

Judge Gerald B. Tjoflat: Well, that was workable, notwithstanding the enormous amount of caseload. Of course, the most strenuous time would be sitting *en banc*. And we would sit in the conference room in a case we're rehearing, and the participation was pretty civil, as a matter of fact. Let's suppose that you are the writing judge in a case, in a panel opinion that we're rehearing. We're rehearing that case,

you're the writing judge, and John Doe is a dissenter. So, it's a divided panel, and here I was with 15 judges, and the case has been reheard, re-argued, and you're going to speak first because you authored the panel opinion that was vacated. Then, the dissenting judge would speak second, and we could ask questions. Anybody could ask a question of you and the dissenting judge, and then we'd go to the chief judge who would give his views of the case, and we'd go down to the junior judge.

In those days, I was the junior judge, so I spoke last, and when a judge made a presentation, many times you could stop and ask him a question, and that tended to keep the discussion focused. So we're all talking about the same issues. We're all on the same page as they say, and then, after the case had been thoroughly discussed in a very cordial manner, I would say, then we would vote on the issues, and we'd start with the junior judge. Like the issue is a affirm or reverse the district court, or the Board of Immigration Appeals, or some such thing. So, we'd start with the junior judge and go up the ladder, and that would be the result. Then the chief judge would assign the opinion. That's how we did business.

We also had a screenings panel method. We had so many cases. They all weren't entitled to oral argument. When I say entitled, oral argument was not necessary. The issues were so clear. So we had a screening system in which we divided the court into five, three judge panels, which were mixed up every three or four months. If you were say, judge 1 on a panel and I'm judge 2 the first thing you would do is you look at the briefs and you'd say to yourself, "Does this case need oral argument?" If the answer is no, then you'd ask yourself whether or not you could write an opinion that would get a concurrence from me and from the third judge. If the answer to that was yes — you had to do considerable mind reading. You had to read my mind, the third judge's mind as to whether they would agree with what you would write.

So you'd write an opinion, and you'd send the opinion with the entire record to the second judge. In those days of big paper records, it's the second judge and if he signed on and concurred, he sent it to the third judge. And if the third judge agreed, the case is over. If you thought the case needed oral argument, you'd send it to the clerk, or if I thought it needed argument, I'd send it to the clerk. Even though you'd written the opinion, they would put the case on the oral argument calendar. That's how the oral argument calendar was built up by cases sent there by the judges. This was very efficient, and that did enable us to sort of put the finger in the dyke for a good while.

But then came a time and in the country when the judiciary is asked by Congress to tell Congress whether it needs more judges to function, and the Judicial Conference in the United States runs data, and they decide whether more judges are needed. This is 1978, and there had been no new federal judgeships created up to that point in time because you had two Republican presidents and a Democratic Congress. So, they weren't going to give the Republican president a chance to make appointments. So, President Carter was elected, and that changed. So, we have studies made of the need for judges, and it was determined that we needed 152 more judges in the United States. We needed 117 district judges and 35 court of appeal judges, and it was decided by statistics — workloads — that the Fifth Circuit should have 11 new judges that would run us from 15 to 26, and that the Ninth Circuit should have 10 new judges and become a court of 23.

There we were in 1978. The House and Senate ultimately get into a conference, judiciary committees and conferring. In addition to judges, the proposed bill that they were conferring over provided for a split of the Fifth Circuit. The proposal came out of the Senate Judiciary Committee, and Senator James Eastland was the chair. He happened to be from Mississippi, and so the provision for splitting the Fifth that was in the judgeship bill, omnibus judgeship bill, they called it, was to have Mississippi, Florida, and Georgia and Alabama in the Fifth Circuit and Texas and Louisiana in the Eleventh Circuit. So here are the House and Senate conferees in 1978 considering. They were agreed on the number of judges, but the stumbling block was the Fifth Circuit.

There were two reasons for it. First of all, some people viewed Senator Eastland as a segregationist, we'll say, and that the division ought to be Florida, Georgia, and Alabama, Texas, Louisiana, and Mississippi because of the workload was about half and a half. But here's Mississippi going east, so he must know something. So civil rights activists were arguing that, in effect, he knows the judges in those four states are going to turn the clock back on civil rights, on school desegregation cases, voting rights cases, and cases of that sort. So, there was a sort of a storm, and it was reflected in the House members on the conference committee. The House members were opposed for splitting the Fifth Circuit in that way, and they had another argument, which was that Texas and Louisiana, the oil and gas states in the circuit, would influence the selection of judges in those two states, the oil and gas industry. So that's another reason for not having just the two states in the Eleventh Circuit. So that's where we were with the conference committee.

Prof. Michael T. Morley: And then you reached out to Senator Eastland?

Judge Gerald B. Tjoflat: Yes.

Prof. Michael T. Morley: Tell us about that.

Judge Gerald B. Tjoflat: Well, he had been chair of the Senate Judiciary Committee a long time. He was from Mississippi, and it was just in the air that why Mississippi is going with Florida, Georgia, and Alabama. The one argument was that Mississippi used to be part of Alabama, and Mississippi and Alabama were part of Georgia and that's the geographical or historical reason for putting Mississippi in with Alabama and Georgia and Florida. But they called it a stumbling block, and there was a lot of fire.

The court realized that was in the air, that there was comment that we judges from Florida, Georgia, Alabama, and Mississippi would turn the clock back on civil rights litigation. But we didn't think that at all about ourselves because we had been laboring in those kinds of cases in mixed panels all the way, all the way from *Brown vs. Board of Public Instruction*. And much had been written about — the great work — in terms of those kinds of cases, all kinds of cases that were done in the Fifth Circuit over that long period of time when we went up through the 15 judges. And that was how I found it when I joined the court in 1975. So, the judgeship bill passes in October 1978, an election year, just before the Congress adjourns. And it had a section in it that I'm going to read. Section 6.

> "Any court of appeals having more than 15 active judges — that would be the Fifth Circuit and the Ninth — may constitute itself into administrative units, complete with such facilities and staff as may be prescribed by the administrative office of the United States courts and may perform an *en banc* function by a such number of members of its *en banc* court, as may be prescribed by rule of the court of appeal."

So here we are, that bill passes in October 78. People are being nominated, and we're ultimately going to have 26 judges.

Prof. Michael T. Morley: Wow.

Judge Gerald B. Tjoflat: Ultimately going to have 26 judges, and so that does happen. Judges are nominated. By the end of July 1979, we had eight of the eleven judges, and they were continuing to come on. And so traditionally, the court sat *en banc* in September, January, and June, and we hear cases *en banc*. We could also have court meetings at those times. So, we had an *en banc* session set for September 10, 1979. We had some cases to be heard, but the question was: Should we hear them with this influx of 11 judges? And so, we took a poll and decided no, we would meet together on the 10th of

September, and we would just discuss what to do with this monstrous court, which is going to increase. But percentage-wise from 15 to 26 is pretty big.

Prof. Michael T. Morley: Let me ask you about that. With that influx of new judges, did you notice either an increase in dissents or an increase in inconsistent panel rulings? Or did it otherwise become harder to be able to reach unanimous agreements for the screener opinions?

Judge Gerald B. Tjoflat: Well, of course we have a lot of new judges who will be coming who had no judicial experience just lawyers or law professors or something. They would all have to be assimilated, and as I mentioned about the mind-reading function when we were doing our screening, no way in a world you anticipate what might be in the mind of a new judge about deciding a particular legal issue and so the screening system that we had in place on the Fifth Circuit would just collapse in a way. So there we were in New Orleans and we started with the chief judge and went down the list to the newest judge to decide what to do. The older judges said, we have to divide this court. We have to ask Congress and say that you have to divide us. We can't function with 26. The new judges unanimously said, we think it could work . I don't know where we think information was coming from.

Prof. Michael T. Morley: <laugh>

Judge Gerald B. Tjoflat: Looking back to Eastland's proposal that Mississippi, Florida, Georgia, and Alabama be together, and that maybe those judges are insensitive to civil rights issues, and we split — so there was some things in the air that the new appointees had promised the appointing power, probably the Senate Judiciary Committee, I don't know, that they would oppose a move to split the court. That they would hold it together.

Prof. Michael T. Morley: At the time, was there any sort of ideological disagreement on the court or any sort of noticeable correlation between geography and where judges were coming down on, you know, civil rights, desegregation, other types of cases?

Judge Gerald B. Tjoflat: I sensed none at all up to that point in time. My experience is 1975, '6, '7, '8, '9, and I sat on all kinds of cases. I sat on the appeal on school desegregation cases coming out of Texas, out of Mississippi, out of all over the Circuit and other kinds of cases. I sensed no ideological division that would be in granite, let's say. As a matter of fact, we weren't even hearing school cases during that period of time *en banc*, which means that nobody on the court looking at an opinion thought it was so wrongly decided that it ought to be re-heard, or that the panel skirted around precedent. The idea that there was this ideological background was worked up, and I think it was all attributed to the fact that Senator Eastland was the one who would like Mississippi to be in a circuit with Alabama, Florida, and Georgia.

So, we discussed this issue on Monday the 10th of September, and the next morning at nine o'clock, Judge Ainsworth from New Orleans on the court moved to table any discussion of what to do with this crowd for one year. And so, it passed unanimously. And so here we were. We were sitting as 26, and it'll be indefinite. So now the next thing that happened is we didn't hear any cases *en banc* in September. And so now they're stacked up for February, January. And so, we had a calendar, we're going to sit *en banc* from January 7 to 11, Monday through Friday. I don't know if the camera could get it, but this is the docket that was set up, a public docket. We had six cases to be orally argued by each side with 35 minutes. We had five cases that we'd decide on briefs. Then we had another flock of cases seven more

that would be decided on briefs. So we heard argument on Monday, three cases. Tuesday we heard three cases, and then we had to confer on those cases.

Prof. Michael T. Morley: What was the setup in the courtroom with all those judges?

Judge Gerald B. Tjoflat: Well, Michael, I said to the chief judge, I said, "Maybe we ought to put the lawyers on the bench and we'll sit in the pews in the courtroom, because the bench wasn't built for 26." It had been built for 15, it went out like that [gestures longways]. We had some judges sitting down where the clerk was, and if you can imagine 35 minutes a side. The lawyers were told that there would be no questions from the bench for 15 minutes, so they had 15 minutes of the 35 to make their case.

Prof. Michael T. Morley: How did it go with 20 or 26 judges asking questions of them simultaneously?

Judge Gerald B. Tjoflat: Well, it was difficult. Of course, some people didn't ask questions. That's obvious. But the interesting part was when we got into conference, now remember that I said when we had 15, we'd be in conference and we'd start with the author of the opinion that's being reheard basically, and the dissenter, and then start with the chief judge and go down and express our views of the issues before the court. Well, and you could interrupt, I could interrupt you and say, "I don't quite understand your point, and then can you explain it to me a little more?" and so forth. We couldn't do that now. So, the rule was after the writer of the case being reheard speaks and the dissenter, we start with the chief judge and we go to the bottom to the 26th. Well, but the rule was you couldn't stop, you couldn't ask anybody a question.

So, as a discussion went from the chief judge down, the shape of the case would change. We might be talking about a giraffe case for about three judges. It starts now, it's becoming an elephant case and so on. So, when you get to the end of the day, it's just scattered. So, it's almost impossible to decide an issue. So we decide only one issue: whether we're going to affirm or reverse the district court. Now, it so happened that the chief judge assigned the opinion writing of the first case to me, it was *United States vs. Williams*. We had 23 judges. We were missing three, still short, 23 judges. And the vote was 12 to 11. I wrote the majority opinion, and there were 11 or 10 who concurred. Then there were a bunch of special concurrences, other opinions written.

And of course, when you're in a court of that size and you write, once you circulate an opinion and then other opinions come in dissenting or concurring or whatever, different views, it's almost impossible to rewrite your majority opinion to take other views into account because you might lose some votes. So you just do the best you can to write an opinion that commands a majority and just hope that they'll hang in there with you after they read other opinions, dissenting opinions. So that's how it was, and we have this issue on the table now, and we went all through the week. We finished Friday around five o'clock and you could imagine how exhausting that was.

Prof. Michael T. Morley: Was it common for your court to hear that many *en banc* cases or did you get more *en bancs* once the size of the circuit expanded?

Judge Gerald B. Tjoflat: Before that, never, we might hear two or three.

Prof. Michael T. Morley: Oh, wow.

Judge Gerald B. Tjoflat: Yeah. But sometimes none depending. Three would be a large number, but not like this. This was an accumulation now of what should have been heard in September and what should have been heard in January so that basically half of the cases were just doubled up.

Prof. Michael T. Morley: Had there been any consideration of using *en banc* panels like the Ninth Circuit does?

Judge Gerald B. Tjoflat: Well, we could do that on the statute that I've read, but here's how the judges of the circuits felt. I'm a circuit judge. I have the full rights of a circuit judge, and if I can't sit on the *en banc* court because we're going to have a court drawn by lot, they become the elite judges. And I'm second class, and I don't want to be second class. So there we were, the new judges having been through that withering week, I mean exhausting week, asked the court to take the issue of split off the table, and we agreed to tell the Congress to split us. So, the split is off the table.

Prof. Michael T. Morley: So the new judges were coming around? They were changing their minds after they saw what it was like?

Judge Gerald B. Tjoflat: Well, not only that, Michael, they had been sitting now since September in three-judge panels and they realized — and they were going through the screening process one thing or another — the extent of which the ability to mind read a fellow judge, which makes things far more efficient, especially when you have an emergency. You have three judges, and there's an emergency to stay an execution of somebody on death row or to this, that, the other thing. And all of a sudden, the same three judges get the motion at the same time, and it is very valuable to have some idea of what the other two judges would be thinking. It takes less pressure off. It doesn't mean we're all going to agree, but if we agree to disagree, at least it's a very civil, calm way. So anyway, in May and June, three or four days apart, the Senate and then the House introduced the bill to divide the Fifth Circuit, three states and three states, Florida, Georgia, Alabama and Mississippi, Texas, Louisiana.

Prof. Michael T. Morley: Was Senator Eastman still in the picture or had he left by then?

Judge Gerald B. Tjoflat: Senator Eastman was still chair of the Judiciary Committee, and joined it. But there was still this air out there notwithstanding that and a lot of rumbling. It was still over a period of two or three months. And those who had opposed split, regardless of how it divided the court, the court came to realize that it had to be done if the court was to function. So in October, I think it was the 24th of October the bill passed and the split was to take effect October 1st, 1981. So it was a one-year delay.

Prof. Michael T. Morley: Why do you think the split was successful for the Fifth Circuit, but not for the Ninth?

Judge Gerald B. Tjoflat:12 judges lived in Florida, Georgia, and Alabama. And there are the 12 in the Eleventh Circuit. Part of this compromise was to keep the number five, Fifth Circuit, with the three western states. So they had 14 judges, and we had 12. And why not successful in the Ninth Circuit? Ideological problems, hugely, in the Ninth Circuit. There's a California problem. In 1996, there was a bill to divide the Ninth Circuit pending before the Senate, and I got a call that they were going to have a hearing in the first of October. I got a call about a month earlier from general counsel of the Senate Judiciary Committee.

He said, “Judge, there’s going to be a hearing in October on a bill to split the Ninth Circuit, and the committee would like you to appear as sort of a resource person.”

I said, “resource?”

Well, I was one of the relics of judges who sat on a court of less than 26 and on a jumbo court and who had experience with the problems in having a court of that large size because the Ninth never did have an *en banc* court of that size. It had an *en banc* court of 11 judges, the chief judge and 10 drawn by lot. So anyhow, I go to the hearing on the Ninth Circuit Court of Appeals split bill. One judge wanted to split, Diarmuid O’Scannlain. And the rest wanted to stay put, and so it was a hearing before the full committee. It was an all-day hearing. It was fun really. After the senators on the Committee made their speeches and the senators from the Ninth Circuit states spoke, that is senators who weren’t on the Chad their say. Most who weren’t from California wanted the circuit divided.

Those from California, of course, wanted to keep it that way. So, too, senators from a couple of other states didn’t want to leave California. Then Chief Judge Wallace made the case for no split. Judge O’Scannlain made the case for a split.

Then they asked me. I didn’t have a speech, they asked me questions, interspersed here and there throughout the hearing. Somebody would say something, and then they’d say, “Well, Judge what do you think about that?” And I would tell them, and I drove home hard the notion that the court has to be small enough for judges to be able to understand each other, to mind read each other. It cuts down on a lot of anxiety and uncertainty and everything else. It’s easier to keep the law of the Circuit stable because, as I explained, you take the Ninth Circuit at 27 judges and an *en banc* court of 11, and it could be that the majority of six are the only six judges in the Circuit with a certain view.

So, the en banc court decides, adopts that view, and 21 judges disagree, where you can’t re-*en banc* the case because that would show that the system fails. It may be that of the 11 judges, those that participated in the three-judge panel argument and decision. They aren’t on the *en banc* court. So, it was an interesting hearing.

Senator Heflin asked me, knowing what the answer would be, because the size of California re was a big problem, “What do we do about California law if we split California? If you divide California, is California law going to be applied by the federal courts the same way in the two circuits?” So the answer to that, Judge Heflin said, “Judge Tjoflat, tell him what to do.”

I said, “What you do is you have California enact a statute that allows the certification of questions from each circuit to the California Supreme Court and that makes California law uniform within in it.”

Judge Wallace’s response to that was the California legislature would never do that. So, but anyway, then they formed a commission on realigning the Circuits chaired by Justice White, and it went around the country holding hearings. Of course, there was resistance to realigning some Circuits because they were working fine the way they were. Of course, you had the bar associations and the lawyers and they wanting nothing disturbed either.

Prof. Michael T. Morley: So following the split, did you find judging then easier? Was it easy? Were you better able to mind read your co-judges and get opinions out more quickly, keep the law of the circuit more coherent?

Judge Gerald B. Tjoflat: I think so. I’ll give you an example. We were sitting *en banc* with the whole 26 in New Orleans maybe it was September before we divided. We anticipated the division. We were going to hear two or three cases *en banc* from the new Circuits. So, the 26 were sitting in the *en banc* courtroom in the pews, and we’re having this meeting with 26. Of course, to be heard you had to raise your voice,

then the clock struck 12. And 12 of us went into a conference room, the new Eleventh Circuit, and 14 went into the other conference room, and there we sat. Now I'm sitting there with 12 and not 26, and you don't have to raise your voice to be heard. It's just an easier setting altogether.

Prof. Michael T. Morley: Is there any issue or controversy at all over which of the states would get to keep the Fifth Circuit designation versus who would be the new Circuit? Was that an issue?

Judge Gerald B. Tjoflat: The way the bill was struck it was supposed to be Florida, Georgia, Alabama were supposed to be the Fifth, but a compromise was done. I wasn't part of the compromise. I didn't negotiate it, I'll put it that way. So, they changed the number. By the way, we still have the same 12, we have far more work than we had in 1981. That's obvious. Because of automation and electronic dockets, I can sit here at the computer and push a button and read all kinds of things in the district court that are electronically filed and do word searches, just a jillion things makes life far more efficient. We have stuck with 12, although by numbers we're probably entitled to 15 or so, another dozen, I don't know.

Prof. Michael T. Morley: Throughout this process, when Congress was considering splitting the Fifth Circuit and looking over the years to potentially expanding the Eleventh Circuit, have they generally given much weight to the views of the judges and the views of the Judicial Conference down there? Or has Congress basically just been doing its own thing?

Judge Gerald B. Tjoflat: Well, no, I think they understand. I remember testifying before the House Judiciary Committee, and they got about 35, I think, and about splitting. Somebody said the points being made about the difficulty of agreeing amongst that big number.

"Well, we have 35," said the congressman "and we pass legislation."

I said, "Well, you do, and you leave holes in it. You leave holes and then litigants try to get the court to fill in the hole — the blank — and then the court may have to say, 'Sorry, that's Congress's job. We're not going to just do it.'"

But the legislature's ideas about decision making, like that, are entirely different. Over the years, when you talked to some of them, they indicate they understand.

Prof. Michael T. Morley: You had mentioned one of the big concerns that opponents of the circuit split had raised was concerns about the civil rights being rolled back or having the circuit split would impede school desegregation efforts. How were those issues ultimately overcome? How were those concerns addressed?

Judge Gerald B. Tjoflat: I think that if you ask anybody who has studied civil rights decision making in the six states that they would find no appreciable difference between the way cases have been decided in this circuit and the new Fifth Circuit. I never heard anybody even suggest that there's any difference that would come from judge shopping. You know we better file the case in the Fifth Circuit because it's more liberal or whatever it is. Then we're here in the Eleventh. I haven't heard of anything like that.

Prof. Michael T. Morley: Did you have close friends or colleagues who, in particular, due to the split, you wouldn't be able to sit with anymore because they were over in the shrunk Fifth Circuit?

Judge Gerald B. Tjoflat: So, that's true.

Prof. Michael T. Morley: As a judge, was it odd to have your view of the law going from being the law across say six different states, right — the entire southeast — to sort of shrinking the realm of your stare decisis impact there to about half that.

Judge Gerald B. Tjoflat: The first thing we did when we split, which was October 1, 1981, we had a big celebration, I'll put it that way, in the courthouse in New Orleans with trumpets and ruffles and flourishes. Then we all, which was silly, we all got on an airplane and went to Atlanta. That wasn't very bright, was it? I think the whole court was on — 12 of us — on that plane. Anyway, then we met in the High Auditorium that afternoon, and we had a case and it was a Fifth Circuit case and we adopted the law of the Fifth Circuit,

Prof. Michael T. Morley: *Bonner v. City of Prichard*.

Judge Gerald B. Tjoflat: The Eleventh Circuit adopted the law of the Fifth Circuit. It was like the state constitutions during the founding adopted the common law of England by constitutional statute. Same idea.

Prof. Michael T. Morley: So no thought to just giving it a go yourselves, start from scratch, get rid of some precedents you disagreed with?

Judge Gerald B. Tjoflat: I can't recall a case at which we decided — considered — whether to overturn a Fifth Circuit precedent that was decided before October 1st, 1981. I can't recall any. Matter of fact, we cite them all the time.

Prof. Michael T. Morley: So over the years, how have you managed to keep the Eleventh Circuit at the same size?

Judge Gerald B. Tjoflat: I think a lot of it has had to do with the size, mind-readability, and I think automation and other kinds of things. Well, you surely know that in the work you're doing and just so many sources that you can get electronically that in the olden days you had to get it on a piece of paper. So, it could all come on a screen at a fingertip. These electronic records, I can't tell you how handy they are on appeal. In the older days, well, you saw them, you had paper filings in boxes. If it was the habeas corpus case, say you were working out of Florida, Georgia, or Alabama, you had all of this other paper, these boxes. Then you had to sort through and find out procedurally what happened at each of these places. Well, all that's electronic now and uniformly filed. And so, it just cuts time down enormously.

Prof. Michael T. Morley: What did the role of either visiting judges or senior judges, district judges sitting by designation, was that at all important?

Judge Gerald B. Tjoflat: That was for a long time as our ability to be efficient was tuning up, let's say. We were inviting judges from other Circuits to sit as visiting judges, one out of three judges. But now I don't think we have one or three visiting judges. Now we do have district judges sit for two days on a court of appeals panel after they have been in office for a year. The idea is to acquaint them with the appellate process. That, of course, acquaints the appellate judges with their views too. So that has kept the law of the Circuit fairly stable and having an *en banc* court of 12 is a whole lot easier than a larger one.

Prof. Michael T. Morley: Do you find that the deliberations are different when there's a district judge on the panel or someone from out of the circuit on the panel?

Judge Gerald B. Tjoflat: No, not really. Usually, they're pretty attuned to Circuit law, as opposed to citing things from elsewhere. But that's not been a problem. Now, I'll say this, in terms of judicial administration, if you have a very serious case on a three-judge panel and you do have a visitor, and it's a case of first impression, the Eleventh Circuit judge should write the opinion rather than to have a visitor write the opinion. I think we've stuck to that policy pretty firmly.

Prof. Michael T. Morley: Do you think the Eleventh Circuit will be able to hold the line at 12 judges?

Judge Gerald B. Tjoflat: Well, I don't know , as long as I'm around, not that I'd have any influence, but I'm sizing up the judges now and I don't see or sense anything. Of course, the problem with adding judges to the court is that you never know unless you've sat at a huge court how it changes by adding a judge, then that second judge, the third judge, the dynamics change. In the first place, if we added one judge, now every judge has to read the work of one more judge. So, part of your day is you keep doing that and part of your day is reading the work of more judges. I remember Justice Kennedy told me one time when he was on the Ninth Circuit, he said he spent half of his time in court administration duties and the other half just about all of it reading what his colleagues are writing. That didn't leave him a whole lot of time for himself. But that's what happens. So, as you increase the court, you lose the ability to mind read, you lose that efficiency and you bring on more work for each — more time. If you increase the court by 50%, for example, it's not going to increase the output of the court by 50%.

Prof. Michael T. Morley: Do you think, along those lines, do you think there's any lessons learned here in terms of how the Fifth Circuit ultimately wound up getting successfully split that can be carried over to the Ninth Circuit?

Judge Gerald B. Tjoflat: Of course, they're now 17, so they added three judges on the Fifth. I don't know.

Prof. Michael T. Morley: But in terms of moving forward with the Ninth Circuit, do you think that any of the experience in splitting the Fifth Circuit back in the '80swould carry over to that? Or would offer some guidance in that respect?

Judge Gerald B. Tjoflat: I can imagine the Ninth Circuit remaining of that size. During that hearing in 1996, one of the senators asked the Chief Judge Wallace, "Do you think you could handle a court of 50?"

"Oh, well, we can handle a court of 50."

"How about 75?"

Somebody said, "It becomes ridiculous."

Prof. Michael T. Morley: It's like the law professor hypotheticals, you just keep pushing it out there. Well, judge, this has been really fascinating. Is there anything else about the history of the split or your experiences either before or after that you think would be important to raise?

Judge Gerald B. Tjoflat: No, I think we've kind of covered it. It was a fascinating period of time — a learning time.

Prof. Michael T. Morley: You've literally had an impact on the judicial structure of the country, right? Not just even the law and the opinions, but the structure of the judiciary that's amazing.

Judge Gerald B. Tjoflat: Well, I look forward to coming to one of your federal courts classes.

Prof. Michael T. Morley: Oh, it'd be an honor.