Testimony of

The Honorable Richard Tallman

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United States Senate
Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit"
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Written Testimony of
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Good morning, Mr. Chairman and Members of the Subcommittee:

My name is Richard C. Tallman, and I am a United States Circuit Judge on the United States Court of Appeals for the Ninth Judicial Circuit with chambers in Seattle, Washington. I was appointed by President William J. Clinton in May 2000. I am honored to appear before you to discuss the reorganization of the Ninth Circuit, and I again join my colleague, Judge Diarmuid O'Scannlain, and the other circuit and district court judges throughout the Ninth Circuit who publicly favor splitting our court to better serve the citizens of the West.

The recently proposed bills present practical and welcome solutions to a problem that has been growing for many years. This issue was already under discussion twenty-five years ago when I became a member of the California and Washington bars. The Ninth Circuit was too big then and it has only become bigger. Today it is enormous by any method of measurement, and still growing. Size does affect the quality and efficiency of administering justice. Inevitable and continuing growth will not permit us to ignore this conundrum indefinitely.

1. The Need for Collegiality Among Circuit Judges

I am acutely aware of the way in which the sheer size of our court impedes the critical development of strong personal working relationships with my fellow judges. The genius of the appellate process is based upon the close collaboration of independent jurists who combine their judgment, experiences, and collective wisdom to decide the issues presented by an appeal. Only by sitting together regularly can members of a court come to know one another and work most effectively in common pursuit of the right answer. Our decisions constantly build on the existing foundations of our jurisprudence, shaping the development of the law in our circuit (with guidance from the Supreme Court).

I came on the bench nearly four years ago, in June 2000. Yet I have not sat on a regular three-judge oral argument panel with all of my other active and senior colleagues. I firmly believe that there is a need for cohesion among the members of an appellate court because we must work closely together if we are to deliver to the nation that elusive but vital work product we call justice.

I appreciate the fact that Congress has been considering various proposals for the configuration of a circuit split. I recognize that the ultimate configuration is a decision best left to the considered judgment of the legislative branch. Whatever you decide, a smaller court would improve our collegiality and enhance predictability, which I learned from practicing law is crucial to maintaining the respect for the rule of law among the people we serve. Smaller groups of judges working together more frequently will surely benefit the citizens of our region and the nation. This will allow

people to plan their business and personal affairs in ways that comport with reasonable expectations of what the law allows or commands.

2. Caseload Concerns

In nearly four years on this job, I have seen the workload increase forty percent from some 9,000 to nearly 13,000 cases docketed annually. Judicial resources in the West simply have not kept pace with this astounding increase in work. Our current active and senior judges have responded by working harder and harder each year, churning out increasing numbers of decisions but taking longer to do so. The Ninth Circuit is consistently among the slowest of the national courts of appeals in processing our workload.

We also find ourselves relying heavily upon visiting district and senior circuit judges from throughout the country in order to staff the increasing number of oral argument panels. We borrowed more than 100 visiting judges in 2002. I personally appreciate the enormous contribution these jurists make to the processing of our appeals. However, there is a price to be paid in the work product of judges who do not regularly sit with us and who understandably may be less familiar with the voluminous jurisprudence of the country's largest court of appeals.

As we struggle to keep pace with the thousands of dispositions, including hundreds of published opinions, and more than 1,000 petitions for rehearing filed by disappointed litigants urging us to rehear their case en banc or amend the panel's decision, I find that there are simply not enough hours in the day for even the most conscientious and hardworking judge to remain current. This is important because my fellow judges' decisions constitute the ever-growing jurisprudence declaring the law of the West. The petitions for rehearing are also significant in that they may alert members of the court who were not originally assigned to hear the appeal of the need to call for en banc review or to suggest an amendment of the original panel opinion. It is also important to understand the practical limits of the United States Supreme Court, which does not have the capacity to issue writs of certiorari to correct every errant circuit court decision.

Circuit judges must not only keep pace with new developments in federal law, but also with the laws of the states in which we sit. It is virtually impossible for any one judge on the Ninth Circuit to gain familiarity with the relevant substantive law of nine states and two territories when sitting in diversity cases. Judges must be familiar with the geography, history, and culture of the lands and people affected by their rulings; for example, such familiarity is critical when we hear environmental and Native American law claims that arise in the Pacific Northwest.

The primary responsibility of each active circuit judge is to thoughtfully review and consider the appellate briefs and excerpts of record in the nearly 500 cases assigned to each of us annually. However, there is a limit to the available time and human endurance required to decide these cases in a timely and thorough manner. For judges who would be assigned to one of the smaller, newly-created Courts of Appeals following a split, and assuming that the caseload currently generated by the states of the Pacific Northwest remains constant, the appellate caseload per circuit judge would be greatly reduced. The changes proposed in these bills would provide each judge with more time available to study and prepare appellate decisions and would guarantee faster processing of cases on appeal, including more expeditious scheduling of oral argument hearings and quicker decisions on the merits.

3. Travel Costs

When I first came on the court and assumed my duty station in Seattle, I was surprised to learn that I would spend very little time actually hearing cases from the Pacific Northwest. I also was surprised at how much time I spend traveling between Seattle and California, where I hear the majority of my cases. This year I will spend only seven days hearing oral argument in cases arising out of the Northwest. The remaining time is assigned primarily to hearing appeals from California, Arizona, and Nevada. While I enjoy deciding cases from all over the Western United States and the Pacific Territories, it seems wasteful of both my limited time and the taxpayers' money that I am required to spend countless hours in airports and on airplanes--time that could be devoted to more efficiently processing the work in chambers. A full 80% of the Ninth Circuit's cases arise from the State of California and the Southwestern states of the circuit. As a result, Pacific Northwest judges are continually borrowed to make up for the shortage of appellate judges in California.

4. Additional Judgeships and Administrative Costs

California needs more judges, and I am pleased to see that Senate Bill 2278 and House Bill 2723 address this need by adding new judgeships. I would certainly be willing to visit wherever needed during the transition period while new judges are nominated and considered for appointment. I volunteered to sit as a district judge in Montana in 2001 and 2002 when that state was down to one active district judge for the entire state, and I will sit in the District of Idaho this year. I continue to volunteer in other districts when able because I think it is important for appellate judges to occasionally sit on the district court in order to appreciate the difficulty of presiding over trials. I also am pleased to see that these bills encourage sharing of administrative staff, facilities, and judicial conferences in order to reduce duplicative and unnecessary expenditures.

Seattle is home to the ten-story William K. Nakamura United States Courthouse, which the district court judges of the Western District of Washington will vacate in July 2004 when they move to a new facility. The Nakamura Courthouse

has more than 100,000 square feet of useable space and it certainly is large enough to serve as a circuit headquarters. The GSA estimates that it will require around $50 million to retrofit the building to make it earthquake safe. The money to pay for this comes from rent that the GSA already collects from tenant courts and does not require new construction funds from Congress. Reconfiguring the Nakamura building to accommodate a new circuit headquarters would not require excessive additional work or financial expenditure beyond that now contemplated by the GSA and approved by Congress.

5. The Ninth Circuit's Limited En Banc Proceedings

The Ninth Circuit is unique among this country's circuit courts of appeals by virtue of its "limited" en banc proceedings. An en banc panel is convened when necessary to maintain uniformity among a circuit's decisions, to resolve conflicts with U.S. Supreme Court precedent, or to address cases involving questions of exceptional importance. In every other circuit, an en banc panel consists of every active member of the court. Unfortunately, the unmanageable size of the Ninth Circuit, which currently has 26 active circuit judges (out of 28 authorized judgeships), has compelled us to experiment with limited en banc panels of only 11 judges.

To briefly summarize our procedures, any active or senior judge may make an en banc call regarding any three-judge panel's decision, or may recommend hearing a case en banc initially. We then have the opportunity to exchange memoranda, and the active judges vote on whether to grant en banc review. If a case is accepted for en banc review by a simple majority of active judges, an 11-judge panel is drawn at random to hear the case.

Our limited en banc proceedings create more problems than they solve. Because the Chief Judge presides over every en banc panel, only ten seats are actually chosen at random. The randomness of this selection process frequently results in an en banc panel that does not contain any of the judges who originally sat on the three-judge panel. This occurred in the California recall election case, Southwest Voters Registration Education Project v. Shelley, and two recent death penalty cases, Payton v. Woodford and Cooper v. Woodford.

Most strikingly, a mere six judges on a limited en banc panel can set the law of the circuit for the other twenty judges, whether or not the resulting decision reflects the full majority's views. It is indisputable that some close cases (with 6-5 or 7-4 split votes) would have been decided differently had different eligible circuit judges been drawn for the en banc panels. A recent example of this is Payton v. Woodford, where a slight majority of six judges on a limited en banc panel granted habeas corpus relief to a death row inmate. It also is theoretically possible that an 11-judge panel could contain none of the minimum of 14 judges who voted to accept the case for en banc review in the first place.

A further disadvantage of this system is that it discourages judges from making en banc calls--which, again, plays a key role in developing and maintaining our jurisprudence--because there is no guarantee that the judge who makes the call and persuades his or her colleagues to accept the case for en banc review will actually be drawn to sit on the resulting 11-judge panel. This serves as a disincentive for judges to invest time in pursuing en banc calls, as they will not know whether they have been randomly assigned to the panel until after a majority of active judges has voted in favor of en banc review. As the court grows bigger, a judge's chances of being drawn for an en banc panel decrease.

Due to the extremely large caseload in the circuit, too many cases are decided annually to permit effective review of each by an en banc panel. En banc proceedings occur in only a small percentage of our cases. For example, in 2002, out of 1,039 petitions for rehearing en banc, judges called for en banc votes in only 35 cases. Of those 35 only 17 were eventually reheard en banc. Further, en banc review is rarely invoked for the thousands of unpublished dispositions that our court issues each year, although the Supreme Court occasionally grants a petition for certiorari and reverses one or two of these decisions.

If the Ninth Circuit receives the seven new judgeships we have requested to augment our currently authorized 28 positions, our court will grow to 35 active judges. With such a large number of judges, we could empanel three separate en banc panels without any overlap in judges. Such limited en banc panels will not truly reflect the shared wisdom of the court as a whole. It is unacceptable that a mere six judges on a limited en banc panel could direct the development of our circuit's law without the input of the 29 who did not happen to be randomly chosen.

Nor is authorizing larger en banc panels the right solution. As the White Commission report observed, at a certain point a panel simply becomes too large for its members to work effectively together. Because litigants are given only 30 minutes per side to present oral arguments to an en banc panel, even now it may be impossible for each judge to effectively pose the questions he or she may have about the case. Oral argument in the California recall election case proved that point beyond cavil. More judges per panel would also decrease the likelihood of panels rendering unanimous decisions that speak with one voice about important matters.

Finally, I would like you to consider what would have happened if the 1981 split of the Fifth Circuit or the 1929 split of the Eighth Circuit had never occurred. As of December 31, 2003, there were 3,270 appeals pending in the Eleventh Circuit and 4,328 appeals pending in the Fifth Circuit. Adding these figures together, there would have been 7,598 pending appeals before the old Fifth Circuit, or nearly 17% of all appeals pending in the U.S. Courts of Appeals. Based on similar figures, the Eighth and Tenth Circuits (if still together) would comprise about 8% of the total federal appeals pending in 2003.

Now compare this figure with the 11,587 (roughly 25%) appeals pending in the Ninth Circuit at the end of 2003. Even if the Fifth and Eleventh Circuits were still together, they would have only about two-thirds the number of appeals now pending in the Ninth Circuit. The Eighth and Tenth combined would be merely one-third of the size of the Ninth Circuit in terms of current workload. Clearly, we are well past the point where we should be asking whether the Ninth Circuit should be split. Instead, we ought to be asking how it should be accomplished.

Conclusion

Circuits have been split in the past to address the problems inherent in unmanageably large courts. We must split the Ninth Circuit in order to attain the optimal size, efficiency, and organizational structure to permit our judges to excel at their duties in a collegial fashion, to promote shared development of judicial precedent in our respective regions, and for the benefit of all who live in the American West.

The ultimate measure of a court's power is its ability to command the respect of the people it serves, including the litigants who must comply with its decisions. The present size of the Ninth Circuit leads to the public perception that this court is incapable of reflecting the views of the huge population it serves over the vast expanse of land it covers. This perception threatens the very heart of the respect necessary for the rule of law and cannot be ignored indefinitely as the caseload continues to grow and the number of judges multiplies.

I thank the Committee for the opportunity to testify and I look forward to your questions.

APPENDIX A
Median Case Processing Time (in months)
from Filing in Lower Court to Final Disposition in Appellate Court

Year	Ninth Circuit	National Median	Difference
2003	30.4	25.9	4.5
2002	30.5	25.9	4.6
2001	30.7	26.6	4.1
2000	30.3	27.0	3.3
1999	29.9	27.1	2.8
1998	29.3	22.0	7.3
1997	29.0	26.0	3.0

Source: Administrative Office of the United States Courts
(AO Table B-4)

APPENDIX B
Ninth Circuit En Banc Ballots
Year Petitions Filed En Banc Ballots Sent Grants of Rehearing En Banc Following a Vote Denials of Rehearing En Banc Following a Vote
2003 972 40 13 27
2002 1039 35 17 17
2001 797 42 19 23
2000 1006 48 23 23
1999 1061 40 21 19
1998 1456 45 16 29
1997 1398 39 19 20
1996 1038 25 12 13

Source: Court of Appeals for the Ninth Circuit, Office of the Clerk

APPENDIX C
Number of Appeals Filed and Pending in the Eighth, Tenth, Fifth, and Eleventh Circuits compared to the Ninth Circuit

Circuit	Appeals Filed in 2003	Percent of National Total (60,581)	Appeals Pending as of Dec. 31, 2003	Percent of National Total (45,597)
8	3,110	5.13%	1,810	3.96%
10	2,509	4.15%	1,956	4.29%
5	8,547	14.12%	4,328	9.50%
11	6,970	11.50%	3,270	7.17%
8 and 10 combined	5,619	9.28%	3,766	8.25%
5 and 11 combined	15,517	25.62%	7,598	16.67%
9	12,694	20.95%	11,587	25.41%

Source: Administrative Office of the United States Courts
(AO Table B, summarizing the twelve-month period ending on December 31, 2003)

APPENDIX D
Legislation and Rules Regarding
the Ninth Circuit's Limited En Banc Procedures

28 U.S.C. § 46(c) (authorizing en banc panels)

Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

PL 95-486, 92 Stat. 1633 (October 20, 1976) (authorizing limited en banc panels)

Sec. 6. Any court of appeals having more than 15 active judges 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 its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

Federal Rule of Appellate Procedure 35 (En Banc Determination)

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.
(1) The petition must begin with a statement that either:
(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

[subsections (b)(2) and (3) and subsections (c) - (f) omitted]

Ninth Circuit Rule 35-3 (addendum to Federal Rule of Appellate Procedure 35)

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.
The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one judge and shall take place on the first working day following the date of the order taking the case or group

of related cases en banc.
If a judge whose name is drawn for a particular en banc is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot.
Notwithstanding the provision herein for random drawing of names by lot, if a judge is not drawn on any of the three successive en banc courts, that judge's name shall be placed automatically on the next en banc court.
In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.