Testimony of

Circuit Judge Richard Tallman

U.S. Court of Appeals for the Ninth Circuit

October 26, 2005

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

Hearing on:
"Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem"
Wednesday, October 26, 2005
Dirksen Senate Office Building, Room 226
Washington, D.C. 20510

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 Clinton in May 2000. I am honored to appear before you to discuss the reorganization of the Ninth Circuit. I join my colleagues, Circuit Judges Andrew Kleinfeld and Diarmuid O'Scannlain and District Judge John Roll, and other judges throughout the Ninth Circuit, who publicly favor splitting our court to bring about a new era of judicial efficiency.
I previously testified before this Subcommittee regarding my reasons for supporting a reorganization of the Ninth Circuit. To avoid repeating it now, I will simply incorporate my prior written and oral testimony. I understand the Subcommittee's interest here today is to discuss how to best reorganize the Ninth Circuit. The need to do so is even more compelling today than it was when I first appeared before you. The benefits of a split far outweigh the cost--both in finance and in efficiency. The Ninth Circuit is too big, too spread out, and too overworked to continue in its present form because we fear a short-term financial impact. I am keenly aware that we cannot get something for nothing, and that the precious taxpayer dollars to fund this reorganization are subject to competing needs. However, over the long term, we can gain a great deal by splitting a circuit that has become too unwieldy to properly handle the nearly 16,000 cases docketed this past fiscal year.
In the more than five years I have served as a United States Circuit Judge on the Ninth Circuit, our caseload has increased by more than 68 percent, from 9,500 to almost 16,000 cases. This equates to a double-digit increase each year of my service. These growth trends show no sign of abating. Yet in the past five years we have never had our full complement of 28 authorized judges and the United States Judicial Conference has annually supported our request to increase the number of active judges to 35. I am pleased to see that the pending circuit split bills all call for adding seven additional appellate judges in the West, particularly to California where they are most needed. It should be noted that the Judicial Conference has declined to take a position either for or against dividing the Ninth Circuit.

1. Housing the Twelfth Circuit in Seattle

I turn to the question of how we should be reorganized. If the Congress prefers a two-way split, the cheapest, most readily available, and most geographically desirable location for the Twelfth Circuit's headquarters is Seattle, Washington. A significant amount of money and time can be saved if we house the headquarters in the now empty ten-story William K. Nakamura United States Courthouse, located at 1010 Fifth Avenue in Seattle. I have included pictures of the building in Appendix A to my testimony. Exhs. 1 & 2. It was the first building in the West designed exclusively as a federal courthouse. The Nakamura Courthouse and its grounds are on the National Register of Historic Places, having been home since 1939 to the United States District Court for the Western District of Washington and appellate judges for the United States Court of Appeals for the Ninth Circuit whose duty stations are based in Seattle. It has also housed United States Senators Warren Magnuson and Scoop Jackson, as well as many other federal agencies since 1940. This building, rich in history, where many great men and women have served our nation, is the perfect building in which to begin a new era in our reorganized circuit judiciary.

Repairing and renovating the Nakamura Courthouse for use as a court of appeals building is already underway by the General Services Administration (GSA). It was vacated in August 2004, when the United States District Court moved out to occupy the new 23-story United States Courthouse at 700 Stewart Street in downtown Seattle.

The old Nakamura Courthouse, with 104,000 usable square feet, is more than adequate to physically house the necessary courtrooms, judges' chambers, clerk's office, circuit executives, staff attorneys, mediators, and other administrative employees of the Twelfth Circuit. During the renovation, GSA is converting old district court chambers into seven resident circuit judge and nine visiting circuit judge chambers. Two of the five old district court trial courtrooms will be configured to accommodate three-judge appellate panels. Exh. 3. The other two trial courtrooms will house the court library and a large conference room sufficient to hold at least 35 people. In addition, there is a large 15-judge en banc and ceremonial courtroom which is more than sufficient to handle an en banc panel consisting of all judges who would serve on the Twelfth Circuit. Exh. 4. As you know, the current Ninth Circuit is too large to accommodate the entire court sitting en banc. Currently, only 11 of the 24 active judges in the Ninth Circuit sit en banc. Starting January 1, 2006, we will enter a two-year trial period where 15 of the 24 judges will sit en banc.

With or without a split, the Nakamura Courthouse renovation will be finished by late 2007. Congress has previously approved the $53 million in seismic repairs and renovation costs in GSA's budget for fiscal year 2005, and preparing it to serve as the headquarters for the Twelfth Circuit will not add excessive work or financial expenditure to the planned renovation. I understand from informal talks with GSA's regional office in Washington state that a relatively modest adjustment in the final architectural plans, costing not more than five-million dollars, would be required. This additional expenditure would allow the GSA to expand and relocate the clerk's office to a ground floor and to build out additional space available for use by circuit executives, staff attorneys, mediators, and their support staff--keeping them all conveniently together in one building. There will be plenty of future space available for growth over the next 30 years. Thus, it will be relatively easy to set up the Nakamura Courthouse as the Twelfth Circuit's headquarters, and all the construction should easily be finished by the time a split becomes effective. This would allow the new circuit to begin operations, hear oral arguments, and carry out other judicial functions upon the effective date of the Twelfth Circuit.

2. Alternate Headquarters for the Twelfth Circuit in Portland

If Congress prefers another Pacific Northwest location, the Gus Solomon United States Courthouse in Portland, Oregon, stands ready to answer the call. Exh. 5. It has even more square footage available, though it too requires seismic repair and renovation similar to that underway at the Nakamura Courthouse. Exh. 6. The plans to upgrade and renovate the old Portland courthouse have not been prepared nor have the costs of renovation and upgrades been determined, so I cannot say how much it would cost or how long it would take to be ready for business. What is clear, however, is that we do not need to build new courthouses. We also ought to avoid arrangements in which the new circuit would be housed in separate buildings within the same city. Seattle's Nakamura Courthouse or Portland's Gus Solomon Courthouse would easily accommodate the space requirements of the Twelfth Circuit's headquarters for decades to come.

3. Travel Costs

Seattle not only has a courthouse that will be newly renovated, seismically upgraded, and ready to house the Twelfth Circuit, it is also centrally located within the states that would make up the new circuit. The current Ninth Circuit consists of nine western states, plus the United States Territory of Guam and the Commonwealth of the Northern Mariana Islands. While I enjoy deciding cases from all over the western United States and the Pacific Territories, the sheer size of the circuit requires me and my colleagues to spend countless hours in airports and on airplanes. Additionally, there is the cost to taxpayers of having current Ninth Circuit judges, and their support staff, regularly travel these great distances. And although I am located in the Pacific Northwest, I spend very little time actually hearing oral argument in Seattle or other northwestern states. Much of my time is now assigned to hearing appeals primarily from California.

My time, and the time of all the other circuit judges in the current Ninth Circuit, would be better spent processing work in chambers. Seattle is easily reached by convenient air service from all of the states in the Twelfth Circuit. Flights to and from Seattle to other states are more frequent, would be shorter in duration, and are less expensive, allowing for less time wasted in airports, and more time spent in chambers handling appellate work. Seattle is the closest port to Alaska, and Washington is contiguous to Oregon and Idaho, and easily accessible from Montana, Arizona, and Nevada. The small incremental cost we will incur on administrative start-up expenditures will be in part offset by the substantial savings resulting from reducing the expense now incurred by all Ninth Circuit judges who must travel throughout the massive existing Ninth Circuit.

Right now, because California is producing 70 percent of the current Ninth Circuit's caseload, a substantial amount of time and money is spent sending judges from outside the Golden State to hear cases in California. I spend the bulk of my time on cases originating in California. This past year, I heard cases at my home base of Seattle for only one week of the entire year. By adding new judges based in California and splitting off many of the current Ninth Circuit states into the Twelfth Circuit, judges outside California will spend less time traveling and more time hearing cases within their own state or within states closer in proximity. Those are real savings of hundreds of thousands of dollars annually and many hours of travel.

4. Additional Judgeships

Our workload and the time it takes the Ninth Circuit to process appeals are two key reasons why the Ninth Circuit must be split. It is necessary to add additional judgeships and to fill empty seats already authorized. However, with or without a circuit split, California requires these new judgeships to handle its overwhelming caseload. Eight years ago, the Judicial Conference

approved the addition of six permanent and two temporary circuit judgeships to the existing Ninth Circuit, and it is unfair to attribute the cost of creating these positions to the cost of splitting the Ninth Circuit, as at least one study has suggested. The true cost of splitting the circuit is in administrative and start-up expenditures--both of which can be reduced by using existing court facilities and sharing administrative functions between the two circuits.
Those expenditures were inflated in past discussions on the cost of the split because it was assumed that brand new courthouses would have to be constructed and there was no offsetting credit based on the financial gain from cost savings resulting from separating the states. A reduced Ninth Circuit, consisting of California, Hawaii, Guam and the Northern Mariana Islands, would cost less to operate than the old Ninth Circuit and the savings should be offset against the anticipated costs of the Twelfth Circuit. In addition, the new Ninth and Twelfth Circuits could easily initially share certain administrative tasks, such as library resources, judicial conferences, and some functions of the clerk's and circuit executive's offices. Shared cost-saving solutions of this nature can be found for many of the problems opponents have raised regarding how much it will actually cost to split the Ninth Circuit.
5. Review of Specific Provisions of Pending Legislation
Attached as Appendix B is a memorandum dated October 17, 2005, to the principal sponsors in Congress of S. 1296, S. 1845, and H.R. 3125 containing specific comments, section by section, for consideration by the Judiciary Committee in markup. Exh. 7.
6. Conclusion
History has proven that splitting an overly large circuit can result in other efficiencies and benefits to the court and to litigants that far outweigh any initial expenditures necessary to set up a new circuit. Justice delayed is justice denied, and it is hard to quantify the benefits of speedier resolution of appeals that will surely follow creation of more manageable, smaller appellate courts. In the end, our citizens, both as taxpayers and consumers of our court services, will greatly benefit from a split of the Ninth Circuit into two manageable circuits. It will provide our citizens with better service, litigants with prompt decisions, and a full en banc review of the most important cases to reach the court. APPENDIX A
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APPENDIX B

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CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN MEMORANDUM

October 17, 2005

TO: Senators Ensign and Murkowski, and Congressman Simpson

FROM: Judges O'Scannlain, T.G. Nelson, Kleinfeld and Tallman

RE: Review of S. 1296, S. 1845, and H.R. 3125 Circuit Split Bills

In our capacity as individual United States Circuit Judges who would be directly affected by the proposed legislation to split the existing Ninth Circuit Court of Appeals, we offer the following comments. We do not purport to speak on behalf of our Court. We have noted the following considerations in reviewing the draft S. 1296 as introduced by Senators Murkowski, Stevens, Burns, Craig, Crapo, Kyl, and Smith on June 23, 2005; H.R. 3125 as introduced by Congressman Mike Simpson on June 29, 2005; and S. 1845 as introduced by Senators Ensign, Murkowski, Burns, Craig, Crapo, Inhofe, Kyl, Smith, and Stevens on October 6, 2005:

1. In Section 3 of S. 1296, the 's' should be struck from the end of "Marianas." We note that this is corrected in S. 1845, Section 3.

2. In Section 4 of all the bills, we note that five new circuit judgeships and two temporary judgeships are created. We want to alert you to a recent U.S. Judicial Conference report from the Committee on Judicial Resources which states that seven new judgeships are inadequate to address the imbalance in workload of the New Ninth Circuit to meet the need generated by California cases. Opponents of the split may argue that there is a pressing need to increase the number of new circuit judgeships for California to equalize the workload per circuit judge as between the New Ninth and the Twelfth Circuits that would require more than seven new judgeships for the New Ninth Circuit. Thought should be given to increasing the number above seven.

3. Section 4 of both Senate bills, S. 1296 and S. 1845, guaranty that any judges appointed to the Former Ninth Circuit before the split are to go to the New Ninth Circuit (it places their official duty stations in California). However, under the House bill, H.R. 3125, two of the five new judges could end up in the Twelfth Circuit (Arizona or Nevada). Therefore, if there is a concern

about keeping enough judges in the New Ninth, the House bill will need to be amended in that respect.

4. In Section 4 of H.R. 3125, under Temporary Judgeships, the two additional circuit judges appointed for the Former Ninth Circuit prior to the split may have their official duty stations in Arizona, California, or Nevada. S. 1296 and S. 1845 place these appointees solely in California. The bills should be reconciled to provide that all new circuit judgeships, permanent or temporary, will be assigned to California (or whatever states comprise the New Ninth Circuit).

5. In Section 5, H.R. 3125 lists the number of judges in the New Ninth as 24 and the number of judges in the Twelfth as 9. S. 1296, Section 5, lists 19 judges and 14 judges, respectively. S. 1845, Section 5, lists 20 judges and 14 judges, respectively. These numbers should be reconciled so that all the bills conform with one another once it is made clear where the new judgeships will be established. Ideally, Title 28, United States Code, § 44, should be amended to provide that there are 19 positions (plus 2 temporary judgeships, for a total of 21 positions) in the New Ninth, and 13 positions in the Twelfth Circuit.

6. Section 6 of S. 1296 leaves out Pasadena as an authorized place for the holding of court for the New Ninth Circuit. S. 1845 corrects this omission.
7. Section 6 of S. 1296 leaves out Las Vegas, Seattle, Boise, and Anchorage as authorized places for the holding of court for the Twelfth Circuit. Section 6 of H.R. 3125 leaves out Las Vegas, Anchorage, Boise, Portland, and Missoula as places for the holding of court for the Twelfth Circuit. S. 1845 leaves out Anchorage and Boise. The bills should be amended so that it is clear that the Twelfth Circuit is authorized to sit in Phoenix, Las Vegas, Boise, Portland, Seattle, Anchorage, and Missoula.

8. S. 1296 and S. 1845 include a provision, in Section 7, that the Twelfth Circuit's headquarters will be in Phoenix, Arizona. H.R. 3125 does not specify where the Twelfth Circuit's headquarters will be. Perhaps the H.R. 3125 version is preferable given the current uncertainties over cost.

9. In Section 8 of S. 1296, the 's' at the end of "Marianas" should be struck. We note that this is corrected in S. 1845, Section 8.

10. Section 9 of S. 1296 and S. 1845, and Section 8 of H.R. 3125, give senior circuit judges the right to elect assignments to either circuit. The bills should require that senior judges elect to which circuit they wish to be assigned before the effective date of the Act. Consideration should also be given to permitting Chief Judge Schroeder to remain as Chief of the New Ninth Circuit while maintaining her resident chambers in Phoenix. Perhaps active judges should be permitted to elect as well.

11. Section 11, sub-paragraph (3) of S. 1296 and S. 1845, and Section 10, sub-paragraph (3) of H.R. 3125, should be consistent. In S. 1296 and S. 1845, petitions for rehearing and petitions for rehearing en banc would be considered by the court of appeals to which they would have been submitted had the Act been in effect at the time the appeal or other proceeding was filed with the court of appeals. In H.R. 3125, these petitions are treated as if the Act had not been enacted. These provisions must be reconciled.

12. Section 12 of S. 1296 and S. 1845, and Section 11 of H.R. 3125, should make clear that circuit judges may also be assigned by the respective chief judges of each circuit to sit on the district courts of each circuit. That will cover three-judge voting rights panels and routine designations when a district needs temporary or emergency staffing on the district court (as has recently been the case in Montana, Idaho, Arizona, Southern California, Guam, and Hawaii). Circuit judges have helped handle district court cases when judicial vacancies have created judicial emergencies or when district judges have had to recuse themselves.

13. The language to be inserted in Section 292 of Title 28, United States Code, contained in Section 13 of S. 1296 and S. 1845, and Section 12 of H.R. 3125, are substantively the same, but worded differently in each bill. S. 1296 and S. 1845 seem to articulate a more complete version of the language.

14. In S. 1296, there is no omnibus appropriations authorization or reference to covering the cost of reorganization in a separate piece of legislation. Thought should be given to doing so in S. 1296, as H.R. 3125 has included such appropriation authorization language in Section 16. S. 1845 has included this language in Section 15.

15. In Section 4 of S. 1296 and S. 1845 the judgeships become effective upon the passage of the Act, but, under Section 15 of S. 1296 and Section 16 of S. 1845, the amendments do not become effective for another twelve months. Under the proposed House bill, H.R. 3125, the judgeships also become effective upon passage; the amendments are not effective until the first day of the fiscal year beginning not less than nine months after five judges are confirmed. It is unclear how long that would take. The House bill requires at least three judges to be appointed after January 2006. It does not give any indication as to when the other two judges must be appointed. In fact, there is no provision for filling subsequent vacancies in existing judgeships before the new judgeships would be filled under the bill. Conceivably, the bill could pass and the circuit never be split. The Senate version seems preferable.

16. S. 1296 and S. 1845 give no attention to authorizing shared circuit conferences or shared administrative services (such as a Main Court Library in San Francisco or Circuit Executive staff assistance for space and security issues). H.R. 3125 does mention administrative coordination in Section 16. Thought should be given to addressing those subjects in S. 1296 and S. 1845.

Thank you for considering our comments regarding the various legislative proposals supporting a reorganization of the current Ninth Circuit.