Testimony of

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U.S. Court of Appeals for the Ninth Circuit

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Hearing on Senate Bill No. 1845

Mr. Chairman and Members of the Judiciary Committee,
I am Richard C. Tallman, United States Circuit Judge on the Ninth Circuit Court of Appeals, with chambers in Seattle, Washington. Thank you for inviting me once again to discuss the configuration of a reorganized federal court of appeals to better serve the western United States and the Pacific Islands. I respectfully refer the Committee to my prior testimony in support of splitting the existing Ninth Circuit. On behalf of the two dozen circuit and district judges who wrote the Chairman on June 29, 2006, urging prompt action in approving Senate Bill No. 1845 to reorganize the existing Ninth Circuit, we all appreciate the recognition that it is time for action.

The proposed legislation under Senate Bill No. 1845 divides the Ninth Circuit into two circuits: California, Hawaii, the Northern Mariana Islands and Guam in a reduced Ninth Circuit, and Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new Twelfth Circuit. Any split configuration will greatly alleviate the increasing workload burden on our overtaxed circuit. It is better to split the circuit now than to wait for the problem to get worse. And it will get worse. We currently have on our docket almost one-third of all pending appellate cases in the federal courts of appeals; historical indicators show that this percentage will continue to grow. Splitting the Ninth Circuit now will ensure that Congress will not have to reconsider this question in the West for many decades to come.

According to U.S. Census Bureau projections, Arizona and Nevada alone are projected to have tremendous population growth in the 25 years between July 1, 2005, and July 1, 2030: Arizona is projected to grow by 82.6% and Nevada by 82.1%. If the Ninth Circuit remains as it is now configured, with Arizona and Nevada tied to California, the certain increase in workload purely from population growth in the Southwest will overwhelm a circuit already stretched to its limit. A split which places California either on its own or with the Pacific Islands will substantially decrease the caseload of all the judges in all the states of the current Ninth Circuit now, for the next 25 years, and beyond.

Absent an agreement to divide California among the newly formed circuits, it is impossible to equalize the caseload per judge throughout the West. That is why Senate Bill No. 1845 adds seven new judgeships to California. But seven new positions is not enough to achieve perfect caseload parity. However, I believe that if we must choose between a slight disparity in caseload

with everyone's caseload reduced after the split, and a completely equal, but currently overwhelming, caseload on circuit judges in the existing Ninth Circuit that increases every year, the better alternative is to choose the former. Furthermore, the proposed split legislation provides that judges placed in the newly created Twelfth Circuit would continue sitting in the reduced Ninth Circuit for an indeterminate period of time to help with the caseload in California while new judges are nominated and confirmed. This holdover will alleviate a good portion of the workload imbalance following the split.

If the Ninth Circuit is not split simply because the caseloads between the newly created circuits are not even, then all the western states will be held hostage to the ever-increasing workload of California and the southwestern states. U.S. Supreme Court Associate Justice Anthony H. Kennedy has trenchantly observed:

The States of Alaska, Washington, Oregon, Idaho and Montana have a community of interest and a geography that justify assigning them to their own circuit. There is no reason to hold these Northwest states hostage to the difficulty of determining a proper circuit for California, Arizona, Hawaii, and Nevada. If the solution for the latter states is not at hand, that could be studied and debated while the Northwest states concentrate their energies on at once forming a cohesive and effective circuit.

Within the twelve-month period ending June 30, 2006, the Ninth Circuit was able to terminate 13,582 appeals--more than any other circuit. However, during that same time period, the Ninth Circuit also received 15,311 new filings--again, more than any other circuit. No matter how efficient the existing Ninth Circuit tries to be, in its current form it simply cannot keep pace with its increasing workload. There were over 17,000 cases pending on our docket as of June 30, 2006, comprising 30.3% of the nation's entire federal appellate caseload.

Of the 17,000 cases currently pending before the Ninth Circuit, approximately 8300 of those are immigration appeals. In fiscal year 2005, there were 6583 immigration appeals filed, but only 4966 terminated. The Ninth Circuit could only dispose of 40% of the immigration appeals filed and pending before the court, and the percentage of dispositions will most assuredly decrease as the workload grows. California accounts for almost 70% of the Ninth Circuit's filed cases and a substantial portion of the immigration appeals arise from the Golden State.

The reality is that absent a substantial increase in the number of authorized judgeships in California, perfect mathematical parity between judicial caseloads in the new Ninth Circuit and the new Twelfth Circuit is simply unattainable. However, if our circuit is not split, every litigant who seeks justice, wherever located, will continue to suffer the ever-increasing backlog of pending cases and longer delays, and all of the judges will face an increasing burden to work at an irresponsibly accelerated speed. The quality of our decisions will continue to suffer as evidenced by our circuit's dismal reversal rate by the Supreme Court. And the limited en banc review process simply cannot keep pace with the staggering increase in appeals, yielding greater chances of erroneous decisions by three-judge panels that are for all intents and purposes unreviewable under the current makeup of the circuit. President Jimmy Carter recognized the burden of an overly large circuit court when the Fifth Circuit was divided into the current Fifth Circuit and the Eleventh Circuit in 1980:

There is a limit to the number of judgeships an appellate court can accommodate and still function effectively.

Some time ago it became clear that if the rapid growth in the caseload of the Fifth Circuit continued, necessitating the addition of more and more judges, an unwieldy bench would result. When the size of this court reached 26 active judges, the practical problems of having all the judges take part in a single case became unmanageable. At the same time, it became increasingly difficult to preserve the consistency and predictability among the decisions of three-judge panels.

I ardently support Senate Bill No. 1845 because I believe the time for action is at hand, and urge its passage should its proposed two-way split configuration be deemed most viable by Congress. But if for some reason, Congress prefers a different split, I want to take this opportunity to offer for consideration a different configuration. Given the growth patterns in the southwestern part of the country, I favor a three-way split. This configuration would be less expensive to employ now, while building space is currently vacant and available, than it will be in the future. First, create a true Pacific Northwest Circuit composed of Alaska, Washington, Oregon, Idaho and Montana, with headquarters in Seattle or Portland. This solution was posed by Washington's United States Senator Warren G. Magnuson in 1955 and by Senators from each of the Pacific Northwest states in 1995. Second, let California once again become a standalone circuit. Third, establish a new Southwest Circuit comprised of Nevada and Arizona with headquarters in either Phoenix or Las Vegas. Hawaii and the Pacific Island Territories could either join the Southwest Circuit or the Pacific Northwest Circuit in order to balance workloads while giving the smaller states and territories more influence than they would enjoy appended to California.

As I previously testified in my last appearance before this Committee, a significant amount of money and time can be saved if we house a circuit headquarters in the now-empty ten-story Nakamura Courthouse, located at 1010 Fifth Avenue in Seattle. Repairing and renovating the Nakamura Courthouse for use as a court of appeals building is already underway by the General Services Administration, and, with or without a split, the Nakamura Courthouse renovation will be finished by late 2008. Congress has previously authorized GSA to spend up to $58 million in seismic repairs and renovation costs in approving GSA's budget for fiscal year 2005. Preparing it to serve as the headquarters for the Twelfth Circuit will not add excessive work or unreasonable additional cost 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 make 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.

Alternatively, the Gus J. Solomon United States Courthouse is available in Portland. It has even more square footage available, though it too requires seismic repair and renovation similar to that already underway at the Nakamura Courthouse. 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 should also 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 Pacific Northwest Circuit's headquarters for decades to come.

Chief Judge Roll has appended to his testimony the projected costs for locating the Southwest Circuit headquarters in Phoenix.

The cost of a split will be reduced by reallocating up to 30% of the existing Ninth Circuit's costs to the new circuits (to correspond to the reduction in the old Ninth Circuit's caseload) and by the corresponding decrease in current travel costs for everyone. The sheer size of the existing Ninth Circuit requires me and my colleagues to spend countless hours in airports and on airplanes. The government currently expends substantial sums necessitated by having current Ninth Circuit judges, and their support staff, regularly travel great distances to hear cases all over the western United States, including Alaska and out into the Pacific. While some travel is inevitable given the vast landmass we serve, real cost reductions will follow reconfiguration.

Reorganization will also significantly reduce the need to bring visiting judges from all over the country to sit on panels of the Ninth Circuit by designation. Last year, approximately 134 visiting judge days were necessary to help fill the 414 panel days in which oral argument was heard. In 2006 the number of visiting judge days is projected to reach 157 out of 425 panel days as our existing circuit struggles to manage its ever-growing caseload. With reorganization, this need, and the corresponding expense associated with importing visiting judges, will be reduced.

Under my proposed configuration, and based on the current duty stations of existing judges, the 36 million people in California would have 21 active and 13 senior judges to manage approximately 11,000 cases per year. The Southwest Circuit, with about 10 million residents, would have 6 active and 3 senior judges for about 2400 cases per year. And the Pacific Northwest Circuit, with 13 million people, would have 8 active and 7 senior judges for just over 2500 cases per year.

The three-way split would also serve to reduce the caseload of all judges in the current Ninth Circuit. While the reduction for California judges will be modest under my proposed configuration (or any configuration that does not involve splitting California or adding the 15 or more judges to the new Ninth Circuit required to achieve caseload parity with the Southwest Circuit), the judges in the Pacific Northwest and Southwest Circuits would see a tremendous reduction in their caseload. In fact, the Pacific Northwest and Southwest judges would have caseloads that are much more closely aligned with the other circuits in our nation.

As of June 30, 2006, all circuits have an average caseload of 382 cases per judge. With the three-way split, the Southwest Circuit judges would have just over that average number: 384; the Northwest Circuit judges would have a slightly lower number: 308 cases. And to the extent that these numbers reveal too much of a disparity with California, with 502 cases per judge on

average, Congress could always realign judicial positions as they become vacant, moving judgeships to the new Ninth Circuit from either the Pacific Northwest or Southwest Circuits. For example, if the Pacific Northwest had only seven active judges, the average caseload per judge would increase to 352, putting it immediately after the Ninth and Southwest Circuits; California would decrease to 459 cases per active judge if two positions were moved there.

Given U.S. Census Bureau projections that most western states are expected to experience significant population growth in the coming 25 years, the average caseloads will grow quickly over time. The average caseload per judge in the Pacific Northwest Circuit will likely move significantly closer to the other circuits as the projected growth is realized. The U.S. Census Bureau projects a 31.2% population increase for Alaska, a 40.0% increase for Idaho, a 34.4% increase for Oregon, and a 39.0% increase for Washington during the 25-year period between July 1, 2005, and July 1, 2030. The total expected population growth of 11.9 million people in the Pacific Northwest and Southwest Circuits suggests that if we see a lower caseload per judge today, the disparity in caseloads will change over time to bring the smaller western circuit averages higher.

No matter how Congress configures the split, however, action is needed now. Some form of reorganization, either through Senate Bill No. 1845, or under a different configuration, will greatly increase the efficiency and manageability of our courts in the West, and reduce delay in processing and deciding cases, while saving money and improving productivity by substantially reducing extended travel time for most of the judges. Faster case processing and higher quality decisions with greater opportunity for full court en banc review will be the result. While the current reality is that there can never be exact parity in caseloads among judges of the new circuits, the key point is that reorganization of the existing Ninth Circuit, coupled with seven or more new judgeships for California, as currently proposed by pending legislation, will reduce the average number of cases being handled by each and every judge in California and the other western states, no matter how Congress chooses to configure the circuits.

Opponents argue that the result of any split will be an unfair, disproportionate caseload between the judges of the new Ninth Circuit and the newly created circuit(s). However, as I have already noted, absent dividing California as part of the reorganization, complete mathematical parity is impossible. Yet at the same time, it is important to note that the average caseload per active circuit judge varies widely among the existing circuit courts of appeals.

I have prepared a chart which uses current caseloads and authorized judgeships to show what the average caseload might be based upon the two-way split proposed in Senate Bill No. 1845. Under the Bill, all seven newly established positions (five permanent and two temporary) are assigned to the new Ninth Circuit in California. Congress could move judgeships from the Twelfth Circuit to the new Ninth Circuit to further improve parity of caseloads, but the proposed legislation would need to be amended to do so. Whatever happens in Congress, it is important to recognize that the numbers will vary annually based upon judicial vacancies and growing caseloads. Nor should we forget that in restructuring the courts of appeals, the current occupant of a particular judicial seat or the political affiliation of those who appoint or confirm judges is irrelevant. We are talking about structural reorganization to administer justice in the West for many decades to come, long after incumbent judges are gone.

A reconfiguration will produce the benefits we have long extolled in discussing the need for this

split: greater efficiency in processing cases which will significantly reduce the current 16-month delay from the time of filing of the Notice of Appeal to disposition on the merits; greater accountability by panels whose decisions can be scrutinized more easily by full-court en banc review when warranted; greater representation of western judges on the Judicial Conference of the United States and on its committees which impact the day-to-day work of the federal judiciary; the opportunity to circulate opinions to the entire court prior to filing; and improved collegiality among judges in smaller circuits. The transaction costs of investing in improving the delivery of justice are far smaller than the productivity costs of maintaining the status quo.
In short, reorganization as contemplated by Senate Bill No. 1845 restores proportionality and accountability to the administration of justice in the West. I applaud your efforts, Mr. Chairman, and those of the sponsors of this urgently needed reorganization bill, to discharge your constitutional authority under Article III, § 1, to "ordain and establish" the lower federal courts which, subject to the supervision of the Supreme Court, exercise the judicial power of the United States.

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