

109th Congress

PURPOSE AND SUMMARY

The purpose of Title I of H.R. 4093, the “Federal Judgeship Act of 2005,” is to authorize the President to appoint, by and with the advice and consent of the Senate, additional circuit and district court judges. These authorizations were developed in coordination with the U.S. Judicial Conference and substantially based on their recommendations. The circuit and district judgeship requirements have been updated from the 108th Congress and are considered meritorious. Congress last enacted an omnibus judgeship bill in 1990.

Title II of H.R. 4093 entitled, the “Enhanced Bankruptcy Judgeship Act of 2005,” authorizes the appointment of additional bankruptcy judges, subject to the provisions of 28 U.S.C. § 152. The request for additional bankruptcy judgeships was developed in coordination with the U.S. Judicial Conference and is substantially based on their recommendations.

Title III of H.R. 4093 entitled, the “Judicial Administration and Improvements Act of 2005,” realigns the existing Ninth Circuit Court of Appeals into two circuits: a newly-created Twelfth Circuit that is comprised of judicial districts in Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington; and a streamlined new Ninth Circuit, which includes all judicial districts in California, Hawaii, the Northern Mariana Islands, and Guam.

Congress has considered proposals to realign the Ninth Circuit for more than 60 years. The Ninth is by far the largest of the thirteen courts of appeals. The size of the Ninth – as measured by the geography of the Circuit, the number of persons it serves, and the volume of cases before it – prevents litigants from receiving timely legal redress. With 28 authorized judgeships, the Ninth is substantially larger than any other circuit court. The U.S. Judicial Conference has requested that Congress authorize five new permanent circuit judgeships and two additional temporary circuit judgeships for the Ninth.

The Committee believes the addition of new judgeships without needed structural reform will exacerbate the unstable development of case law, delays in the adjudication and disposition of cases, and the perpetuation of conditions that have led the Ninth Circuit to be widely recognized as having both an extraordinary number of decisions that the U.S. Supreme Court must hear on appeal as well as a high rate of reversals. The Committee also notes that the Ninth Circuit is notorious for having an excessive number of cases summarily or unanimously reversed by the U.S. Supreme Court. The Committee concurs with the recommendations of two independent commissions, the former Chief Justice of the United States, William Rehnquist, and four Associate Justices of the U.S. Supreme Court that the Ninth should be reorganized. The Committee believes the only viable long-term solution is a structural realignment.

Title IV of H.R. 4093 contains language that was requested by the Administrative Office of the Courts, which authorizes such appropriations as are necessary to implement the provisions of the H.R. 4093.

BACKGROUND AND NEED FOR LEGISLATION

Constitutional Authority to Organize Inferior Courts

Art. I, § 8, cl. 9 of the U.S. Constitution grants to the Congress of the United States the sole authority and responsibility “[t]o constitute Tribunals inferior to the Supreme Court.”

Art. III, § 1, reiterates Congress’ unique role in providing for the organization and effective functioning of the “judicial Power of the United States” by declaring that such power “shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.” Pursuant to its Constitutional authority, Congress has enacted numerous laws to organize and provide for the creation, composition, and from time to time, the reorganization of inferior courts. These laws are designed to ensure that the “judicial Power of the United States” is administered efficiently and effectively and that its operations protect the rights of the American people. The principal statutes that regulate and organize the Courts of Appeals are codified with great specificity in title 28 of the United States Code. In 28 U.S.C. § 40, the Congress has prescribed, *inter alia*, the creation and composition of circuit courts of appeals, the number and composition of circuits, the number of judges authorized to be appointed to each circuit, and the places where the courts of appeals shall hold regular sessions.

The Creation of New Judgeships for the Realigned Ninth and Other Circuits Will Greatly Enhance the Operations of the Federal Judiciary

The House Committee on the Judiciary received the submission of the Judicial Conference of the United States, which requests Congress to authorize additional Art. III judgeships. The request of the Conference was based upon a biennial review of the judgeship needs of all U.S. Courts of Appeals and U.S. District Courts that was completed in March 2005. The Committee concurs that the creation of 12 new judgeships in five courts of appeals and 56 new judgeships in 29 district courts will enhance the ability of the Federal court system to administer civil and criminal justice matters appropriately. Additionally, the Committee supports the creation of 17 new permanent bankruptcy judgeships and eight new temporary bankruptcy judgeships.

The Creation of the Court of Appeals System and the Ninth Circuit

In 1891, Congress created the regional court of appeals system and the Ninth Circuit by enacting the Evarts Act. Describing the Act’s significance, Associate Justice O’Connor has written, “[t]he establishment of a court of appeals and the expansion of the discretionary power of the Supreme Court to grant or deny review in many cases meant that from 1891 on the great majority of Federal court appellate decision making would be made at the level of the circuit court of appeals. That effect is still felt today as the Supreme Court on which I sit accepts for review less than 2 percent of the petitions filed. The great bulk of Federal case law is developed and made in the courts of appeals.”

With the great bulk of Federal case law emanating from regional courts of appeals and a recognition that, as a practical matter, courts of appeals are the courts of last resort for the overwhelming majority of litigants, the Committee takes seriously its obligation to ensure that

the regional courts of appeals system functions appropriately and effectively.

Historically, Congress has exercised this obligation in a number of ways to include, from time to time, adding territories and states to existing circuits and periodically re-aligning circuits to improve the administration of judicial functions. Two recent examples include the realignment by Congress of the Eighth Circuit by creating the Tenth Circuit in 1929, and similarly, the creation of the Eleventh Circuit from the Fifth in 1981.

When the Ninth Circuit was established, the American West was characterized by a vast geography that was sparsely populated. The continental contours of the circuit have been unchanged since 1912 when Arizona was added to the Ninth. According to census figures from 1910, the combined population of the states that comprise the Ninth today constituted less than 6 percent of the total U.S. population. In stark contrast, today the circuit encompasses more than 58 million people, nearly 20 percent of the total U.S. population. This figure exceeds by 27 million the number of people in the next most populous Circuit, the Sixth, and by 37 million the average population of the other circuits.

There is no foreseeable end to the phenomenal population growth in the region. Three of the five fastest-growing American cities with populations that exceed 1,000,000 and seven of the ten fastest-growing cities with populations that exceed 100,000 lie within the Ninth's confines.

The Ninth's enormity dominates over the other regional circuits. The Ninth is 25 times larger than the smallest of the circuits, the First. The Committee believes that a regional court of appeals system that places one in five Americans and 40 percent of the nation's geographic area in a single regional circuit with the ten remaining regional courts of appeals dividing 60 percent of the nation's land mass is unwieldy and inefficient.

The Ninth Circuit: Structure and Concerns

The U.S. Courts of Appeals for the Ninth Circuit is comprised of nine states and includes the districts of Alaska, Arizona, Central California, Eastern California, Northern California, Southern California, Hawaii, Idaho, Montana, Nevada, Oregon, Eastern Washington, Western Washington, Guam, and Northern Mariana Islands. The Committee notes that the average number of states in the other circuits is 4.25 and that the Ninth's composition is more than twice as large.

Twenty-four of its 28 authorized judgeships are filled and there are 23 senior judges assigned to the circuit. Currently, the Ninth Circuit has 47 serving judges, four vacancies, and a request for seven additional judgeships, for a total of 58. This figure approaches twice the number of total serving judges in the next largest circuit, the Sixth, with 29 serving judges and a request for one additional judgeship for a total of 30. The Committee notes the average total number of judges among all other circuits is 20 and that the Ninth's requirements approach three times that figure.

During the year ending June 30, 2005, 15,685 appeals were filed in the Ninth. This number represents three times the average of other circuits and approximately one-quarter of all

appeals heard by U.S. Courts of Appeals. The Committee notes that the median time for disposing of an appeal from filing is approximately 40 percent longer in the Ninth than the average of the other Courts of Appeals. This delay increases both the expenses incurred by parties and the uncertainty associated with the ultimate resolution of the case. The lives of the individuals involved are seriously and negatively impacted when the Federal court system fails to dispense justice in a swift, unbiased, and equitable manner. The Committee is convinced that it can no longer be maintained, and that the enormity of the Ninth Circuit presents unique administrative challenges that are responsible for the persistent inability of the Ninth to meet the legitimate needs and expectations of its citizens.

The Committee is concerned that these delays may imperil the spirit of fundamental guarantees that are provided by the U.S. Constitution. Specifically, the Committee is concerned that the Sixth Amendment guarantee to an accused of a “speedy ... trial” in all criminal prosecutions and the Equal Protection clause’s requirement that all American citizens receive equal treatment under the law in every Federal court are unduly placed in jeopardy by the size, scope, and failure of the Ninth to eliminate needless delays and materially reduce its backlog.

The Committee notes that the Ninth’s backlog of total appeals pending recently stood at 13,417 cases. This number exceeded by almost three times the number of total appeals pending in the circuit with the second-highest total, the Fifth. Further, the Committee notes that the Ninth’s 56.1 percent increase in appeals filed in the four years that ended September 30, 2004 far outpaced the rate of increase in any other district.

The following chart summarizes the workload of the Ninth relative to the other circuits.

Data	D.C.	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
App. Filed 04	1,390	1,723	7,008	3,871	4,957	8,509	4,841	3,377	3,101	14,274	2,646	7,065
% Chg. Prv. Yr.	24.0	-6.6	10.2	-2.2	1.4	-1.2	-2.5	-4.0	-2.8	10.9	4.2	1.2
% Chg. Prv. Four Yrs.	-7.7	17.8	43.3	11.2	5.7	3.1	-1.5	-2.4	-2.0	56.1	-0.4	0.0
App. Trm. 04	1,155	1,643	4,611	2,047	4,713	8,100	4,655	3,294	2,916	12,151	2,448	6,908
Tot. App. Pnd.	1,266	1,601	4,240	3,332	2,766	4,854	4,534	2,375	1,993	13,417	2,151	3,542
Med. Time Disp.	10.5	11.2	11.0	11.6	7.5	8.5	16.8	10.3	9.8	14.0	11.7	8.8

Data Key

App. Filed 04 – The number of appeals filed for 12-month period ending 9-30-04.

% Chg. Prv. Yr. – The percentage increase or decrease of appeals filed from the previous year.

% Chg. Prv. Four Yrs. – The percentage increase or decrease of appeals filed from 9-30-00 to 9-30-04.

App. Term. 04 – The number of appeals terminated for the 12-month period ending 9-30-04.

Tot. App. Pnd. – The total number of appeals still pending for the 12-month period ending 9-30-04.

Med. Time Disp. – The median time from filing notice of appeal to disposition (in months) for the 12-month period ending 9-30-04.

The Ninth Circuit is the preferred venue for the filing of administrative appeals. A large increase in immigration appeals accounts for an inordinate percentage, approximately half, of the Ninth's workload. The Committee is presently engaged in a major restructuring of our nation's immigration laws. Ensuring that sensible and uniform immigration policies are enacted and applied equitably throughout the nation is a major component. Nevertheless, the Committee notes it is the Ninth's broad and well-earned reputation for the lenient enforcement of our current immigration laws that has directly contributed to this increased caseload – a condition that some seek to assert as a justification for Congress suspending necessary action to restructure the circuit.

Like other circuits, the Ninth is administered generally by a chief judge and circuit judicial council supported by a circuit executive. A clerk's office handles the administration of

the court of appeals. The Ninth has adopted unique practices to facilitate the processing of the voluminous number of cases that it must handle. Among these practices is the extensive use of staff attorneys and the exclusive reliance on “limited” *en banc* panels.

While the court employs six to eight attorneys who serve as mediators, the court conducts most of its work through the use of three-judge panels. Each active judge serves on oral argument panels seven or eight weeks each year, hearing approximately 32 to 36 cases in each of those weeks. When there are not enough active and senior judges to create argument panels, the court fills out panels with district court judges.

Judges have frequently commented on the importance of “collegiality” when sitting on a three-judge panel. Frequent interaction among judges can enhance understanding of one another’s reasoning and decrease the possibility of misinformation and misunderstandings. There are more than 3,000 possible combinations of panels in the Ninth. This incredible number prevents individual judges from becoming better acquainted with the personalities and jurisprudence of their colleagues.

The Ninth has been criticized for permitting its jurisprudence to be developed by three-judge panels with the outcome of particular cases riding subjectively on the makeup of a given panel rather than objectively on general principles of circuit law. This erodes confidence in the law-declaring role, one of a circuit’s two primary functions (the other being to correct errors on appeal).

Circuit judges also serve for one or two months each year on screening panels that review cases that were preliminarily screened by court staff. The Committee is informed that it is customary for circuit judges to rely heavily on the recommendations of staff attorneys and that the time spent by a judge on a pre-screened matter may be measured in mere minutes. Such a cursory review may lead to an erosion of confidence in the public perception of the judiciary.

Like other circuits, the Ninth may sit *en banc* to maintain the uniformity of its decisions and to decide cases involving questions of exceptional importance. The Ninth differs from other circuits, however, in that it is the only Circuit to ever use a “limited” *en banc* court consisting of the Chief Judge and, pursuant to a recently approved local Circuit rule, 14 others (until this year, the procedure was limited to 11 judges total). The effect of the Ninth’s long-standing practice was that a majority of six judges (now eight) can establish circuit-wide precedent for one-fifth of the nation’s population and on behalf of a court authorized 28 judges in full-time active service. The Committee notes the Ninth adopted this local rule change only seven years after the Commission on Structural Alternatives for the Federal Courts of Appeals, also known as the White Commission, issued its final report that called upon the circuit to abolish its *en banc* practice. Further, the Committee notes that it was a desire to ensure that a full *en banc* hearing was available to appellants that motivated the judges of the former Fifth Circuit to unanimously support the realignment that resulted in the creation of the Eleventh Circuit.

The Ninth’s rules do permit a judge dissatisfied with the decision of a “limited” *en banc* court to call for a vote on whether the full court should convene to reconsider the case. However, the Committee notes the court has never voted in favor of a “full-court” rehearing.

The Committee considers the Ninth's exclusive and extensive reliance on "limited" *en banc* hearings to be a direct function of the size, geography, and extraordinary number of judgeships of the court.

The Committee notes that commentators have observed that full *en banc* hearings can be extraordinarily useful in serving a court's development of coherent, consistent, and predictable case law, in promoting familiarity and collegiality among colleagues, and in eliminating intra-circuit conflicts. The Committee notes the fact that the Ninth's "limited" *en banc* practice has resulted in denying appellants the opportunity to have all circuit judges in regular active service participate in an *en banc* hearing. The Committee recognizes that the Ninth's practice is more convenient for the Chief Judge and the limited number of judges selected to participate but the Committee, nevertheless, urges the Ninth Circuit to reconsider this practice and to instead adopt the normal *en banc* process utilized in all other circuits. The goals of an appellate court must include the provision of well-reasoned, predictable, timely, and uniform decisions. Towards this end, the Committee notes another benefit of a re-aligned Ninth will be to facilitate the practice of pre-circulating opinions, a practice common to the Supreme Court and the other circuit Courts of Appeals. This could prevent intra-circuit conflicts and foster greater awareness of the body of law created by a circuit.

Extraordinary History of Congressional Review of Realignment

Even before the passage of the Evarts Act, Congress was informed the enormous size of the proposed Ninth Circuit would create inefficiencies, delays, and administrative burdens. In 1890, Frank M. Stone, a San Francisco attorney, wrote to Senator George F. Edmunds asking the Senate to give further thought to the massive geographical jurisdiction of the proposed Ninth. Presciently, he wrote that such a large circuit "would be more than any one such court of appeals . . . could possibly attend to without the business running behind, and the calendar becoming clogged."

Forewarned, Congress nevertheless created the Ninth largely along the continental boundaries that exist today. In 1937, Ninth Circuit Judge William Denman testified before the Senate on the need to add two additional judges to the court in order to process the number of appeals and clear the court's backlog. He stated, "[w]e need these two judges now," but acknowledged to Congress that, "you will have to divide the circuit and have still more judges" later, adding, "it is inevitable that the northern part of the circuit will eventually be separated from the southern part."

David C. Frederick, the author of *Rugged Justice*, a history of the Ninth's first half century, describes the situation in familiar terms, "the Ninth Circuit's geographical size suggested two competing options: one, to increase the number of judges on the court; the other, to divide the circuit, as Congress had done with the Eighth The predominant issue . . . was whether administrative need justified division. Denman did not think so. In 1937, when the threat of division was low, he estimated the number of appeals . . . [to not be] significant enough to warrant a split."

By 1941, Senator Bone and Representative Magnuson from Washington introduced

legislation in each chamber to divide the circuit into two, creating a new Eleventh Circuit that would have contained Alaska, Idaho, Montana, Oregon, and Washington. A furious debate was ignited but Congress chose not to act after the Ninth Circuit adopted a new operating rule and issued a well-timed announcement that they would increase sittings in Seattle and Portland. Despite his earlier pronouncements about the inevitability of a split, Judge Denman orchestrated the opposition among California-based Ninth Circuit judges and successfully defeated the proposal.

The next serious attempt to deal with streamlining the Ninth Circuit came in 1973 when Congress created the so-called “Hruska” Commission to study circuit realignment and the appellate courts’ internal operating procedures. The Hruska Commission filed a report in 1973 that recommended a split of both the Fifth and the Ninth Circuits but Congress did not act for seven years. In 1978, it passed an omnibus judgeship bill that authorized the use of divisions for certain administrative tasks as well as limited *en banc* functions, along with new judgeships for the Fifth and Ninth. Judges from the Fifth, however, chose to preserve the rights of appellants to seek a full court *en banc* review and determined it was better to realign than to insist on a continued expansion of the size of the court.

In 1989, Senator Slade Gorton of Washington and seven other Senators introduced legislation to create a new Twelfth Circuit composed of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands. Similar proposals were made in succeeding Congresses.

Responding to ongoing interest in the subject, the 105th Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals. The statute directed the Commission to study the present circuit configuration and the structure and alignment of the courts of appeals, with particular reference to the Ninth.

In its report issued on December 18, 1988, the Commission proposed that the Ninth be organized into three regionally-based adjudicative divisions which would hear and decide all appeals from the district courts. The Committee’s Subcommittee on Courts and Intellectual Property conducted a hearing on the Commission’s report during the 106th Congress. Witnesses and other interested parties roundly criticized the findings because they maintained an implementation of intra-circuit divisions would lead to the abandonment of circuit-wide *stare decisis* and ultimately to the creation of more intra-circuit conflicts.

Notably, five Justices of the U.S. Supreme Court, including then Chief Justice Rehnquist, wrote the chair of the White Commission to offer their suggestions. According to the final report, “[o]f the four who commented on the Ninth Circuit, all were of the opinion that it is time for a change. In general, the Justices expressed concern about the ability of judges . . . to keep abreast of the court’s jurisprudence and about the risks of intra-circuit conflicts in a court with an output as large as that court’s. Some expressed concern about the adequacy of the Ninth Circuit’s *en banc* process to resolve intra-circuit conflicts.” Chief Justice Rehnquist wrote favorably of the Commission’s “division” proposal but added that he “share[d] many of the concerns expressed by my colleagues [Justices O’Connor, Kennedy, Scalia, and Stevens] on the Court who previously corresponded with the Commission and advocated that some change in the

structure of the Court of Appeals for the Ninth Circuit is needed.”

In addition to the two independent commissions that have studied and provided to Congress their recommendations, which were to re-organize the Ninth Circuit structurally to improve the circuit’s ability to render quality decisions and to quickly and efficiently dispose of cases, the Committee has identified no fewer than 23 hearings that have been conducted in Congress since 1983 and at least 16 bills that have been introduced since the 1973.

The Committee finds no basis for any assertion that there has been inadequate process devoted to this serious public policy matter by Congress nor can the Committee support any implication that the voluminous record, which has been developed over decades ought to be disregarded so the existing Ninth Circuit may enjoy another two years of unchecked growth.

Delays in adjudicating cases may be more understandable to litigants if the quality of final decisions were enhanced. Unfortunately, there is ample evidence that something is systemically amiss with Ninth Circuit decision-making. The Committee notes it is statistically incorrect to equate the reversal rate of the Ninth, which typically has a high number of cases granted *certiorari* by the Supreme Court, with that of a smaller circuit, such as the Eleventh, which may average only one or two cases before the Court in a given term.

Two other phenomena are of more serious concern than the rate of reversals: the large number of Ninth Circuit cases that the Supreme Court feels consistently obliged to grant discretionary review; and the extraordinary number of summary reversals and unanimous reversals of Ninth decisions. Illustrative of this is the fact that during one recent five-year term, the Supreme Court heard nearly twice as many cases from the Ninth as the next “nearest” circuit, the Sixth.

The Committee notes that the new Twelfth Circuit will have the ability to adopt the precedents that currently exist in the present Ninth and expects little confusion as to what the controlling precedents will be in the new circuit.

The Committee notes that there may be confusion about the resources that are currently authorized to the states that would be in the new Ninth Circuit and those that will be made available under H.R. 4093. According to the Administrative Office of the Courts, the jurisdictions that will be in the new Ninth account for 72 percent of the caseload and are currently authorized 15 active service judgeships or 54 percent of judicial resources in the existing Ninth. When fully implemented, the new Ninth will have 22 such judgeships and its relative share of judicial resources will rise to 63 percent. To accommodate the caseload demands in California, H.R. 4093 directs 100 percent of the seven new judgeships to that state. Again, it is worth noting that California will receive seven new judgeships under H.R. 4093. This number exceeds the number of new judgeships allotted to the rest of the nation.

The Committee is committed to securing all reasonable and necessary appropriations to fully implement H.R. 4093. Towards that end, the Committee included in the reported measure the appropriations language requested by the Administrative Office of the Courts. The Committee also prepared for the realignment and new judgeships in its submission to the Budget

Committee.

The Committee understands there to be a number of vacant and underutilized court facilities that may be used to assist in the operations of the new Twelfth Circuit. The Committee strongly encourages the efficient use of such facilities. While the Committee is always conscious of the necessity to maximize budget savings, the Committee considers increasing the quality of the Federal court system and improving the public's access to justice to be benefits that are of equal or more importance.

The Committee notes that some may have concern that the new Ninth will still have a large caseload. Discussing a different realignment, Professor Arthur Hellman testified before the Subcommittee on Courts, the Internet and Intellectual Property in the 108th Congress that he believed that if a realignment was otherwise acceptable that, "the fact that the new Ninth Circuit would still be a very large circuit is not I think a reason for not doing it."

The Committee notes that H.R. 4093 provides authority to the Chief Judges of the realigned circuits to temporarily assign, upon request, and consistent with the public interest, a judge or judges to the other circuit.

The creation of more judgeships in the absence of necessary reform will not improve the administration of justice in the United States. Circuit Courts of Appeals must be organized in a manner to promote administrative efficiencies and with an eye towards distributing judgeships to achieve structural coherence within each circuit. The realigned Ninth and Twelfth Circuits will result in greater proximity and access by litigants, increased productivity, reduced travel expenses for judges and the public, enhanced collegiality among judges, and more consistency and coherence in the development of circuit-wide case law.

The Committee notes the current Ninth Circuit far surpasses the size of the pre-1980 Fifth Circuit that Congress re-aligned into the present Fifth and Eleventh Circuits. In fact, the Ninth's 2004 population of 58.3 million equals more than 96 percent of the 60.6 million people that reside in the present Fifth and Eleventh Circuits combined.

The Committee considers the question before Congress to be not whether the Ninth Circuit provides an adequate or minimally acceptable level of judicial process but whether justice may be better served by re-aligning the circuit into two or more circuits. There are limits to how large a circuit court ought to grow. The Committee is convinced the only feasible long-term solution is for the Ninth to be re-structured rather than to grow inexorably.

Finally, the Committee notes again that it is the province of the Congress to provide for the organization of the inferior courts. Recognizing this, the Judicial Conference Committee on Court Administration and Case Management recommended in September 2005 that the "Conference not take a position either endorsing or opposing legislation providing for the division of the Ninth Circuit. The committee added, [t]hese ... decisions are rightly the province of the legislative and executive branches."

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 4093.

COMMITTEE CONSIDERATION

On October 27, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 4093 with an amendment to the House by a recorded vote of 22 to 12, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth the following rollcall votes that occurred during the Committee's consideration of H.R. 4093:

ROLL CALL NO. 1

DATE: 10-27-05

**COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
109th CONGRESS 1st SESSION**

SUBJECT: Rep. Berman's amendment to Rep. Issa's amendment in the nature of a substitute to H.R. 4093, was not agreed to by a vote of 14 ayes to 21 nays.

	Ayes	Nays	Present
MR. HYDE		x	
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY		x	
MR. GOODLATTE		x	
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS			
MR. INGLIS		x	
MR. HOSTETTLER		x	
MR. GREEN		x	
MR. KELLER		x	

MR. ISSA		x	
MR. FLAKE		x	
MR. PENCE		x	
MR. FORBES		x	
MR. KING		x	
MR. FEENEY		x	
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER			
MR. NADLER	x		
MR. SCOTT	x		
MR. WATT	x		
MS. LOFGREN	x		
MS. JACKSON – LEE			
MS. WATERS	x		
MR. MEEHAN	x		
MR. DELAHUNT	x		
MR. WEXLER			
MR. WEINER	x		
MR. SCHIFF	x		
MS. SANCHEZ	x		
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN			
TOTAL	14	21	

Final Passage. The motion to report the bill, H.R. 4093, favorably as amended to the House was agreed to by a roll call vote of 22 yeas to 12 nays.

ROLL CALL NO. 2

DATE: 10-27-05

**COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
109th CONGRESS 1st SESSION**

SUBJECT: Motion to Report H.R. 4093, as amended, was agreed to by a vote of 22 ayes to 12 nays.

	Ayes	Nays	Present
MR. HYDE	x		
MR. COBLE	x		
MR. SMITH	x		
MR. GALLEGLY	x		
MR. GOODLATTE	x		
MR. CHABOT	x		
MR. LUNGREN	x		
MR. JENKINS	x		
MR. CANNON	x		
MR. BACHUS	x		
MR. INGLIS	x		
MR. HOSTETTLER	x		
MR. GREEN	x		
MR. KELLER	x		
MR. ISSA	x		
MR. FLAKE	x		
MR. PENCE	x		
MR. FORBES	x		
MR. KING	x		
MR. FEENEY	x		
MR. FRANKS	x		

MR. GOHMERT	x		
MR. CONYERS		x	
MR. BERMAN		x	
MR. BOUCHER			
MR. NADLER		x	
MR. SCOTT		x	
MR. WATT		x	
MS. LOFGREN		x	
MS. JACKSON – LEE			
MS. WATERS		x	
MR. MEEHAN			
MR. DELAHUNT			
MR. WEXLER			
MR. WEINER		x	
MR. SCHIFF		x	
MS. SANCHEZ		x	
MR. VAN HOLLEN		x	
MRS. WASSERMAN SCHULTZ		x	
MR. SENSENBRENNER, CHAIRMAN			
TOTAL	22	12	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 4093, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4093 will authorize additional circuit, district, and bankruptcy judgeships and realign the current Ninth Circuit Court of Appeals by creating a new Ninth Circuit and a new Twelfth Circuit.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in art. I, § 8, cl. 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

TITLE I – CIRCUIT AND DISTRICT JUDGESHIPS

Sec. 5201. Short title.

Section 101 sets forth the short title of Title I as the “Federal Judgeship Act of 2005.”

Sec. 5202. Circuit judges for the circuit courts of appeals.

Section 5202 provides for the creation of nine permanent judgeships and three temporary judgeships for the United States Courts of Appeals. The creation of these judgeships reflects the recommendations of the Judicial Conference of the United States, which conducts a biennial review of the judgeship needs of all U.S. Courts of Appeals to determine if any of the courts require additional judges to appropriately administer civil and criminal justice in the federal court system. This title reflects the recommendations presented to the Congress in March 2005.

Subsection 5202(a) creates nine additional permanent judgeships for the U.S. Courts of Appeals. The allocation of these positions is as follows: one for the First Circuit Court of Appeals; two for the Second Circuit Court of Appeals; one for the Sixth Circuit Court of Appeals; and five for the Ninth Circuit Court of Appeals.

Subsection 5202(b) creates three additional temporary judgeships for the U.S. Courts of Appeals. The allocation of these positions is as follows: one for the Eighth Circuit Court of Appeals; and two for the Ninth Circuit Court of Appeals.

Such additional judgeships are “temporary” in that, beginning ten years after the temporary judgeship or judgeships on a given court of appeals are initially filled, a number of vacancies occurring on the court, equal to the number of positions authorized under this subsection, will not be filled so that the court will fall back to the number of authorized judgeships specified for that circuit in 28 U.S.C. §44.

Subsection 5202(c) amends the table contained in 28 U.S.C. §44(a) to reflect the additional permanent appellate judgeships created by section 5202(a).

Sec. 5203. District judges for the district courts.

Section 103 provides for the creation of forty-four permanent judgeships and twelve (12) temporary judgeships for the United States District Courts. The creation of these judgeships reflects the recommendations of the Judicial Conference of the United States, which conducts a biennial review of the judgeship needs of all United States District Courts to determine if any of the courts require additional judges to appropriately administer civil and criminal justice in the federal court system. This title reflects the recommendations presented to the Congress in March 2005.

Subsection 103(a) creates 44 additional permanent judgeships for the U.S. District Courts. The allocation of these positions is as follows: one for the Northern District of Alabama; four for the District of Arizona; four for the Central District of California; four for the Eastern District of California; three for the Northern District of California; one for the Southern District of California; one for the District of Colorado; four for the Middle District of Florida; three for the Southern District of Florida; one for the District of Idaho; one for the Northern District of Illinois; one for the Southern District of Indiana; one for the Western District of Missouri; one for the District of Nebraska; one for the District of Nevada; one for the District of New Mexico; three for the Eastern District of New York; one for the Western District of New York; one for the District of Oregon; one for the District of South Carolina; three for the Southern District of Texas; two for the Eastern District of Virginia; and one for the Western District of Washington.

Subsection 103(b) creates 12 additional temporary judgeships for the U.S. District Courts. The allocation is as follows: one for the Middle District of Alabama; one for the District of Arizona; one for the Northern District of California; one for the District of Colorado; one for the Middle District of Florida; one for the Northern District of Iowa; one for the District of Minnesota; one for the District of New Jersey; one for the District of New Mexico; one for the Southern District of Ohio; one for the District of Oregon; and one for the District of Utah.

Such additional judgeships are “temporary” in that, beginning ten years after the temporary judgeship or judgeships on a given district court are initially filled, a number of vacancies occurring on the court, equal to the number of positions authorized under this

subsection, will not be filled so that the court will fall back to the number of authorized judgeships specified for that district in 28 USC § 133.

Subsection 103(c)(1) converts to permanent status the following three temporary judgeships created by Public Law 101-650, the Judicial Improvements Act of 1990: one in the District of Hawaii; one in the District of Kansas; and one in the Eastern District of Missouri.

Subsection 103(c)(2) extends the existing judgeship for the Northern District of Ohio authorized by Public Law 101-650. The first vacancy in the office of district judge in this district occurring 20 years or more after the confirmation date of the judge named to fill the temporary judgeship created by Section 203(c) of Public Law 101-650 shall not be filled.

Subsection 103(d) amends the table contained in 28 U.S.C. §133 to reflect the additional permanent district judgeships created by sections 103(a) and 103(c)(1).

Sec. 5204. Establishment of article III court in the Virgin Islands.

Section 104 establishes an Article III court in the United States Virgin Islands, in place of the current territorial court.

Subsection 104(a) adds 28 U.S.C. §126A to include the Virgin Islands among the United States judicial districts.

Subsection 104(b) amends 28 U.S.C. §133(a), which authorizes the number of judges in each district. The number of judges is maintained at its current level of two in the Virgin Islands.

Subsection 104(c) amends 28 U.S.C. §152(a) to make clear that bankruptcy judges for the Virgin Islands will be appointed in the same manner as bankruptcy judges in other United States district courts. At this time, the bankruptcy caseload is not sufficient to justify creating bankruptcy judgeships in the Virgin Islands. The district court can handle the caseload with its other judicial resources.

Subsection 104(d) amends 28 U.S.C. §333 by eliminating the references to judges of the territorial District Court of the Virgin Islands with respect to attendance at circuit judicial conferences. These references are unnecessary since the new Article III court will be a “district court” as defined in 28 U.S.C. §451.

Subsection 104(e) amends 28 U.S.C. §373 by deleting references to the territorial District Court of the Virgin Islands in the provisions governing the territorial judges’ retirement system. Judges of the new Article III court will be included in the Article III judges’ retirement system provided in sections 371 and 372 of title 28.

Subsection 104(f) amends section 28 U.S.C. §376, concerning annuities for judges’

survivors, by deleting the references to judges of the territorial District Court of the Virgin Islands. Judges of the new Article III court will be covered by section 376 by virtue of their positions as “judges of the United States” as defined in 28 U.S.C. §451.

Subsection 104(g) amends section 28 U.S.C. §526(a)(2) by eliminating the reference to the territorial District Court of the Virgin Islands in the context of the investigating authority of the Attorney General. This reference is unnecessary since the new Article III court will be covered by that provision as a “court of the United States” as defined in 28 U.S.C. §451.

Subsection 104(h) amends the definition of “courts” in 28 U.S.C. §610 to delete the reference to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court” as defined in 28 U.S.C. §451. An obsolete reference to the Canal Zone is also deleted.

Subsection 104(i) amends 28 U.S.C. §631(a), authorizing appointment of United States magistrate judges by the territorial District Court of the Virgin Islands, since the new Article III court will be a “district court” as defined in 28 U.S.C. §451.

Subsection 104(j) amends 28 U.S.C. §753(a), regarding court reporters, to delete the reference to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court” as defined in 28 U.S.C. §451. An obsolete reference to the Canal Zone is also deleted.

Subsection 104(k) amends 28 U.S.C. §1291, regarding final decisions of district courts, to delete the reference to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court” as defined in 28 U.S.C. §451. An obsolete reference to the Canal Zone is also deleted.

Subsection 104(l) amends subsections (a) and (d)(4) of section 1292 of title 28, regarding interlocutory decisions, by deleting the references to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court” as defined in 28 U.S.C. §451. An obsolete reference to the Canal Zone is also deleted from section 1292(a).

Subsection 104(m) amends 28 U.S.C. §1295(a), regarding the jurisdiction of the United States Court of Appeals for the Federal Circuit, by deleting the reference to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court” as defined in 28 U.S.C. §451. Obsolete references to the Canal Zone are also deleted.

Subsection 104(n) amends 28 U.S.C. §1346(b), regarding the United States as defendant, by deleting the reference to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court” as defined in 28 U.S.C. §451. An obsolete reference to the Canal Zone is also deleted.

Subsection 104(o) amends 18 U.S.C. §3006A(j), the Criminal Justice Act, to delete the

reference to the territorial District Court of the Virgin Islands since the new Article III court will be a “district court of the United States created by chapter 5 of title 28,” within the meaning of section 3006A(j).

Subsection 104(p) ensures that the amendments made by this section do not affect the tenure in office of an incumbent judge of the District Court of the Virgin Islands, and do not affect the rights under the territorial judges’ retirement system (28 U.S.C. § 373) and the Judicial Survivors’ Annuities System (28 U.S.C. § 376) of any former judge who has retired, or will retire, before the effective date of this section. It also guarantees that judges who have accrued service under the territorial judges’ retirement system will receive credit for the time served under the Article III judges’ retirement systems (28 U.S.C. §§ 371, 372) if they are reappointed as Article III judges of their courts.

Subsection 104(q) makes conforming amendments to the judicial provisions of the Revised Organic Act of the Virgin Islands in order to reflect the creation of an Article III court and the abolishment of the territorial District Court for the Virgin Islands. The territorial court’s existing appellate jurisdiction over local court decisions is transferred to the Article III court until a local appellate court is established by the Virgin Islands legislature. This legislation also retains the existing jurisdiction of the United States Court of Appeals for the Third Circuit over final decisions of the highest local court for fifteen years following establishment of a local appellate court.

Subsection 104(r) provides that any existing reference to the “District Court of the Virgin Islands” will be deemed to refer to the new Article III court.

Subsection 104(s) provides that the amendments made by section 104 of this Act will take effect 90 days after the date of enactment of this Act and that cases pending on the effective date may be pursued to final determination in the Article III court.

Sec. 5205. Effective date.

The section provides that the provisions of Title I, with the exception of section 104, will take effect on the date of enactment of the Act.

TITLE II – BANKRUPTCY JUDGESHIPS

Sec. 5301. Short title.

Section 201 sets forth the short title of Title II as the “Enhanced Bankruptcy Judgeship Act of 2005.”

Sec. 5302. Authorization for additional bankruptcy judgeships.

Section 202 would authorize the creation of sixteen additional permanent bankruptcy

judgeships in 12 judicial districts. This section reflects the recommendations of the Judicial Conference of the United States, which has the duty under 28 U.S.C. § 152(b)(2) to make recommendations to Congress regarding the authorization of additional bankruptcy judgeships. The most recent Conference recommendation for 47 additional bankruptcy judgeships was transmitted to Congress in February 2005.

Section 1223 of Pub. L. No. 109-8, enacted in April 2005, authorized only 28 additional bankruptcy judgeships based upon a superceded Conference recommendation, leaving authorization of 24 of the additional judgeships recommended in 2005 pending. The 16 permanent judgeships that this section would authorize are justified by those districts' workload, and continue to be necessary for the districts involved to manage their caseloads. The allocation of these new judgeships is as follows: three for the eastern district of Michigan; two for the middle district of Florida; two for the northern district of Georgia; one for the southern district of New York; one for the western district of Pennsylvania; one for the district of Maryland; one for the eastern district of Texas; one for the eastern district of Kentucky; one for the western district of Tennessee; one for the eastern district of Arkansas; one for the western districts of Arkansas; one for the district of Utah, and one for the southern district of Georgia.

The Judicial Conference's 2005 recommendation comprised a combination of temporary and permanent judgeships based upon each district's caseload and circumstances. For two districts, the Conference recommended a combination of judgeships. The Conference recommended that the middle district of Florida and the district of Maryland receive two permanent and two temporary judgeships each. Although the district of Maryland received three temporary judgeships under section 1223 of Pub. L. No. 109-8, the additional permanent judgeship that would be authorized by section 2 of this bill is recommended by the Judicial Conference of the United States, and continues to be necessary for the administration of the bankruptcy system in the district of Maryland. Combined with the conversion of one temporary judgeship in the district of Maryland pursuant to section 4 of this bill, the district of Maryland would be authorized 2 permanent and 2 temporary additional bankruptcy judgeships, as recommended by the Conference in 2005.

Sec. 5303. Temporary bankruptcy judgeships.

Section 203 would authorize the creation of eight (8) additional temporary bankruptcy judgeships in seven (7) judicial districts, as follows: two for the middle district of Florida; one for the western district of North Carolina; one for the northern district of Mississippi; one for the southern district of Ohio; one for the northern district of Indiana; one for the district of Nevada; and one for the northern district of Florida.

These additional temporary bankruptcy judgeships were not enacted as part of section 1223 of Pub. L. No. 109-8 because that section of the recently enacted bankruptcy act was based upon a superceded Judicial Conference recommendation, and did not reflect the Judicial Conference's most recent recommendation. These additional judgeships are necessary for the administration of the bankruptcy system in the enumerated districts.

Sec. 5304. Conversion of existing temporary bankruptcy judgeships.

Subsection 5304(a) of this bill would convert the existing temporary bankruptcy judgeships in the district of Delaware, the district of Puerto Rico, and the southern district of Illinois (authorized by Pub. L. No. 102-361, as amended by Pub. L. No. 104-317, title III, § 307 (28 U.S.C. § 152 note)) to permanent bankruptcy judgeships under 28 U.S.C. §152(a)(2). Conversion of these three temporary bankruptcy judgeships was recommended to Congress by the Judicial Conference in February 2005. Section 1223 of Pub. L. No. 109-8 only extends the date after which the next vacancy in the district of Puerto Rico and the district of Delaware would not be filled. The Judicial Conference's evaluation of these districts resulted in the 2005 recommendation that conversion of these three temporary judgeships, not mere extension of the lapse date, is necessary for these districts to have adequate judicial resources both at present and in the future.

Subsection 5304(b) of this bill would convert the existing temporary bankruptcy judgeships authorized by section 1223 of Pub. L. No. 109-8 to permanent bankruptcy judgeships under 28 U.S.C. §152(a)(2) of title 28, United States Code, in the following districts: the northern district of New York, the southern district of New York, the eastern district of Pennsylvania, the district of Delaware, the district of New Jersey, the district of Maryland, the eastern district of North Carolina, the eastern district of Michigan, the western district of Tennessee, and the southern district of Georgia.

In its February 2005 recommendation to Congress, the Judicial Conference of the United States specifically recommended that these judgeships be created as permanent based upon these districts' case filings, workloads, and unique circumstances. However, section 1223 of Pub. L. No. 109-8 created these judgeships as only temporary. This means that at any point in time five years from the date each of these new judgeships is filled, each of these districts will permanently lose the new judgeship(s) and will be reduced to the judgeship resource levels that have existed since at least 1999. Based on the workload and case filings of the districts that are the subject of this section of the bill, the Conference specifically recommended that these additional judgeships be authorized as permanent to continuously provide these districts with the necessary judicial resources now and in the future. Therefore, this section would convert these judgeships to permanent to effect that goal.

Sec. 5305. General provisions.

Section 5305(a) would make technical amendments to 28 U.S.C. §152(a)(2), to reflect the additional permanent bankruptcy judgeships created by this bill, by both new authorization and conversion of temporary judgeships. Section 205(b) provides that it is the sense of the Congress that bankruptcy judges in the eastern district of California should conduct bankruptcy proceedings on a daily basis in Bakersfield, California.

Sec. 5306. Effective date.

Section 5306 provides that Title II and the amendments to current law contained therein will take effect on the date of the enactment of this Act.

TITLE III – NINTH CIRCUIT REORGANIZATION

Sec. 5401. Short title.

Section 5401 sets forth the short title for Title III as the “Judicial Administration and Improvements Act of 2005.”

Sec. 5402. Definitions.

Section 5402 sets forth the definitions for Title III. For the purposes of this title, the term “Former Ninth Circuit” means the ninth judicial circuit of the United States as it exists on the day before the effective date of this title. The term “New Ninth Circuit” means the ninth judicial circuit as established in section 5403(2)(A) of this bill, which includes California, Guam, Hawaii, and the Northern Mariana Islands. The term “Twelfth Circuit” means the twelfth judicial circuit as established in section 5403(2)(B) of the bill, which includes Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

Sec. 5403. Number and composition of circuits.

Section 5403 amends the table contained in 28 U.S.C. §41 to provide for one additional circuit court of appeals and reallocates the jurisdiction of the current Ninth Circuit Court of Appeals between the New Ninth Circuit and the newly formed Twelfth Circuit Court of Appeals. The Ninth Circuit Court of Appeals would consist of California, Guam, Hawaii, and the Northern Mariana Islands. The Twelfth Circuit Court of Appeals would consist of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

Sec. 5404. Number of circuit judges.

Section 5404 amends the table contained in 28 U.S.C. §44(a) to reflect the number of circuit court judges for the Ninth and Twelfth Circuit Court of Appeals. The New Ninth Circuit would have 19 circuit court judges; the Twelfth Circuit would have 14 circuit court judges.

Sec. 5405. Places of circuit court.

Section 5405 amends 28 U.S.C. §48(a) to set forth the places where the New Ninth Circuit and the Twelfth Circuit will hold regular sessions. The New Ninth Circuit will hold regular sessions in Honolulu, Hawaii; Pasadena, California; and San Francisco, California. The Twelfth Circuit will hold regular sessions in Las Vegas, Nevada; Missoula, Montana; Phoenix, Arizona; Portland, Oregon; and Seattle, Washington.

Sec. 5406. Assignment of circuit judges.

Section 5406 provides that the circuit judges that are in regular active service and whose official duty station on the day before the effective date of this title in California, Guam, Hawaii, or the Northern Mariana Islands will become circuit judges of the New Ninth Circuit. Section 306 also provides that the circuit judges that are in regular active service and whose official duty station on the day before the effective date of this title in Alaska, Arizona, Idaho, Montana, Nevada, Oregon, or Washington will become circuit judges of the Twelfth Circuit.

Sec. 5407. Election of assignment by senior judges.

Section 5407 provides that senior judges of the Former Ninth Circuit can elect to be assigned to either the New Ninth Circuit or the Twelfth Circuit.

Sec. 5408. Seniority of judges.

Section 5408 provides that the seniority of the judges of the New Ninth Circuit and the Twelfth Circuit shall run from the date of commission of the judge in the Former Ninth Circuit.

Sec. 5409. Application to cases.

Section 5409 provides for the disposition of cases of the Former Ninth Circuit after realignment. Cases submitted for decision prior to the effective date of this title will proceed as if the title had not been enacted, with the exception that a petition for a rehearing en banc that is pending on or after the effective date of this title will be heard by the circuit court of appeal that would have had jurisdiction if this title had been in effect at the time of filing the appeal. For cases that have not been submitted for decision prior to the effective date of this title, the appeal or proceeding, together with the original papers, records, and record entries, will be transferred to the circuit court of appeal that would have had jurisdiction if this title had been in effect at the time of the appeal.

Sec. 5410. Temporary assignment of circuit judges among circuits.

Section 5410 amends 28 U.S.C. §291 to allow the Chief Judge of either the New Ninth Circuit or the Twelfth Circuit to designate and temporarily assign any circuit court judge to the other circuit of the Former Ninth Circuit if the chief judge of the other circuit requests such assistance and it serves the public interest.

Sec. 5411. Temporary assignment of district judges among circuits.

Section 5411 amends 28 U.S.C. §292 to allow the Chief Judge of the New Ninth Circuit to designate and assign any district court judge to sit on the Twelfth Circuit, or a division thereof, if the Chief Judge of the Twelfth Circuit requests such assistance and it serves the public interest. The section allows the Chief Judge of the New Ninth Circuit to designate and temporarily assign a district court judge to hold a district court in any district of the Twelfth Circuit if it serves the public interest. Section 5411 gives identical powers to the Chief Judge of

the Twelfth Circuit. Section 5411 further provides that any such designations or assignments shall be made in accordance with the rules of the court of appeals or district court to which the judge has been designated or assigned.

Sec. 5412. Administration.

Section 5412 provides that the Former Ninth Circuit can take such administrative action as is required to carry out this title and amendments thereto. Section 5412 provides further that the Former Ninth Circuit shall cease to exist for administrative purposes two years after the date of enactment of this Act.

Sec. 5413. Effective date.

Section 5413 provides that Title III shall take effect no later than December 31, 2006.

TITLE IV – AUTHORIZATION OF APPROPRIATIONS

Sec. 5501. Authorization of appropriations.

Section 5501 authorizes such funds as may be necessary to carry out this Act for FY 2006 - 2009, including such sums as may be necessary to provide appropriate space and facilities for the judicial positions created by this Act.

CHANGES IN EXISTING LAW BY THE BILL, AS REPORTED

[Ramseyer included as attachment]

109th Congress

PURPOSE AND SUMMARY

H.R. 3648 establishes a \$1,500 L visa fee in order to meet the reconciliation obligations of the House Committee on the Judiciary.

BACKGROUND AND NEED FOR THE LEGISLATION

Overview of the Budget Reconciliation Process

Under the Congressional Budget and Impoundment Control Act of 1974 (Pub. L. No. 93-344, as amended), the House and Senate are required to adopt at least one budget resolution each year. The budget resolution is a concurrent resolution that is not sent to the President for his approval or veto. Rather, it serves as a broad congressional statement regarding the appropriate revenue, spending, and debt policies, as well as a guide to the subsequent consideration of legislation implementing such policies at agency and programmatic levels. Budget resolution policies are enforced through a variety of mechanisms, including points of order. The House and Senate Budget Committees, which were created by the 1974 Act, exercise exclusive jurisdiction over budget resolutions and are responsible for monitoring their enforcement.

In developing a budget resolution, the House and Senate Budget Committees rely on baseline budget projections prepared by the Congressional Budget Office (CBO). A budget resolution typically reflects many different assumptions regarding legislative action expected to occur during a session that would cause revenue and spending levels to be changed from baseline amounts. However, most revenue and direct spending occurs automatically each year under permanent law; therefore, if the committees with jurisdiction over the revenue and direct spending programs do not report legislation to carry out the budget resolution policies by amending existing law, revenue and direct spending for these programs likely will continue without change.

The budget reconciliation process is an optional procedure that operates as an adjunct to the budget resolution process. The chief purpose of the reconciliation process is to enhance Congress' ability to change current law in order to bring revenue and spending levels into conformity with the policies of the budget resolution. Accordingly, reconciliation probably is the most effective budget enforcement tool available to Congress for a significant portion of the budget. Reconciliation is a two-stage process. First, reconciliation instructions are included in the budget resolution, directing the appropriate committees to develop legislation achieving the desired budgetary outcomes. The instructed committees submit their legislative recommendations to their respective Budget Committees by the deadline prescribed in the budget resolution; the Budget Committees incorporate them into an omnibus budget reconciliation bill without making any substantive revisions.

The second step involves consideration of the resulting reconciliation legislation by the House and Senate under expedited procedures. Among other things, debate in the Senate on any

reconciliation measure is limited to 20 hours (and 10 hours on a conference report) and amendments must be germane. The House Rules Committee typically sets limitations on debate and the offering of amendments during consideration of reconciliation measures in the House.¹

The L Visa Program

L visas are available for “intracompany transferees” – they allow employees working at a company’s overseas branch to be shifted to the company’s worksites in the United States. A L visa is available to an alien who:

within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm . . . or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him²

“Specialized knowledge” with respect to a company is special knowledge of the company product and its application in international markets or an advanced level of knowledge of processes and procedures of the company.³

An alien can stay in L status for up to five years if admitted to render services in a capacity that involves specialized knowledge and for up to seven years if admitted to render services in a managerial or executive capacity.⁴ The initial period of admission is no longer than three years.⁵ Extensions of stay may be authorized in increments of up to two years – new petitions must be filed for all applicants seeking an extension of stay (including aliens who were the beneficiaries of blanket petitions).⁶

To make the L visa program more convenient for established and frequent users of the program, “blanket” L visas are available.⁷ If an employer meets certain qualifications – it 1) is

¹ See Robert Keith, Congressional Research Service, *The Budget Reconciliation Process: Timing of Legislative Action* (2005), http://www.congress.gov/erp/rl/html/RL30458.html#TOC3_3.

² See 8 U.S.C. 1101(a)(15)(L).

³ See 8 U.S.C. 1184(c)(2)(B).

⁴ See 8 U.S.C. 1184(c)(2)(D).

⁵ See 8 C.F.R. § 214.2(1)(11).

⁶ See 8 C.F.R. § 214.2(1)(15).

⁷ See 8 U.S.C. 1184(c)(2)(A).

engaged in commercial trade or services; 2) has an office in the U.S. that has been doing business for at least one year; 3) has three or more domestic and foreign branches, subsidiaries; or affiliates; and 4) has received approval for at least 10 L visa professionals during the past year or has U.S. subsidiaries or affiliates with annual combined sales of at least \$25 million or has a U.S. workforce of at least 1,000 employees⁸ – it can receive pre-approval for an unlimited number of L visas from the Department of Homeland Security. Individual aliens seeking visas (within six months of the blanket petition approval⁹) to work for the company simply have to go to a U.S. consular office abroad and show that the job they will be employed in qualifies for the L visa program and that they are qualified for the job.¹⁰

In 2004, the State Department issued 62,700 L visas (not including visas for family members). In 2004, the Department of Homeland Security approved petitions (including petitions for extension of stay) for 49,696 aliens (not including family members), including 28,840 managers and executives and 20,261 aliens with “specialized knowledge.”

In 2004, because of a history of fraud in the L and H-1B visa programs,¹¹ a \$500 fee per alien was added to the L visa and H-1B visa programs to fund anti-fraud initiatives.¹²

“Specialized knowledge” L visas are somewhat comparable to “H-1B” visas, which are available for workers coming temporarily to the United States to perform services in a specialty occupation.¹³ Such an occupation is one that requires “theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific speciality (or its equivalent) as a minimum for entry into the occupation in the United States.”¹⁴

However, unlike L visas, H-1B visas are numerically limited (65,000 annual cap),¹⁵ require payment of at least the prevailing occupational wage level,¹⁶ and require special

⁸ See 8 C.F.R. § 214.2(l)(4)(i).

⁹ See 8 C.F.R. § 214.2(l)(5)(ii).

¹⁰ See 8 C.F.R. § 214.2(l)(5).

¹¹ See *Nonimmigrant Visa Fraud: Hearing Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.*, 106th Cong. (1999).

¹² See Pub. L. No. 108-447 § 426 (codified at INA sec. 214(c)(12)).

¹³ See 8 U.S.C. 1101(a)(15)(H)(i)(b).

¹⁴ See 8 U.S.C. 1184(i)(1).

¹⁵ See 8 U.S.C. 1184(g)(certain employers are exempt from the cap).

¹⁶ See 8 U.S.C. 1182(n)(1)(A)(i).

attestations for heavy users of the program,¹⁷ among other requirements not found in the L program. In addition, in 2004, a \$1,500 per alien fee was added to the H-1B program.¹⁸ This fee originated in 1998 as a \$500 fee to fund scholarship assistance for students studying mathematics, computer science, and engineering, for Federal job training services, and for administrative and enforcement expenses.¹⁹ It has been alleged that certain employers have been intentionally evading the requirements of the H-1B program by instead seeking “specialized knowledge” L visas for aliens and then “contracting out” these aliens to other companies, especially after the H-1B program’s numerical caps were hit in 2004 and 2005.²⁰

H.R. 3648

In order to meet the Judiciary Committee’s obligations in the reconciliation process to reduce direct spending by at least \$60 million in fiscal year 2006 and \$300 million in fiscal years 2006-10, H.R. 3648 would implement a \$1,500 per alien L visa fee.²¹ The bill will also have the salutary effect of reducing the incentive of employers to utilize the L visa program rather than the H-1B program by equalizing the fees charged under the two programs.

The bill provides that a \$1,500 fee will be imposed on an employer when: 1) an alien files an application abroad for a visa authorizing initial admission to the U.S. under the L visa program pursuant to a “blanket” L petition; 2) the employer files a petition initially to grant an alien status under the L visa program; and 3) the employer files a petition to extend the stay (for the first time) of an alien having status under the L visa program. The fee applies only to principal aliens, and not to spouses and children. Fees shall be deposited in the Treasury. An employer may not require an alien to reimburse the employer for the cost of the fee.

¹⁷ See 8 U.S.C. 1182(n)(1)(E).

¹⁸ See Pub. L. No. 108-447 § 422 (codified at INA sec. 214(c)(9)). The fee is imposed on employers (other than primary or secondary education institutions, institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit entities which engage in established curriculum related clinical training of students registered at such institutions, nonprofit research organizations, or governmental research organizations) initially to grant an alien H-1B status, to extend the stay of an alien having such status (unless the employer previously has obtained an extension for such alien), or to obtain authorization for an H-1B alien to change employers. A smaller \$750 fee is charged to employers having not more than 25 full-time equivalent employees who are employed in the U.S.

¹⁹ See Pub. L. No. 105-277 § 421. In 2000, the fee was raised to \$1,000 (Pub. L. No. 106-311).

²⁰ See, e.g., Brian Grow and Manjeet Kripalani, *A Visa Loophole as Big as a Mainframe*, Business Week, March 10, 2003.

²¹ See H. Con. Res. 95. Reconciliation obligations may be met by increasing mandatory fees. See letter from Jim Nussle, Chairman, House Committee on the Budget, to F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary (June 24, 2005).

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 3648.

COMMITTEE CONSIDERATION

On September 29, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 3648 with an amendment to the House by a recorded vote of 20 to 6, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth the following rollcall votes that occurred during the Committee's consideration of H.R. 3648:

Final Passage. The motion to report the bill, H.R. 3648, favorably as amended to the House was agreed to by a roll call vote of 20 yeas to 6 nays.

ROLL CALL NO. 1

DATE: 9-29-2005

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
109th CONGRESS 1st SESSION

SUBJECT: Motion to report H.R. 3648 favorably as amended. By a Roll Call Vote of 20 yeas to 6 nays, the motion was agreed to.

	Ayes	Nays	Present
MR. HYDE			
MR. COBLE	X		
MR. SMITH			
MR. GALLEGLY	x		
MR. GOODLATTE			
MR. CHABOT	x		
MR. LUNGREN	X		
MR. JENKINS	X		
MR. CANNON	x		
MR. BACHUS			
MR. INGLIS	x		
MR. HOSTETTLER	X		
MR. GREEN	X		

MR. KELLER	X		
MR. ISSA	X		
MR. FLAKE	X		
MR. PENCE			
MR. FORBES	X		
MR. KING	X		
MR. FEENEY	X		
MR. FRANKS	X		
MR. GOHMERT	X		
MR. CONYERS		X	
MR. BERMAN			
MR. BOUCHER			
MR. NADLER		x	
MR. SCOTT	x		
MR. WATT	x		
MS. LOFGREN			
MS. JACKSON LEE			
MS. WATERS		X	
MR. MEEHAN			
MR. DELAHUNT		X	
MR. WEXLER			
MR. WEINER			
MR. SCHIFF		X	
MS. SANCHEZ		X	
MR. VAN HOLLEN			
MRS. WASSERMAN SCHULTZ			
MR. SENSENBRENNER, CHAIRMAN	x		
TOTAL	20	6	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 3648, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

October 21, 2005

H.R. 3648

A bill to impose additional fees with respect to immigration services for intracompany transferees

As ordered reported by the House Committee on the Judiciary on September 29, 2005

SUMMARY

H.R. 3648 would impose a fee of \$1,500 on multinational employers that seek temporary admission to the United States for certain intracompany transferees, known as L-1 nonimmigrants, who work in managerial or executive capacities or who provide services that involve specialized knowledge. CBO estimates that enacting the bill would increase offsetting receipts (a credit against direct spending) by \$80 million in fiscal year 2006 and by about \$1 billion over the 2006-2015 period. (The bill would direct these collections to be recorded as offsetting receipts.)

H.R. 3648 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 3648 would impose a new private-sector mandate, as defined in UMRA, by requiring employers to pay when a petition is made for an L-1 visa allowing their foreign employees to transfer to work for companies in the United States. CBO estimates that the direct cost of complying with the mandate would fall below the annual threshold established by UMRA (\$123 million in 2005, adjusted annually for inflation) in each of the next five years.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 3648 is shown in the following table. The effects of this legislation fall within budget function 750 (administration of justice).

	By Fiscal Year, in Millions of Dollars									
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
CHANGES IN DIRECT SPENDING										
Estimated Budget Authority	-80	-105	-105	-105	-105	-105	-105	-105	-105	-105
Estimated Outlays	-80	-105	-105	-105	-105	-105	-105	-105	-105	-105

BASIS OF ESTIMATE

H.R. 3648 would impose a fee of \$1,500 on multinational employers that seek temporary admission to the United States for certain intracompany transferees, known as L-1 nonimmigrants. Employers would have to pay the fee for each employee who is admitted to the United States as an L-1 nonimmigrant, including individuals who change their nonimmigrant status to L-1, and for each employee who extends L-1 status for the first time. The fee would not be charged for subsequent extensions.

Based on information from the Department of State and the Department of Homeland

Security about the number of U.S. admissions and extensions for L-1 nonimmigrants in recent years, CBO estimates that the new fee would apply to about 70,000 persons annually. We expect the added fee would cause only a minor decrease in such admissions and extensions because the fee is primarily paid for by major employers. We estimate that enacting H.R. 3648 would increase collections by \$80 million in fiscal year 2006 and by about \$1 billion over the 2006-2015 period, assuming the bill is enacted by the end of calendar year 2005.

Similar to the budget classification of other visa fees, the bill would direct these collections to be deposited in the Treasury as offsetting receipts (a credit against direct spending). The new fees collected under H. R. 3648 would not be available for spending unless provided in an appropriations act.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 3648 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 3648 would impose a new private-sector mandate, as defined in UMRA, by requiring employers to pay for an L-1 visa allowing their foreign employees to transfer to work for companies in the United States. The bill would require such employers to pay a \$1,500 fee when a petition is made for a transfer or for a first time extension of an L-1 visa. The bill also would prohibit employers from passing along the fee to their L-1 visa employees. The cost of the mandate would be the total fees paid by those employers. Based on information from the Department of State, CBO estimates that the direct cost of complying with the mandate would range from approximately \$80 million in 2006 to \$105 million in 2010, and thus would fall below the annual threshold established by UMRA (\$123 million in 2005, adjusted annually for inflation) in each of the next five years.

ESTIMATE PREPARED BY:

Federal Costs: Mark Grabowicz (226-2860)

Impact on State, Local, and Tribal Governments: Melissa Merrell (225-3220)

Impact on the Private Sector: Paige Piper/Bach (226-2940)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

October 21, 2005

Honorable F. James Sensenbrenner Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3648, a bill to impose additional fees with respect to immigration services for intracompany transferees.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

Douglas Holtz-Eakin

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3648 establishes a \$1,500 L visa fee in order to meet the reconciliation obligations of the Judiciary Committee.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in art. I, § 8, cl. 4 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 5101. Fees With Respect to Immigration Services for Intracompany Transferees.

This section amends section 214(c) of the Immigration and Nationality Act by adding a new paragraph (15). Subparagraph A provides that the Secretary of State shall impose a fee on an employer when an alien files an application abroad for a visa authorizing initial admission to the U.S. as a “L” visa nonimmigrant (section 101(a)(15)(L) of the INA) in order to be employed by the employer, if the alien is covered by a blanket petition.

Subparagraph B provides that the Secretary of Homeland Security shall impose a fee on an employer filing a petition initially to grant an alien L nonimmigrant status or to extend for the first time the stay of an alien having such status.

Subparagraph C provides that the amount of the fee shall be \$1,500.

Subparagraph D provides that the fee shall only apply to principal aliens and not to spouses or children who are accompanying or following to join such principal aliens.

Subparagraph E provides that fees collected shall be deposited as offsetting receipts in the Treasury, and shall not be available for expenditure until appropriated.

Subparagraph F provides that an employer may not require an alien who is the beneficiary of the visa or petition for which a fee is imposed to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. In addition, civil penalties under section 274A(g)(2) of the INA – which provides a penalty against any person or entity who is determined to have in the hiring, recruiting, or referring for employment of any individual, required the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under section 274A relating to the hiring, recruiting, or referring of the individual -- shall apply to

a violation of this subparagraph.

CHANGES IN EXISTING LAW BY THE BILL, AS REPORTED

[Ramseyer included as attachment]