

with the advice and consent of the Senate, four additional circuit judges for the fifth circuit.” The second sentence of section 1(c) of Pub. L. 89-372 which provided that the first four vacancies occurring in the office of circuit judge in the fifth circuit shall not be filled was deleted by section 2 of Pub. L. 90-347, which also made those judgeships permanent and further provided that the present incumbents of such judgeships shall henceforth hold their offices under this section.

Pub. L. 90-347, §1, June 18, 1968, 82 Stat. 184, provided: “That the President shall appoint, by and with the advice and consent of the Senate, one additional circuit judge for the third circuit, two additional circuit judges for the fifth circuit, one additional circuit judge for the sixth circuit, four additional circuit judges for the ninth circuit, and one additional circuit judge for the tenth circuit.”

Pub. L. 95-486, §3(a), Oct. 20, 1978, 92 Stat. 1632, provided that: “The President shall appoint, by and with the advice and consent of the Senate, one additional circuit judgeship for the first circuit, two additional circuit judgeships for the second circuit, one additional circuit judgeship for the third circuit, three additional circuit judgeships for the fourth circuit, eleven additional circuit judgeships for the fifth circuit, two additional circuit judgeships for the sixth circuit, one additional circuit judgeship for the seventh circuit, one additional circuit judgeship for the eighth circuit, ten additional circuit judgeships for the ninth circuit, one additional circuit judgeship for the tenth circuit, and two additional circuit judgeships for the District of Columbia.”

Pub. L. 98-353, title II, §201(a), July 10, 1984, 98 Stat. 346, provided that:

“(1) Subject to the provisions of paragraph (2), the President shall appoint, by and with the advice and consent of the Senate, two additional circuit judges for the first circuit court of appeals, two additional circuit judges for the second circuit court of appeals, two additional circuit judges for the third circuit court of appeals, one additional circuit judge for the fourth circuit court of appeals, two additional circuit judges for the fifth circuit court of appeals, four additional circuit judges for the sixth circuit court of appeals, two additional circuit judges for the seventh circuit court of appeals, one additional circuit judge for the eighth circuit court of appeals, five additional circuit judges for the ninth circuit court of appeals, two additional circuit judges for the tenth circuit court of appeals, and one additional circuit judge for the District of Columbia circuit court of appeals.

“(2) The President shall appoint, by and with the advice and consent of the Senate, no more than 11 of such judges prior to January 21, 1985.”

Pub. L. 101-650, title II, §202(a), Dec. 1, 1990, 104 Stat. 5098, provided that: “The President shall appoint, by and with the advice and consent of the Senate—

- “(1) 2 additional circuit judges for the third circuit court of appeals;
- “(2) 4 additional circuit judges for the fourth circuit court of appeals;
- “(3) 1 additional circuit judge for the fifth circuit court of appeals;
- “(4) 1 additional circuit judge for the sixth circuit court of appeals;
- “(5) 1 additional circuit judge for the eighth circuit court of appeals; and
- “(6) 2 additional circuit judges for the tenth circuit court of appeals.”

#### EXECUTIVE ORDER No. 11972

Ex. Ord. No. 11972, Feb. 14, 1977, 42 F.R. 9659, as amended by Ex. Ord. No. 11993, May 24, 1977, 42 F.R. 27197, which related to the United States Circuit Judge Nominating Commission, was revoked by Ex. Ord. No. 12059, May 11, 1978, 43 F.R. 20949, formerly set out below.

#### EXECUTIVE ORDER No. 12059

Ex. Ord. No. 12059, May 11, 1978, 43 F.R. 20949, as amended by Ex. Ord. No. 12097, Nov. 8, 1978, 43 F.R.

52455, which established the United States Circuit Judge Nominating Commission and provided for its membership, functions, etc., was revoked by Ex. Ord. No. 12305, May 5, 1981, 46 F.R. 25421, set out as a note under section 14 of the Federal Advisory Committee Act in the Appendix to Title 5, Government Organization and Employees.

#### EX. ORD. NO. 13300. FACILITATING THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS

Ex. Ord. No. 13300, May 9, 2003, 68 F.R. 25807, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the prompt appointment of judges to the Federal courts, it is hereby ordered as follows:

**SECTION 1. Policy.** The Federal courts play a central role in the American justice system. For the Federal courts to function effectively, judicial vacancies in those courts must be filled in a timely manner with well-qualified candidates.

**SEC. 2. Plan.** The presidential plan announced on October 30, 2002, calls for timely consideration of judicial nominees, with the President submitting a nomination to fill a vacancy in United States courts of appeals and district courts within 180 days after the President receives notice of a vacancy or intended retirement, absent extraordinary circumstances.

**SEC. 3. Responsibilities.** The Counsel to the President shall take all appropriate steps to ensure that the President is in a position to make timely nominations for judicial vacancies consistent with this plan. All Federal departments and agencies shall assist, as requested and permitted by law, in the implementation of this order.

**SEC. 4. Reservation of Authority.** Nothing in this order shall be construed to affect the authority of the President to fill vacancies under clause 3 of section 2 of article II of the Constitution.

**SEC. 5. Judicial Review.** This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

#### § 45. Chief judges; precedence of judges

(a)(1) The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—

- (A) are sixty-four years of age or under;
- (B) have served for one year or more as a circuit judge; and
- (C) have not served previously as chief judge.

(2)(A) In any case in which no circuit judge meets the qualifications of paragraph (1), the youngest circuit judge in regular active service who is sixty-five years of age or over and who has served as circuit judge for one year or more shall act as the chief judge.

(B) In any case under subparagraph (A) in which there is no circuit judge in regular active service who has served as a circuit judge for one year or more, the circuit judge in regular active service who is senior in commission and who has not served previously as chief judge shall act as the chief judge.

(3)(A) Except as provided in subparagraph (C), the chief judge of the circuit appointed under paragraph (1) shall serve for a term of seven years and shall serve after expiration of such term until another judge is eligible under paragraph (1) to serve as chief judge of the circuit.

(B) Except as provided in subparagraph (C), a circuit judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

(C) No circuit judge may serve or act as chief judge of the circuit after attaining the age of seventy years unless no other circuit judge is qualified to serve as chief judge of the circuit under paragraph (1) or is qualified to act as chief judge under paragraph (2).

(b) The chief judge shall have precedence and preside at any session of the court which he attends. Other circuit judges of the court in regular active service shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The circuit justice, however, shall have precedence over all the circuit judges and shall preside at any session which he attends.

(c) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the chief judge of the circuit shall be such other circuit judge who is qualified to serve or act as chief judge under subsection (a).

(d) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the circuit judge in active service, present in the circuit and able and qualified to act, who is next in precedence.

(June 25, 1948, ch. 646, 62 Stat. 871; Oct. 31, 1951, ch. 655, §35, 65 Stat. 723; Pub. L. 85-593, §1, Aug. 6, 1958, 72 Stat. 497; Pub. L. 97-164, title II, §§201, 204, Apr. 2, 1982, 96 Stat. 51, 53.)

#### HISTORICAL AND REVISION NOTES

Based on sections 216 and 216a of title 28, U.S.C., 1940 ed. (Mar. 3, 1911, ch. 231, §120, 36 Stat. 1132; May 23, 1934, ch. 339, 48 Stat. 796).

Subsection (a), providing for "chief judge," is new. Such term is adopted to replace the term "senior circuit judge" in recognition of the great increase in administrative duties of such judge.

Subsection (b) conforms with section 4 of this title relating to precedence of associate justices of the Supreme Court, and consolidates the provisions of the second and third sentences of section 216 of title 28, U.S.C., 1940 ed. The designation when filed in the court of appeals will not only record the transfer of function from the relieved chief judge to his successor, but will also determine the question of willingness of the successor to serve.

Other provisions of section 216 of title 28, U.S.C., 1940 ed., are covered by section 47 of this title.

Subsection (c) is new.

Subsection (d) is based on section 216a of title 28, U.S.C., 1940 ed.

The official status of the Chief Justice of the Court of Appeals for the District of Columbia holding office on the effective date of the act is preserved by section 2 of the bill to enact revised Title 28.

Changes were made in phraseology.

#### AMENDMENTS

1982—Subsec. (a). Pub. L. 97-164, §201(a), designated existing first sentence of subsec. (a) as par. (1), substituted "The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—(A) are sixty-four years of age or under; (B) have served for one year or more as a circuit judge; and (C) have not served pre-

viously as chief judge" for "The circuit judge in regular active service who is senior in commission and under seventy years of age shall be the chief judge of the circuit" in par. (1) as so designated, designated existing second sentence of subsec. (a) as par. (2)(A), substituted "In any case in which no circuit judge meets the qualifications of paragraph (1), the youngest circuit judge in regular active service who is sixty-five years of age or over and who has served as circuit judge for one year or more shall act as the chief judge" for "If all the circuit judges in regular active service are seventy years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under seventy years of age, but a judge may not act as chief judge until he has served as a circuit judge for one year" in par. (2)(A) as so designated, and added pars. (2)(B) and (3).

Subsec. (b). Pub. L. 97-164, §204, inserted "of the court in regular active service" after "circuit judges" in second sentence.

Subsec. (c). Pub. L. 97-164, §201(b), amended subsec. (c) generally, substituting "the chief judge of the circuit shall be such other circuit judge who is qualified to serve or act as chief judge under subsection (a)" for "the circuit judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the circuit".

1958—Subsec. (a). Pub. L. 85-593 provided that chief judges of circuit courts cease to serve as such upon reaching the age of seventy, that the youngest circuit judge act as chief judge where all circuit judges in regular active service are seventy years or older until a judge under seventy has been appointed and qualified, and that circuit judge must have served one year before acting as chief judge.

1951—Subsec. (a). Act Oct. 31, 1951, inserted "in active service who is".

#### EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

#### EFFECTIVE DATE OF 1958 AMENDMENT

Pub. L. 85-593, §3, Aug. 6, 1958, 72 Stat. 497, as amended by Pub. L. 95-486, §4, Oct. 20, 1978, 92 Stat. 1632, provided that: "The amendments to sections 45 and 136 of title 28 of the United States Code made by this Act shall take effect at the expiration of one year from the date of enactment of this Act [Aug. 6, 1958]."

#### SAVINGS PROVISION

Pub. L. 97-164, title II, §203, Apr. 2, 1982, 96 Stat. 53, provided that:

"(a) The amendments to section 45 of title 28, United States Code, and to section 136 of such title, made by sections 201 and 202 of this Act, shall not apply to or affect any person serving as chief judge on the effective date of this Act [Oct. 1, 1982].

"(b) The provisions of section 45(a) of title 28, United States Code, as in effect on the day before the effective date of this Act [Oct. 1, 1982], shall apply to the chief judge of a circuit serving on such effective date. The provisions of section 136(a) of title 28, United States Code, as in effect on the day before the effective date of this part [Oct. 1, 1982], shall apply to the chief judge of a district court serving on such effective date."

#### APPOINTMENT OF CHIEF JUDGE OF COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pub. L. 97-164, title I, §166, Apr. 2, 1982, 96 Stat. 50, provided that: "Notwithstanding the provisions of section 45(a) of title 28, United States Code, the first chief judge of the United States Court of Appeals for the Federal Circuit shall be the Chief Judge of the United States Court of Claims or the Chief Judge of the United States Court of Customs and Patent Appeals, whoever has served longer as chief judge of his court. Notwithstanding section 45 of title 28, United States Code,

whichever of the two chief judges does not become the first chief judge of the United States Court of Appeals for the Federal Circuit under the preceding sentence shall, while in active service, have precedence and be deemed senior in commission over all the circuit judges of the United States Court of Appeals for the Federal Circuit (other than the first chief judge of that circuit). When the person who first serves as chief judge of the United States Court of Appeals for the Federal Circuit vacates that position, the position shall be filled in accordance with section 45(a) of title 28, United States Code, as modified by the preceding sentence of this section.”

CHIEF JUDGE OF COURT OF APPEALS FOR DISTRICT OF COLUMBIA

Act June 25, 1948, ch. 646, §2(a), 62 Stat. 985, provided in part that the Chief Justice of the Court of Appeals for the District of Columbia in office on Sept. 1, 1948, shall thereafter be known as the Chief Judge.

**§ 46. Assignment of judges; panels; hearings; quorum**

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

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

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

(June 25, 1948, ch. 646, 62 Stat. 871; Pub. L. 88-176, §1(b), Nov. 13, 1963, 77 Stat. 331; Pub. L. 95-486, §5(a), (b), Oct. 20, 1978, 92 Stat. 1633; Pub. L. 97-164, title I, §103, title II, §205, Apr. 2, 1982, 96 Stat. 25, 53; Pub. L. 104-175, §1, Aug. 6, 1996, 110 Stat. 1556.)

HISTORICAL AND REVISION NOTES

Based in part on title 28, U.S.C., 1940 ed., §212 (Mar. 3, 1911, ch. 231, §117, 36 Stat. 1131).

Subsections (a)-(c) authorize the establishment of divisions of the court and provide for the assignment of circuit judges for hearings and rehearsals in banc.

The Supreme Court of the United States has ruled that, notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal. (See *Textile Mills Securities Corporation v. Commissioner of Internal Revenue*, 1941, 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249.)

The Supreme Court in upholding the unanimous view of the five judges as to their right to sit in banc, notwithstanding the contrary opinion in *Langs Estate v. Commissioner of Internal Revenue*, 1938, 97 F.2d 867, said in the *Textile Mills* case: “There are numerous functions of the court, as a ‘court of record, with appellate jurisdiction’, other than hearing and deciding appeals. Under the Judicial Code these embrace: prescribing the form of writs and other process and the form and style of its seal (28 U.S.C., §219); the making of rules and regulations (28 U.S.C., §219); the appointment of a clerk (28 U.S.C., §221) and the approval of the appointment and removal of deputy clerks (28 U.S.C., §222); and the fixing of the ‘times’ when court shall be held (28 U.S.C., §223). Furthermore, those various sections of the Judicial Code provide that each of these functions shall be performed by the court.”

This section preserves the interpretation established by the *Textile Mills* case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions.

Whether divisions should sit simultaneously at the same or different places in the circuit is a matter for each court to determine.

REFERENCES IN TEXT

Section 6 of Public Law 95-486 (92 Stat. 1633), referred to in subsec. (c), is section 6 of Pub. L. 95-486, Oct. 20, 1978, 92 Stat. 1633, which is set out as an Appeals Court Administrative Units note under section 41 of this title.

AMENDMENTS

1996—Subsec. (c). Pub. L. 104-175, in last sentence, inserted “(1)” after “eligible” and “, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service” before period at end.

1982—Subsec. (a). Pub. L. 97-164, §103(a), substituted “panels” for “divisions”.

Subsec. (b). Pub. L. 97-164, §103(b), substituted “panels” for “divisions” wherever appearing and inserted provisions requiring that at least a majority of the panels of each circuit be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness, and that the United States Court of Appeals for the