

COMMISSION ON REVISION OF THE FEDERAL APPELLATE SYSTEM

Pub. L. 92-489, Oct. 13, 1972, 86 Stat. 807, as amended by Pub. L. 93-420, Sept. 19, 1974, 88 Stat. 1153, provided for the establishment, membership, travel expenses, personnel, experts and consultants, administrative and research services, cooperation of other governmental agencies, and appropriations of not to exceed \$606,000 of a Commission on Revision of the Federal Court Appellate System which Commission was to study the geographical division of the judicial circuits and the structure and internal procedures of the appellate court system and to report to the President, Congress, and the Chief Justice its recommendations for changes in the geographical boundaries of the circuits to expedite disposition of judicial business and for changes in the appellate court structure to expedite disposition of the appellate courts caseload in a manner consistent with fundamental concepts of fairness and due process. The Commission was to cease existence ninety days after submission of its final report, which report was submitted June 20, 1975.

CONTINUATION OF ORGANIZATION OF COURT

Act June 25, 1948, ch. 646, §2(b), 62 Stat. 985, provided in part that the provisions of this title as set out in section 1 of act June 25, 1948, with respect to the organization of each of the several courts therein provided, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees thereof and of the United States attorneys and marshals and their deputies and assistants, in office on Sept. 1, 1948, shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of this title, pursuant to his prior appointment.

§ 42. Allotment of Supreme Court justices to circuits

The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court. The Chief Justice may make such allotments in vacation.

A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.

(June 25, 1948, ch. 646, 62 Stat. 870.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §215 (Mar. 3, 1911, ch. 231, §119, 36 Stat. 1131; Dec. 23, 1944, ch. 724, 58 Stat. 925).

The authority of the Chief Justice in vacation to assign a circuit justice to more than one circuit was extended by omitting the phrase "whenever by reason of death or resignation, no Justice is allotted to a circuit."

The provision in section 215 of Title 28, U.S.C., 1940 ed., that, for the purposes of said section, the "District of Columbia shall be deemed to be a judicial circuit," was omitted, since the District of Columbia is made a judicial circuit by section 41 of this title.

The last paragraph was added to make clear the intent of Congress that the powers of the Court to assign the justices among the several circuits should be completely flexible.

Changes were made in phraseology.

§ 43. Creation and composition of courts

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

(b) Each court of appeals shall consist of the circuit judges of the circuit in regular active service. The circuit justice and justices or judges designated or assigned shall be competent to sit as judges of the court.

(June 25, 1948, ch. 646, 62 Stat. 870; Pub. L. 88-176, §1(a), Nov. 13, 1963, 77 Stat. 331.)

HISTORICAL AND REVISION NOTES

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

The provision in section 212 of title 28, U.S.C., 1940 ed., for a three-judge court of appeals was permissive and did not limit the power of the court to sit in banc. Thus, subsection (b) reflects present status of law, namely, that court is composed of not only circuit judges of the circuit in active service, of whom there may be more than three, but the circuit justice or justices and judges who may be assigned or designated to the court. (See *Textile Mills Securities Corporation v. Commissioner of Internal Revenue*, 1942, 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249 and Reviser's Notes under section 46 of this title.)

Words "with appellate jurisdiction, as hereinafter limited and established" were omitted as covered by section 1291 et seq. of this title, conferring appellate jurisdiction on the courts of appeals.

The term "court of appeals" was substituted in this section and throughout this title for the term "circuit court of appeals."

Provision for a quorum of the court is now covered by section 46(d) of this title.

Editorial Notes

AMENDMENTS

1963—Subsec. (b). Pub. L. 88-176 inserted "regular" before "active service".

Statutory Notes and Related Subsidiaries

CHANGE OF NAME OF COURT

Act June 25, 1948, ch. 646, §2(b), 62 Stat. 985, provided in part that each circuit court of appeals should, after Sept. 1, 1948, be known as a United States Court of Appeals, but that the enactment of act June 25, 1948 should in no way entail any loss of rights, interruption of jurisdiction, or prejudice to matters pending in any such courts on Sept. 1, 1948.

§ 44. Appointment, tenure, residence and salary of circuit judges

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

| Circuits                   | Number of Judges |
|----------------------------|------------------|
| District of Columbia ..... | 11               |
| First .....                | 6                |
| Second .....               | 13               |
| Third .....                | 14               |
| Fourth .....               | 15               |
| Fifth .....                | 17               |
| Sixth .....                | 16               |
| Seventh .....              | 11               |
| Eighth .....               | 11               |
| Ninth .....                | 29               |
| Tenth .....                | 12               |
| Eleventh .....             | 12               |
| Federal .....              | 12.              |

(b) Circuit judges shall hold office during good behavior.

(c) Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service. While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of the Federal Courts Improvement Act of 1982, and the chief judge of the Federal judicial circuit, whenever appointed, shall reside within fifty miles of the District of Columbia. In each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state<sup>1</sup> in that circuit.

(d) Each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 871; Aug. 3, 1949, ch. 387, §1, 63 Stat. 493; Feb. 10, 1954, ch. 6, §1, 68 Stat. 8; Mar. 2, 1955, ch. 9, §1(b), 69 Stat. 10; Pub. L. 87–36, §1(b), May 19, 1961, 75 Stat. 80; Pub. L. 88–426, title IV, §403(b), Aug. 14, 1964, 78 Stat. 434; Pub. L. 89–372, §1(b), Mar. 18, 1966, 80 Stat. 75; Pub. L. 90–347, §3, June 18, 1968, 82 Stat. 184; Pub. L. 94–82, title II, §205(b)(2), Aug. 9, 1975, 89 Stat. 422; Pub. L. 95–486, §3(b), Oct. 20, 1978, 92 Stat. 1632; Pub. L. 96–452, §3, Oct. 14, 1980, 94 Stat. 1994; Pub. L. 97–164, title I, §102, Apr. 2, 1982, 96 Stat. 25; Pub. L. 98–353, title II, §201(b), July 10, 1984, 98 Stat. 346; Pub. L. 101–650, title II, §202(b), Dec. 1, 1990, 104 Stat. 5099; Pub. L. 102–198, §10(c), Dec. 9, 1991, 105 Stat. 1626; Pub. L. 105–119, title III, §307, Nov. 26, 1997, 111 Stat. 2493; Pub. L. 110–177, title V, §509(a), Jan. 7, 2008, 121 Stat. 2543.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §213, and sections 11–201, 11–202, District of Columbia Code, 1940 ed. (Feb. 9, 1893, ch. 74, §1, 27 Stat. 434; Mar. 3, 1901, ch. 854, §§221, 222, 31 Stat. 1224; Mar. 3, 1911, ch. 231, §118, 36 Stat. 1131; Jan. 13, 1912, ch. 9, 37 Stat. 52; Feb. 25, 1919, ch. 29, §2, 40 Stat. 1156; Sept. 14, 1922, ch. 306, §6, 42 Stat. 840; Mar. 3, 1925, ch. 437, 43 Stat. 1116; Dec. 13, 1926, ch. 6, §1, 44 Stat. 919; Feb. 28, 1929, ch. 363, §2, 45 Stat. 1347; Mar. 1, 1929, ch. 413, §§1, 2, 45 Stat. 1414; June 10, 1930, ch. 437, 46 Stat. 538; June 10, 1930, ch. 438, 46 Stat. 538; June 19, 1930, ch. 538, 46 Stat. 785; June 16, 1933, ch. 102, 48 Stat. 310; Aug. 2, 1935, ch. 425, §1, 49 Stat. 508; June 24, 1936, ch. 735, §1, 49 Stat. 1903; Apr. 14, 1937, ch. 80, 50 Stat. 64; May 31, 1938, ch. 290, §§1, 3, 52 Stat. 584, 585; May 24, 1940, ch. 209, §1, 54 Stat. 219; Dec. 14, 1942, ch. 731, 56 Stat. 1050; Dec. 7, 1944, ch. 521, §1, 58 Stat. 796; July 31, 1946, ch. 704, §1, 60 Stat. 716).

This section includes the members of the United States Court of Appeals for the District of Columbia and designates them as “judges” rather than as “justices”, thus harmonizing it with the provisions of section 41 of this title, which specifically designates the District of Columbia as a judicial circuit of the United States. In doing so it consolidates sections 11–201, 11–202 of the District of Columbia Code, 1940 ed., which provided for one “chief justice” and five associate “justices.”

Act February 9, 1893, established a court of appeals for the District of Columbia to consist of one chief justice and two associate justices whose jurisdiction was almost entirely to review the judgments of the Supreme Court of the District of Columbia, the name of which was changed in 1936 to the District Court of the United States for the District of Columbia. Circuit courts were established by the first Judiciary Act of

September 24, 1789, §4, and R.S. §608, enacted June 22, 1874. R.S. §605 provided that the words “circuit justice” and “justice of a circuit” should designate the justice of the Supreme Court of the United States allotted to any circuit; that “judge” when applied to any circuit included such justice.

The Judiciary Appropriation Act, 1945, Act June 26, 1944, ch. 277, §202, 58 Stat. 358, provided that as used in that Act, “the term ‘circuit court of appeals’ includes the United States Court of Appeals for the District of Columbia; the term ‘senior circuit judge’ includes the Chief Justice of the United States Court of Appeals for the District of Columbia; and the term ‘circuit judge’ includes associate justice of the United States Court of Appeals for the District of Columbia; and the term ‘judge’ includes justice.”

Provisions in section 11–202 of the District of Columbia Code, 1940 ed., and section 213 of title 28, U.S.C., 1940 ed., for payment of salaries in monthly installments were omitted, since time of payment is a matter of administrative convenience (20 Comp. Gen. 834).

The exception in subsection (c) extends to circuit judges in the District of Columbia the effect of the recent decision in *U.S. ex rel. Laughlin v. Eicher*, D.C. 1944, 56 F.Supp. 972, holding that residence requirement of section 1 of title 28, U.S.C., 1940 ed., did not apply to district judges in the District of Columbia. (See Reviser’s Note under section 134 of this title.)

The provision in section 213 of the title 28, U.S.C., 1940 ed., that “it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law,” was omitted as unnecessary since the duty to serve is implied by the creation and composition of the court in section 43 of this title.

Last sentence, providing that nothing in section 213 of title 28, U.S.C., 1940 ed., should prevent a circuit judge from holding district court as provided by law, was omitted as unnecessary. (See section 291 of this title authorizing assignments to district courts.)

Subsection (b) was added in conformity with the U.S. Constitution, art. 3.

Changes were made in phraseology.

REFERENCES IN TEXT

The effective date of the Federal Courts Improvement Act of 1982, referred to in subsec. (c), is the effective date of Pub. L. 97–164, Oct. 1, 1982. See Effective Date of 1982 Amendment note set out under section 171 of this title.

Section 225 of the Federal Salary Act of 1967, referred to in subsec. (d), is section 225 of Pub. L. 90–206, Dec. 16, 1967, 81 Stat. 642, as amended, which is classified to chapter 11 (§351 et seq.) of Title 2, The Congress.

Editorial Notes

AMENDMENTS

2008—Subsec. (a). Pub. L. 110–177, §509(a)(2), substituted “29” for “28” in item relating to Ninth Circuit.

Pub. L. 110–177, §509(a)(1), substituted “11” for “12” in item relating to District of Columbia Circuit.

1997—Subsec. (c). Pub. L. 105–119 inserted at end “In each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit.”

1991—Subsec. (c). Pub. L. 102–198 substituted “the Federal Courts Improvement Act of 1982” for “this Act”.

1990—Subsec. (a). Pub. L. 101–650 altered number of permanent circuit judgeships in named circuits as follows:

| Circuits     | Former | New |
|--------------|--------|-----|
| Third .....  | 12     | 14  |
| Fourth ..... | 11     | 15  |
| Fifth .....  | 16     | 17  |
| Sixth .....  | 15     | 16  |

<sup>1</sup> So in original. Probably should be capitalized.

| <i>Circuits</i> | <i>Former</i> | <i>New</i> |
|-----------------|---------------|------------|
| Eighth .....    | 10            | 11         |
| Tenth .....     | 10            | 12         |

1984—Subsec. (a). Pub. L. 98-353 altered number of permanent circuit judgeships in named circuits as follows:

| <i>Circuits</i>            | <i>Former</i> | <i>New</i> |
|----------------------------|---------------|------------|
| District of Columbia ..... | 11            | 12         |
| First .....                | 4             | 6          |
| Second .....               | 11            | 13         |
| Third .....                | 10            | 12         |
| Fourth .....               | 10            | 11         |
| Fifth .....                | 14            | 16         |
| Sixth .....                | 11            | 15         |
| Seventh .....              | 9             | 11         |
| Eighth .....               | 9             | 10         |
| Ninth .....                | 23            | 28         |
| Tenth .....                | 8             | 10         |
| Eleventh .....             | 12            | 12         |
| Federal .....              | 12            | 12         |

1982—Subsec. (a). Pub. L. 97-164, §102(a), inserted item relating to Federal circuit with 12 judges.

Subsec. (c). Pub. L. 97-164, §102(b), inserted provision relating to requirement that judges of Federal judicial circuit reside within fifty miles of the District of Columbia.

1980—Subsec. (a). Pub. L. 96-452 substituted “14” for “26” in item relating to Fifth Circuit, and added item relating to Eleventh Circuit.

1978—Subsec. (a). Pub. L. 95-486 altered number of permanent circuit judgeships in the named circuits as follows:

| <i>Circuits</i>            | <i>Former</i> | <i>New</i> |
|----------------------------|---------------|------------|
| District of Columbia ..... | 9             | 11         |
| First .....                | 3             | 4          |
| Second .....               | 9             | 11         |
| Third .....                | 9             | 10         |
| Fourth .....               | 7             | 10         |
| Fifth .....                | 15            | 26         |
| Sixth .....                | 9             | 11         |
| Seventh .....              | 8             | 9          |
| Eighth .....               | 8             | 9          |
| Ninth .....                | 13            | 23         |
| Tenth .....                | 7             | 8          |

1975—Subsec. (d). Pub. L. 94-82 substituted provision that each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision that each circuit judge shall receive a salary of \$33,000 a year.

1968—Subsec. (a). Pub. L. 90-347 increased the number of circuit judges in the enumerated circuits as follows: Third Circuit, eight to nine; Fifth Circuit, nine to fifteen; Sixth Circuit, eight to nine; Ninth Circuit, nine to thirteen, and Tenth Circuit, six to seven.

1966—Subsec. (a). Pub. L. 89-372 increased the number of circuit judges in the enumerated circuits as follows: Fourth Circuit, five to seven; Sixth Circuit, six to eight; Seventh Circuit, seven to eight; Eighth Circuit, seven to eight.

1964—Subsec. (d). Pub. L. 88-426 increased the salary of the circuit judges from \$25,500 to \$33,000.

1961—Subsec. (a). Pub. L. 87-36 increased the number of circuit judges in the enumerated circuits, as follows: Second Circuit, six to nine; Third Circuit, seven to eight; Fourth Circuit, three to five; Fifth Circuit, seven to nine; Seventh Circuit, six to seven; and Tenth Circuit, five to six.

1955—Subsec. (d). Act Mar. 2, 1955, increased the salary of circuit judges from “\$17,500” a year to “\$25,500”.

1954—Subsec. (a). Act Feb. 10, 1954, increased the number of circuit judges in the Fifth Circuit from six to seven, and in the Ninth Circuit from seven to nine.

1949—Subsec. (a). Act Aug. 3, 1949, increased the number of circuit judges for the District of Columbia from six to nine, for the Third Circuit from six to seven, for

the Seventh Circuit from five to six, and for the Tenth Circuit from four to five.

**Statutory Notes and Related Subsidiaries**

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110-177, title V, §509(b), Jan. 7, 2008, 121 Stat. 2543, provided that: “The amendments made by subsection (a)(2) [amending this section] shall take effect on January 21, 2009.”

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-650, title II, §206, Dec. 1, 1990, 104 Stat. 5104, provided that: “This title [amending this section and section 133 of this title and enacting provisions set out as notes under this section and sections 133 and 331 of this title] shall take effect on the date of the enactment of this title [Dec. 1, 1990].”

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 1980 AMENDMENT

Amendment by Pub. L. 96-452 effective Oct. 1, 1981, see section 12 of Pub. L. 96-452, set out as a note under section 41 of this title.

EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88-426 effective on first day of first pay period which begins on or after July 1, 1964, except to extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

EFFECTIVE DATE OF 1955 AMENDMENT

Amendment by act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as a note under section 4501 of Title 2, The Congress.

NOMINATION TO FEDERAL JUDGESHIP ON NONDISCRIMINATORY BASIS

Pub. L. 98-353, title II, §211, July 10, 1984, 98 Stat. 351, provided that: “It is the sense of the Congress that the President, in selecting individuals for nomination to the Federal judgeships created by this Act [see Short Title of 1984 Amendment note set out under section 151 of this title], shall give due consideration to qualified individuals without regard to race, color, sex, religion, or national origin.”

CONTINUED SERVICE OF JUDGES

Pub. L. 97-164, title I, §165, Apr. 2, 1982, 96 Stat. 50, provided that judges of United States Court of Claims and of United States Court of Customs and Patent Appeals in regular active service on Oct. 1, 1982, would continue in office as judges of United States Court of Appeals for the Federal Circuit and senior judges of United States Court of Claims and of United States Court of Customs and Patent Appeals on Oct. 1, 1982, would continue in office as senior judges of United States Court of Appeals for the Federal Circuit.

CONGRESSIONAL STATEMENT REGARDING APPOINTMENT OF JUDGES

Pub. L. 97-164, title I, §168, Apr. 2, 1982, 96 Stat. 51, provided that: “The Congress—

“(1) takes notice of the fact that the quality of the Federal judiciary is determined by the competence and experience of its judges; and

“(2) suggests that the President, in nominating individuals to judgeships on the United States Court of Appeals for the Federal Circuit and the United States Claims Court [now United States Court of Federal Claims], select from a broad range of qualified individuals.”

SALARY INCREASES

For adjustment of salaries of circuit judges under this section, see the executive order detailing the ad-

justment of certain rates of pay set out as a note under section 5332 of Title 5, Government Organization and Employees.

For prior year salary increases per the recommendation of the President, see Prior Salary Recommendations notes under section 358 of Title 2, The Congress.

For miscellaneous provisions dealing with adjustments of pay and limitations on use of funds to pay salaries in prior years, see notes under section 5318 of Title 5, Government Organization and Employees.

Salaries of circuit judges increased from \$12,500 to \$17,500 a year by act July 31, 1946, ch. 704, §1, 60 Stat. 716.

Salaries of circuit judges increased from \$8,500 to \$12,500 a year by act Dec. 13, 1926, ch. 6, §1, 44 Stat. 919.

Salaries of circuit judges increased from \$7,000 to \$8,500 a year by act Feb. 25, 1919, ch. 29, §1, 40 Stat. 1156.

Salaries of circuit court judges set at \$7,000 a year by the Judicial Code of 1911, act Mar. 3, 1911, ch. 231, §1, 36 Stat. 1131.

#### ADDITIONAL JUDGES

Since 1925, the appointment of additional judges was authorized by the following acts:

Second circuit. Act May 31, 1938, ch. 290, §1, 52 Stat. 584.

Third circuit. Act Aug. 3, 1949, ch. 387, §1, 63 Stat. 493; act Dec. 7, 1944, ch. 521, §1, 58 Stat. 796; act June 10, 1930, ch. 438, 46 Stat. 538; act June 24, 1936, ch. 735, §1, 49 Stat. 1903, repealed by act May 31, 1938, ch. 290, §3, 52 Stat. 585.

Fifth circuit. Act Dec. 14, 1942, ch. 731, 56 Stat. 1050; act May 31, 1938, ch. 290, §1, 52 Stat. 584; act June 10, 1930, ch. 437, 46 Stat. 538.

Sixth circuit. Act May 24, 1940, ch. 209, §1, 54 Stat. 219; act May 31, 1938, ch. 290, §1, 52 Stat. 584.

Seventh circuit. Act Aug. 3, 1949, ch. 387, §1, 63 Stat. 493; act May 31, 1938, ch. 290, §1, 52 Stat. 584.

Eighth circuit. Act May 24, 1940, ch. 209, §1, 54 Stat. 219; act Mar. 3, 1925, ch. 436, 43 Stat. 1116.

Ninth circuit. Act Apr. 14, 1937, ch. 80, 50 Stat. 64; act Aug. 2, 1935, ch. 425, §1, 49 Stat. 508; act June 16, 1933, ch. 102, 48 Stat. 310 (removing limitation on filling of vacancy); act Mar. 1, 1929, ch. 413, 45 Stat. 1414.

Tenth circuit. Act Aug. 3, 1949, ch. 387, §1, 63 Stat. 493.

District of Columbia Court of Appeals. Act Aug. 3, 1949, ch. 387, §1, 63 Stat. 493; act May 31, 1938, ch. 290, §2, 52 Stat. 584; act June 19, 1930, ch. 538, 46 Stat. 785.

Act Feb. 28, 1929, ch. 363, §2, 45 Stat. 1346, 1347 provided that "There shall be in the sixth, seventh, and tenth circuits, respectively, four circuit judges; and in the second and eighth circuits, respectively, five circuit judges; and, in each of the other circuits three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate."

Another part of act Feb. 10, 1954, ch. 6, §1, 68 Stat. 8, which amended subsec. (a) of this section, provided for the appointment by the President, by and with the advice and consent of the Senate, of the additional judges for the Fifth and Ninth Circuits, provided for in such amendment.

Pub. L. 87-36, §1(a), May 19, 1961, 75 Stat. 80, provided that: "The President shall appoint, by and with the advice and consent of the Senate, three additional circuit judges for the second circuit, one additional circuit judge for the third circuit, two additional circuit judges for the fourth circuit, two additional circuit judges for the fifth circuit, one additional circuit judge for the seventh circuit, and one additional circuit judge for the tenth circuit."

Pub. L. 89-372, §1(a), Mar. 18, 1966, 80 Stat. 75, provided that: "The President shall appoint, by and with the advice and consent of the Senate, two additional circuit judges for the fourth circuit, two additional circuit judges for the sixth circuit, one additional circuit judge for the seventh circuit, and one additional circuit judge for the eighth circuit."

Pub. L. 89-372, §1(c), Mar. 18, 1966, 80 Stat. 75, as amended by Pub. L. 90-347, §2, June 18, 1968, 82 Stat. 183, provided that: "The President shall appoint, by and

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 Documents

##### 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.

#### Editorial Notes

##### 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