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'' 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''.

Statutory Notes and Related Subsidiaries

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 rehearings 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.

Editorial Notes

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 Federal Circuit 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 determine by rule the number of judges, not less than three, who constitute a panel.

Subsec. (c). Pub. L. 97–164, §§ 103(c), 205, inserted provision 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 and that, as an alternative to the requirement that a court in banc consist of all circuit judges in regular active service, such a court may consist of 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 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.

Subsec. (d). Pub. L. 97–164, § 103(d), substituted ''panel'' for ''division''.

1978—Pub. L. 95–486, § 5(b), substituted ''panels'' for ''divisions'' in section catchline.

Subsec. (c). Pub. L. 95–486, § 5(a), substituted ''panel'' for ''division'' and struck out provision authorizing a retired circuit judge to sit as a judge of the court in banc in the rehearing of a case if he sat in the court or division in the original hearing of such case.

1963—Subsec. (c). Pub. L. 88–176 inserted ''regular'' before ''active service'' wherever appearing, and provided that a retired circuit judge shall be competent to sit as a judge of the court in banc, in a rehearing if he sat in at the original hearing.

Statutory Notes and Related Subsidiaries

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.

§ 47. Disqualification of trial judge to hear appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

(June 25, 1948, ch. 646, 62 Stat. 872.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 216, and District of Columbia Code, 1940 ed., § 11–205 (Feb. 9, 1893, ch. 74, § 6, 27 Stat. 435; July 30, 1894, ch. 172, § 2, 28 Stat. 161; Mar. 3, 1901, ch. 854, § 225, 31 Stat. 1225; Mar. 3, 1911, ch. 231, § 120, 36 Stat. 1132).

The provision in section 11–205 of the District of Columbia Code, 1940 ed., that a justice of the district court while on the bench of the Court of Appeals in the District of Columbia shall not sit in review of judgment, order, or decree rendered by him below, was consolidated with a similar provision of section 216 of title 28, U.S.C., 1940 ed. The consolidation simplifies the language without change of substance.

References in said section 11–205 to the power to prescribe rules, requisites of record on appeal, forms of bills of exception, and procedure on appeal, were omitted as covered by Rules 73, 75, 76, of the Federal Rules of Civil Procedure and by Rule 51 of the Federal Rules of Criminal Procedure.

Said section 11–205 contained a provision that on a divided opinion by the Court of Appeals for the District of Columbia the decision of the lower court should