

(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 stand affirmed. This was omitted as unnecessary as merely expressing a well-established rule of law.

Other provisions of said section 11-205 are incorporated in section 48 of this title.

The provision of section 216 of title 28, U.S.C., 1940 ed., with respect to the competency of justices and judges to sit, was omitted as covered by section 43 of this title.

Specific reference in said section 216 to the Chief Justice of the United States was likewise omitted inasmuch as he sits as a circuit justice.

The provision of said section 216 with respect to assignment of district judges was omitted as covered by section 291 et seq. of this title.

Provision of said section 216 relating to presiding judge was omitted as covered by section 44 of this title.

**§ 48. Terms of court**

(a) The courts of appeals shall hold regular sessions at the places listed below, and at such other places within the respective circuit as each court may designate by rule.

| Circuits                   | Places  |
|----------------------------|---|
| District of Columbia ..... | Washington.   |
| First .....                | Boston.   |
| Second .....               | New York.   |
| Third .....                | Philadelphia.   |
| Fourth .....               | Richmond, Asheville.  |
| Fifth .....                | New Orleans, Fort Worth, Jackson.   |
| Sixth .....                | Cincinnati.   |
| Seventh .....              | Chicago.  |
| Eighth .....               | St. Louis, Kansas City, Omaha, St. Paul.  |
| Ninth .....                | San Francisco, Los Angeles, Portland, Seattle.  |
| Tenth .....                | Denver, Wichita, Oklahoma City.   |
| Eleventh .....             | Atlanta, Jacksonville, Montgomery.  |
| Federal .....              | District of Columbia, and in any other place listed above as the court by rule directs. |

(b) Each court of appeals may hold special sessions at any place within its circuit as the nature of the business may require, and upon such notice as the court orders. The court may transact any business at a special session which it might transact at a regular session.

(c) Any court of appeals may pretermitt any regular session of court at any place for insufficient business or other good cause.

(d) The times and places of the sessions of the Court of Appeals for the Federal Circuit shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable.

(e) Each court of appeals may hold special sessions at any place within the United States outside the circuit as the nature of the business may require and upon such notice as the court orders, upon a finding by either the chief judge of the court of appeals (or, if the chief judge is unavailable, the most senior available active judge of the court of appeals) or the judicial council of the circuit that, because of emergency conditions, no location within the circuit is reasonably available where such special sessions could be held. The court may transact any business at a special session outside the circuit which it might transact at a regular session.

(f) If a court of appeals issues an order exercising its authority under subsection (e), the court—

(1) through the Administrative Office of the United States Courts, shall—

(A) send notice of such order, including the reasons for the issuance of such order, to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives; and

(B) not later than 180 days after the expiration of such court order submit a brief report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives describing the impact of such order, including—

- (i) the reasons for the issuance of such order;
- (ii) the duration of such order;
- (iii) the impact of such order on litigants; and
- (iv) the costs to the judiciary resulting from such order; and

(2) shall provide reasonable notice to the United States Marshals Service before the commencement of any special session held pursuant to such order.

(June 25, 1948, ch. 646, 62 Stat. 872; Oct. 31, 1951, ch. 655, § 36, 65 Stat. 723; Pub. L. 96-452, § 4, Oct. 14, 1980, 94 Stat. 1994; Pub. L. 97-164, title I, § 104, Apr. 2, 1982, 96 Stat. 26; Pub. L. 102-572, title V, § 501, Oct. 29, 1992, 106 Stat. 4512; Pub. L. 109-63, § 2(a), Sept. 9, 2005, 119 Stat. 1993.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 223 and § 11-205 District of Columbia Code, 1940 ed. (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, § 126, 36 Stat. 1132; July 17, 1916, ch. 246, 39 Stat. 385; Jan. 8, 1925, ch. 57, 43 Stat. 729; July 3, 1926, ch. 735, 44 Stat. 809; Feb. 28, 1929, ch. 363, § 3, 45 Stat. 1347; May 17, 1932, ch. 190, 47 Stat. 158).

This section consolidates section 223 of title 28, U.S.C., 1940 ed., with part of section 11-205 of the District of Columbia Code.

Reference to San Juan as a place for holding court in the First Circuit was omitted. The revised section will