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How Senior Status Vacancies Will Shape the 4th Circ.

by Kevin Elliker

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By this time next year, the U.S. Court of Appeals for the Fourth Circuit will likely have two new judges, due to the vacancies created by Judge Dennis W. Shedd and Judge William B. Traxler taking senior status. Judge Shedd assumed senior status on Jan. 30, 2018, and Judge Traxler will do the same at the end of August 2018. These vacancies mark President Trump's first opportunity to affect the composition of the Fourth Circuit, a court currently dominated by judges appointed by President Clinton and President Obama. Although the two new judges are unlikely to upset the status quo, litigants may face an increased likelihood that their panel will be composed of Republican-appointed judges.

What is Senior Status?

The Constitution provides that federal judges "shall hold their offices during good behavior," meaning they are appointed for life.¹ Although many judges serve out those life terms, federal law provides the option to retire with a pension equal to their salary. The retirement-eligibility requirement hinges on the judge's age and years of service: A judge who is at least 65 years old can retire after serving for 15 years on the federal bench. For each additional year of age, the minimum service requirement comes down by a year.² This is colloquially known as the "Rule of 80," derived from the required sum of the judge's age and federal tenure.

A retirement-eligible judge also has the option to take "senior status." A senior judge continues to serve on the bench with the opportunity to take a reduced caseload.³ Importantly, the senior judge vacates an active position on the bench, thus creating a judicial vacancy.

Judge Shedd, appointed to the Fourth Circuit by President George W. Bush, has served a combined 27 years on the federal bench (12 on the District of South Carolina and 15 on the Fourth Circuit). He turned 65 in 2018, so he appears to have taken senior status soon after becoming eligible. By the time Judge Traxler, a President Bill Clinton appointee, assumes senior status, he will have served a combined 26 years on the federal bench (six years as a judge in the District of South Carolina and 20 years on the Fourth Circuit). He has been eligible for senior status since he turned 65 in 2013.⁴

What Effect will Senior Status Have on the Fourth Circuit?

By taking senior status, Judge Shedd and Judge Traxler will vacate two of the Fourth Circuit's 15 judgeships, leaving two slots open for appointments by President Trump. The two senior judges will not lose the core of their adjudicative responsibilities. Senior judges, if they so choose, continue to sit on the three-judge panels, write opinions, and decide cases.

The key distinction between senior and active judges in the Fourth Circuit comes with en banc

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proceedings — cases in which the Fourth Circuit sits as a full 15-member court. Under Fourth Circuit rules, senior judges may participate in en banc proceedings only if they sat on the panel that rendered the original decision.⁵ That limitation can be significant in high-profile cases.⁶ Even with the addition of two new judges appointed by President Trump, the Fourth Circuit will remain dominated by judges appointed by Democratic presidents.⁷

Nevertheless, the significance of the balance on the en banc Fourth Circuit can be overstated. For one, tying a judge’s jurisprudence to the ideology of the president who appointed that judge is a risky wager.⁸ More significantly, en banc proceedings account for less than one-tenth of 1 percent of the cases decided by the Fourth Circuit.⁹ Thus, although an en banc case may involve “a question of exceptional importance,” such a circumstance arises less than a handful of times in any given year.¹⁰

Instead, the impact of Judge Traxler and Judge Shedd taking senior status will be felt by the addition of two Trump appointees to the pool from which three-judge panels are drawn. Assuming the new senior judges maintain a somewhat normal caseload, then that pool will expand from 15 to 17. Litigants’ chances of drawing a Fourth Circuit panel of Republican-appointed judges will increase, even if only slightly.

What Future Retirements Might Affect the Fourth Circuit?

The announced personnel changes on the Fourth Circuit in 2018 also raise the question of what other retirements or senior-status decisions may arise in the near future. Notably, more than half of the remaining 13 judges sitting on the Fourth Circuit are or will become eligible to take senior status in 2018. Those judges are:

Judge	Appointed By
Chief Judge Roger L. Gregory	President Clinton / President George W. Bush ¹¹
Judge J. Harvie Wilkinson III	President Ronald Reagan
Judge Paul V. Niemeyer	President George H. W. Bush
Judge Diana Gribbon Motz	President Clinton
Judge Robert B. King	President Clinton
Judge Allyson K. Duncan	President George W. Bush
Judge Henry F. Floyd	President Barack Obama ¹²

By the end of 2020, two more Fourth Circuit judges will become eligible for senior status:

Judge	Appointed By
Judge G. Steven Agee	President George W. Bush
Judge Barbara Milano Keenan	President Obama

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The remaining Fourth Circuit judges — all Obama appointees — will not become eligible for senior status until after the next presidential election (or well beyond it):

Judge	Eligible for Senior Status
Judge James A. Wynn Jr	2022
Judge Albert Diaz	2025
Judge Stephanie D. Thacker	2030
Judge Pamela A. Harris	2027

Whether any of the judges eligible for senior status during President Trump’s first term will make that decision is difficult, if not impossible, to predict. Although many presume that judges wait to announce their intent to retire or take senior status until a president of their liking can appoint a successor, the factors influencing the retirement or senior status decision can be varied and personal.¹³

Conclusion

The Fourth Circuit sets itself apart from other courts in a variety of ways. It is among the most cordial courts in the country, as shown by the tradition of judges leaving the bench after every argument to shake hands with counsel. It also remains the fastest-moving federal appeals court, deciding most appeals in less than six months.¹⁴ The addition of new jurists to the Fourth Circuit will introduce new voices and may affect the composition of particular panels. At the same time, the court’s traditions of collegiality and efficiency permeate every case, no matter the personality or ideology of any particular judge on a panel. Lawyers and litigants should expect the same to hold true for the court’s newest members in the coming year.

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¹ U.S. Const. art. III, § 1.

² See 28 U.S.C. 371(c).

³ The minimum caseload and service requirements for senior judges is outlined in 28 U.S.C. § 371(e). In most instances, senior judges must maintain a caseload equivalent to at least 25 percent of the caseload maintained by the average active judge. The

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particular threshold is set each year by the Administrative Office. Because senior judges would otherwise be eligible to retire in full without taking on any cases, the Administrative Office refers to senior judges as “effectively provid[ing] volunteer service to the courts.” U.S. Courts, FAQs: Federal Judges, <http://www.uscourts.gov/faqs-federal-judges#faq-What-is-a-senior-judge> (last visited Jan. 25, 2018).

⁴ Notably, the district-to-appeals-court path has been quite common among South Carolina federal judges. All four South Carolinians currently serving on the Fourth Circuit — Judge Traxler, Judge Shedd, Judge Henry F. Floyd, and Senior Judge Clyde H. Hamilton — ascended to their positions after service as trial judges on the District of South Carolina. In fact, Judge Traxler was elevated from the district court (where he had replaced Judge Hamilton) to replace Judge Donald S. Russell — also a former South Carolina district court judge. When Judge Hamilton assumed senior status, Judge Shedd was elevated to the Fourth Circuit, leaving the district court vacancy filled by Judge Floyd. This district-to-appeals-court pattern extended also to the appointments of Judge William W. Wilkins (D.S.C. 1981-1986) to the Fourth Circuit (from which he retired in 2008) and Judge Karen LeCraft Henderson (D.S.C. 1986-1990) to the DC Circuit (where she still sits as an active judge). It remains to be seen whether the District of South Carolina will be a springboard for Judge Traxler’s and Judge Shedd’s replacements. There are only four Republican-appointed judges on that court, ranging in age from 59 to 72. Given the Trump administration’s focus on appointing relatively young jurists — the average age of his first 13 circuit court nominees is around 49 years old — the next South Carolinians to sit on the Fourth Circuit may come from some other proving ground.

⁵ Under the Fourth Circuit’s rules, an en banc rehearing is initiated by the polling of all active-service judges. No senior judge gets to vote in the poll, but a senior judge can ask for the poll to be taken if he was sitting on the panel that decided the case originally. See 4th Cir. Local R. 35(b).

⁶ In the Fourth Circuit’s most recent en banc decision — *International Refugees Assistance Project v. Trump* — the court opted to skip panel hearing and go straight to en banc consideration. Under such rare circumstances, no senior judge would be eligible to participate.

⁷ Notably, President Obama appointed seven jurists to the Fourth Circuit, six of whom still serve on the bench: Barbara Milano Keenan; James A. Wynn, Jr.; Albert Diaz; Henry F. Floyd; Stephanie D. Thacker; and Pamela A. Harris. President Obama’s first appointee, Andre M. Davis, took senior status in 2014 then retired from the bench in 2017.

⁸ For example, Judge Traxler was appointed to the district court by President George H. W. Bush before he was appointed to the Fourth Circuit by President Clinton. In two recent en banc decisions, he took what some may see as alternatively “conservative” and “liberal” positions: he would have applied strict scrutiny to Maryland’s ban on assault weapons and large-capacity magazines, see *Kolbe v. Hogan*, 849 F.3d 114, 151 (4th Cir. 2017) (en banc) (Traxler, J., dissenting), and he voted to uphold the injunction against President Trump’s second travel ban, see *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 606 (4th Cir.) (en banc) (Traxler, J., concurring in judgment), vacated and remanded, 138 S. Ct. 353 (2017).

⁹ Since 2008, the Fourth Circuit has disposed of more than 50,000 appeals, only 20 of which were decided by the en banc court. See U.S. Court of Appeals for the Fourth Circuit, Monthly Statistical Report: Dec. 31, 2017, <http://www.ca4.uscourts.gov/docs/pdfs/publicstats.pdf?sfvrsn=141>.

¹⁰ See Fed. R. App. P. 35(a)(2).

¹¹ President Clinton used a recess appointment to put Chief Judge Gregory on the Fourth Circuit in late 2000. President George W. Bush then re-nominated him in 2001.

¹² Judge Floyd has been eligible for senior status since 2015 by virtue of his combined service on the Fourth Circuit and the District of South Carolina, to which he was appointed in 2003 by President George W. Bush.

¹³ See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. Legal Stud. 111, 145 (2013) (recognizing “policy preference” as one factor among others influencing retirement and senior-status decisions, including “preferences on income, leisure, and good weather”).

¹⁴ In the 12-month period ending Sept. 30, 2017, the median time from filing a notice of appeal to disposition of the case in the Fourth Circuit was 5.7 months. The next-fastest court was the Eighth Circuit, with a median time of 7.3 months. See U.S. Courts, Federal Court Management Statistics — Summary: Sept. 30, 2017, <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-september-2017>.