

# The Curious Case of the Temporary Judgeship

BY JON O. NEWMAN



**WHEN A DISTRICT COURT OR A COURT OF APPEALS HAS AN UNUSUALLY LARGE BACKLOG, CONGRESS SOMETIMES AUTHORIZES WHAT IS CALLED A “TEMPORARY JUDGESHIP.”** Several aspects of the concept of a temporary judgeship are often not understood, and one curious aspect is almost entirely unknown.<sup>1</sup>

## What Is a Temporary Judgeship?

Let’s start with the basics. The judge appointed to a temporary judgeship is not temporary. That judge has life tenure, just like every other judge appointed to an Article III court.

Temporary judgeships are authorized by statute. That statute has a “don’t fill” provision, which provides that a particular vacancy occurring in the district or circuit will not be filled. The vacancy may be either the next vacancy, the first vacancy occurring after a specified number of years, or the first vacancy occurring after a specified event.

Most “don’t fill” provisions provide that the *next* vacancy will not be filled.<sup>2</sup> The most common formulation states, “The first vacancy occurring in the office of district judge in [the] district shall not be filled.”<sup>3</sup>

When Congress provides that a vacancy occurring after a specified number of years will not be filled, time

periods of two,<sup>4</sup> five,<sup>5</sup> and ten<sup>6</sup> years have been used. Among the events after which the next vacancy will not be filled have been “the effective date of the Act,”<sup>7</sup> “the confirmation date of the judge named to fill” the temporary judgeship,<sup>8</sup> or the departure from active status of “the judge senior in commission” in the district.<sup>9</sup>

A vacancy that creates the opportunity for the president to appoint a judge to a temporary judgeship occurs when a full-time judge (sometimes called “in active status”) elects to become a senior judge<sup>10</sup> or leave the judiciary,<sup>11</sup> becomes or is certified as disabled,<sup>12</sup> dies, is elevated to a higher court, or temporarily leaves a judgeship to take a position in the field of federal judicial administration.<sup>13</sup>

The departure, for any reason, of a judge who has taken senior status does not create a vacancy that the president can fill with a new appointment.

What is temporary about a temporary judgeship is the increase in the number of judges in a district or a circuit. After the vacancy specified in the authorizing statute occurs, that vacancy is not filled, and the number of judges in the district or circuit returns to the number it had before the temporary judgeship was authorized. For example, the temporary judgeship authorized for the District of New Jersey in 1970 increased

the number of judgeships from nine to ten; when the first vacancy occurred, it was not filled, and the number of judgeships returned to nine.

One curious aspect of the term “temporary judgeship” is that it has no accepted definition. The authoritative *Black’s Law Dictionary* does not even have an entry for the term.<sup>14</sup> I suggest the following definition: A judgeship is temporary if the statute authorizing the judgeship provides that a subsequent vacancy in the district or circuit will not be filled by the appointment of another judge.

Another curious aspect is that when Congress authorizes a temporary judgeship, as it often does, it hardly ever labels such judgeships “temporary.” Occasionally, Congress has used “temporary judgeships” as a subsection heading.<sup>15</sup>

## What Becomes of a Temporary Judgeship?

After Congress has authorized a temporary judgeship, there are three possible outcomes. The most likely is that Congress later makes the judgeship permanent by repealing the “don’t fill” provision. Of the 99 judgeships Congress has authorized since 1898 that were temporary when authorized,<sup>16</sup> Congress has made 57 of them permanent.<sup>17</sup> The second most likely ►

outcome is that a temporary judgeship expires pursuant to the terms of a “don’t fill” provision in the authorizing statute. That has occurred for 32 temporary judgeships.<sup>18</sup>

The third potential outcome is that Congress extends the number of years after which a vacancy in the temporary judgeship will not be filled. That has occurred with respect to 10 temporary judgeships.<sup>19</sup> For some, Congress has made such extensions several times.<sup>20</sup> In December 2022, the temporary judgeship for the District of Kansas, for example, was extended for the 18th time.<sup>21</sup> As long as Congress keeps extending the number of years after which a temporary judgeship is scheduled to expire, the number of judgeships in the district does not decrease. Congress is currently considering a bill to make permanent all of the currently existing temporary judgeships.<sup>22</sup>

### The Most Curious Aspect

The most curious aspect of a temporary judgeship is that until the vacancy contemplated by the authorizing statute occurs, no one can be certain *which* judgeship in the district or circuit is the temporary judgeship. At the time when the statute with a “don’t fill” provision is enacted, the authorized judgeship is then the temporary judgeship, but when the vacancy specified in the statute occurs, some other judgeship in the district or circuit might become the temporary judgeship, and what *was* the temporary judgeship becomes, in effect, a permanent judgeship.

A series of events in the Eastern District of California illustrates the point. In 1990, Congress authorized a temporary judgeship for the Eastern District of California;<sup>23</sup> the authorizing statute provided that “[t]he first vacancy occurring in the office of dis-

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trict judge . . . , occurring 5 years or more after the effective date of this title, shall not be filled.”<sup>24</sup> That “don’t fill” provision *initially* made the judgeship authorized in 1990 a temporary judgeship. The first vacancy contemplated by the 1990 statute occurred in 2004 (more than five years after the title authorizing the temporary judgeship) when Judge William B. Shubb took senior status. Judge Shubb was filling a (permanent) judgeship first authorized in 1978. As a result of the “don’t fill” provision in the 1990 statute, the judgeship authorized in 1978 was not filled, and that judgeship became, in effect, a temporary judgeship and expired. The judgeship authorized in 1990, which was first filled by Judge Garland E. Burrell Jr., became vacant in 2012 when Judge Burrell took senior status, and was filled by the appointment of Judge Troy L. Nunley. Because the vacancy created by Judge Burrell’s taking senior status in 2012 occurred after Judge Shubb took senior status in 2004, the judgeship authorized in 1990, which was temporary when first

authorized, in effect, became a permanent judgeship and was filled.

This characterization of the judgeship authorized in 1978 as “becoming temporary” and the judgeship authorized in 1990 as “becoming permanent” is confirmed by the helpful “Succession of seats” chart prepared by Wikipedia and displayed near the bottom of its article on the United States District Court for the Eastern District of California.<sup>25</sup> The last entry for Seat 6, which Judge Shubb filled, states, “Seat abolished on November 1, 2004, (*temporary* judgeship expired).”<sup>26</sup> Wikipedia correctly understands that the judgeship filled by Judge Shubb became temporary when, by taking senior status in 2004, he created the first vacancy to occur more than five years after enactment of the 1990 act. Also, the last entry for Seat 7, which Judge Burrell filled, states, “Seat *became permanent* upon the abolition of Seat 6 on November 1, 2004.”<sup>27</sup> Wikipedia correctly understands that the judgeship filled by Judge Burrell became permanent when the judgeship filled by Judge Shubb became temporary and was abolished.

The importance of recognizing *which* judgeship is or becomes temporary is that the president *cannot* make an appointment to a temporary judgeship but *can* make an appointment to a judgeship that becomes permanent.

### A Bit of History

In 1898, Congress for the first time authorized an additional judgeship that resulted in a judgeship becoming temporary.<sup>28</sup> And in 1922, Congress provided for additional judgeships in 20 districts, specifying that a vacancy occurring within two years of the act in any of the districts would not be filled. And once, Congress authorized a temporary judgeship in an unusual

way: Apparently fearing the possibility of a noncomplying nomination by President Warren G. Harding and Senate confirmation after a vacancy occurred, Congress provided that “if an appointment is made to fill such vacancy occurring within two years[,] a vacancy thereafter occurring in said office shall not be filled unless Congress shall so provide.”<sup>29</sup>

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Temporary judgeships have helped district courts and courts of appeals reduce unusually large backlogs. Understanding some of the curious aspects of such judgeships should be helpful to all those interested in the functioning of the federal court system.



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<sup>1</sup> This article is adapted from a section on temporary judgeships in Judge Newman’s forthcoming book, *“Inferior Courts”—the History of the Existing and Former Federal Trial and Appellate Courts of the United States, 1789-2024*, to be published by William S. Hein & Co., and appears here with the permission of the publisher.

<sup>2</sup> E.g., 1970 Act, Pub. L. No. 91-272, § 2(a), 84 Stat. 294, 296.

<sup>3</sup> E.g., 1970 Act, Pub. L. No. 91-272, § 2(a), 84 Stat. 294, 296.

<sup>4</sup> Act of Sept. 14 1922, ch. 306, 67th Cong., 2d Sess., § 1, 42 Stat. 837, 838.

<sup>5</sup> 1984 Act, Pub. L. No. 89-353, § 202(b), 98 Stat. 333, 348.

<sup>6</sup> 2002 Act, Pub. L. No. 107-273, § 312(c)(2), 116 Stat. 1758, 1788.

<sup>7</sup> 1978 Act, Pub. L. No. 85-486, § 2, 92 Stat. 1629, 1632.

<sup>8</sup> 2002 Act § 312(c).

<sup>9</sup> Act of Mar. 26, 1938, ch. 53, 75th Cong., 3d Sess., § 1, 52 Stat. 120.

<sup>10</sup> “Senior judge” means that a judge has the option of taking less than a full workload. A senior judge has the option of continuing to take a full caseload, taking no caseload, or taking any percentage of a caseload, and can vary the caseload from year to year. An active judge becomes eligible to be a se-

nior judge at age 65 with 15 years as a judge, age 70 with 10 years as an Article III judge, or any age in between if the judge’s age and years as an Article III judge add up to 80. See 28 U.S.C. § 371(c). A senior judge continues to receive the salary of the office (i.e., including statutory pay raises) as an annuity, for life. *Id.* § 371(a). A senior judge taking less than a 25% workload (caseload plus administrative duties) receives the salary the judge was receiving (without statutory salary increases) for life, as an annuity. See *id.* § 371(b)(2) (workload requirements detailed in subsection (e)). A judge who elects to become a senior judge is said to “retire from the office,” *id.* § 371(a), and be “in senior status,” *id.* (section caption).

<sup>11</sup> A judge who leaves the judiciary is said by some “to resign,” although the relevant statute confusingly uses the word “retire” to describe both leaving the judiciary and leaving active service to become a senior judge. 28 U.S.C. § 371(a), (b)(1). If the judge, at the time of resigning, has met the eligibility requirements to be a senior judge, see *id.* § 371(a), (c), the judge receives the salary the judge was receiving, as an annuity, for life. *Id.* § 371(a).

<sup>12</sup> A judge who becomes permanently disabled “from performing his duties” may retire from regular active service after ten years of service and receive the salary of the office for life, or after less than ten years of service and receive one-half the salary of the office for life. *Id.* § 372(a). A statute enacted in 1957 provides that when any judge “who is eligible to retire under [28 U.S.C. § 372(a)] does not do so and a certificate of disability signed by a majority of the members of the Judicial Council of his circuit . . . is presented to the President[,] and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make [an] appointment.” Act of Sept. 2, 1957, Pub. L. No. 85-261, 71 Stat. 586 (emphasis added) (amending 28 U.S.C. § 372). The next sentence makes clear that the authorized appointment is for a temporary judgeship: “Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled.” *Id.* An earlier statute with slightly different wording, enacted in 1919, also provided for a temporary judgeship in the same circumstances. Act of Feb. 25, 1919, ch. 29, 65th Cong., 3d Sess., § 6, 40 Stat. 1156, 1158 (amending 1911 Judicial Code § 260).

<sup>13</sup> Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 303, 104 Stat. 5089, 5105 (When an active district judge “assumes the duties of a full-time office of Federal judicial administration, the President shall appoint . . . an additional judge for the court on which such judge serves.”). The next sentence makes clear that the authorized appointment is for a temporary judgeship: “If the judge who assumes the duties of such full-time office leaves the office and resumes the duties as an active judge of the court, then the President shall not appoint a judge to fill the first vacancy which occurs thereafter in such court.” *Id.*

<sup>14</sup> As of this writing, the entry for “Judge” had a subentry for “temporary judge,” which refers the reader to the subentry for “visiting judge,” which is quite different from a “temporary judgeship,” however defined. See *Judge*, BLACK’S LAW DICTIONARY (11th ed. 2019). The 12th edition, published June 4, 2024,

now includes an entry for “temporary judges.”

<sup>15</sup> E.g., 1990 Act § 203(c), 104 Stat. 5089, 5101 (“TEMPORARY JUDGESHIPS”). The Administrative Office of the United States Courts regularly uses the term “temporary judgeship.” See, e.g., “Chronological History of Authorized Judgeships District Courts,” U.S. CTS., available at [https://www.uscourts.gov/judges-judgeships/authorized-judgeships-chronological-history-authorized-judgeships-district-courts](https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts) (last visited Mar. 27, 2024). The Judicial Conference of the United States also calls some judgeships “temporary” when recommending additional judgeships. See Table 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE 2023, U.S. CTS., available at [https://www.uscourts.gov/sites/default/files/2023\\_judicial\\_conference\\_judgeship\\_recommendations\\_0.pdf](https://www.uscourts.gov/sites/default/files/2023_judicial_conference_judgeship_recommendations_0.pdf) (temporary judgeships abbreviated “T/P”).

<sup>16</sup> The first temporary judgeship was authorized for the Northern District of Texas. Act of Feb. 9, 1898, ch. 15, 55th Cong., 2d Sess., § 2, 30 Stat. 240.

<sup>17</sup> BARRY J. MCCILLION, CONG. RSCH. SERV., R. 47340, TEMPORARY JUDGESHIPS: FREQUENTLY ASKED QUESTIONS 8 (2023). See, e.g., Act of June 8, 1940, ch. 282, 76th Cong., 3d Sess., § 253 (making permanent in 1940 the temporary judgeship authorized for the Southern District of New York in 1938).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 28 U.S.C. § 133, Historical and Revision Notes, Additional Federal Judgeships, (“The first vacancy in the office of district judge in the district of Kansas occurring 19 years or more after the confirmation date of the judge named to fill the temporary judgeship created for such district under this subsection [this note], shall not be filled.”). The extensions are collected in the entry for Kansas in the AO’s *Chronological History of Authorized Judgeships in District Courts*, U.S. CTS., [https://www.uscourts.gov/judges-judgeships/authorized-judgeships-chronological-history-authorized-judgeships-district-courts](https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts) (last visited Mar. 31, 2024).

<sup>22</sup> Federal Judiciary Stabilization Act of 2024. S. 3998, 118th Cong., 2nd Sess.

<sup>23</sup> Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 203(c)(2), 104 Stat. 5089, 5101.

<sup>24</sup> *Id.*

<sup>25</sup> *United States District Court for the Eastern District of California*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [https://en.wikipedia.org/wiki/United\\_States\\_District\\_Court\\_for\\_the\\_Eastern\\_District\\_of\\_California](https://en.wikipedia.org/wiki/United_States_District_Court_for_the_Eastern_District_of_California) (last visited Mar. 31, 2024). Wikipedia prepares similar charts for every district court and every court of appeals.

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> Act of Feb. 2, 1898, ch. 15, 55th Cong., 2d Sess., §§ 1-2, 30 Stat. 240 (authorizing an additional judgeship for the Northern District of Texas). This statute was unusual in that it specified that the vacancy “in the office of the existing district judge” shall not be filled.” *Id.* (emphasis added). The statute did not use the word “temporary.”

<sup>29</sup> Act of Sept. 14, 1922 Act, ch. 306, 67th Cong., 2d Sess., § 1, 42 Stat. 837, 838. The statute authorized judgeships for two other districts, but exempted one of them, the Middle District of Tennessee, from the two-year “don’t fill” provision, and applied the “don’t fill” provision to a vacancy occurring at any time to the District of New Mexico. *Id.*