

# Not Getting Any Younger

I'm not. You're not. The judges aren't either. At [Slate](#), Joseph Goldstein writes that the federal bench is old. Extremely old. Superannuated?

Judge Richard Owen of the U.S. District Court in Manhattan gathered a group of lawyers in his courtroom in 2007 to discuss the possible leak of sealed documents in a business case. As the hearing got under way, Owen, then 84, asked for someone to explain this newfangled mode of communication the lawyers kept mentioning—e-mail. “It pops up in a machine in some administrative office, and is somebody there with a duty to take it around and give it to whoever it's named to?” he asked.

The problem was that Judge Owen had just tried investment banker Frank Quattrone, which revolved around an email. A month later, he “stumbled” again sentencing a drug dealer to life. Too old? Lost it? Alzheimers? Dementia?

Federal judges enjoy life tenure. Is this a feature or a flaw?

Life tenure, intended to foster judicial independence, has been a unique feature of the federal bench since the Constitution was ratified in 1789. Back then, the average American lived to be about 40 and the framers didn't express much worry about senile judges. “A superannuated bench,” Alexander Hamilton said, is an “imaginary danger.”

No longer. Today, aging and dementia are the flip side of life tenure, with more and more judges staying on the bench into extreme old age. About 12 percent of the nation's 1,200 sitting federal district and circuit judges are 80 years or older, according to a 2010 survey conducted by ProPublica. Eleven federal judges over the age of 90 are hearing cases—compared with four just 20 years ago. (One judge, a Kansan appointed by President John F. Kennedy, is over 100. [Note: [Judge Wesley Brown](#) of Kansas, 103.]) The share of octogenarians and nonagenarians on the federal bench has doubled in the past 20 years. The demographics of the federal bench have no analogue on the state courts, where judges mostly occupy their office for a term of fixed years and generally have mandatory retirement ages, often in their 60s or 70s.

While our agist view might be that these old-timers, prone as they may be to frailty, are a problem, consider, for example, [Jack Weinstein](#), age 90, in the Eastern District of New York.

Let's face it, Judge Weinstein is old. He's also got more sand than almost anyone else in the system when it comes to **feeling** the **freedom** to do the **right thing**.

Indeed, many of our judges, including one-time conservatives on issues such as the death penalty, tend to grow more understanding, less harsh, as they age. Like a fine wine, they mellow. And others don't.

At [Above the Law](#), David Lat tells a story from his clerkship days for a Ninth Circuit judge.

When I clerked on the [Ninth Circuit](#) years ago, one of the judges on the court at the time was extremely old — and didn't seem very "with it." His law clerks seemed to take on a large amount of responsibility. One of his clerks that year, a law school classmate of mine I'll call "Mary," would negotiate over the phone *with Ninth Circuit judges* over how particular cases should come out — a responsibility well beyond the legal research and opinion drafting done by most clerks. On one occasion, a vote on whether to rehear a case en banc emanated not from the judge's chambers account, but from Mary's personal email account. Even more embarrassingly, it was written not on behalf of the judge or the chambers, but in the first person: "I vote YES to rehearing en banc." A law school classmate of mine who was also clerking for the Ninth that year remarked, "I thought only judges did that. When did Mary get her presidential commission?"

This is one of our worst nightmares, that the judge has been reduced to a puppet, and decisions are being made by children in chambers. While no lawyer worth his salt treats court staff disrespectfully, because you never know whose voice is heard by the judge, we nonetheless direct our arguments to the judge in the robe, not the kid in knickers.

Ironically, one of my favorite bizarre judicial moments is with Judge Owen of whom Goldstein first writes. During a hearing to suppress statements for a Chinese defendant who had been mirandized in Mandarin when he spoke with Fuchun dialect, our interpreter explained the significant differences between the two. After testimony was complete, Judge Owen asked the interpreter to give the Miranda warning, first in Mandarin and then in Fuchun dialect.

The interpreter complied with the judge's command. Judge Owen then announced that it all sounded the same to him. Denied. And that was more than twenty years ago. Did it occur to anyone that Judge Owen's current issues might have nothing to do with age or disability? But when they get old, everyone says senile dementia. It's a lot harder to explain when they're young.

While it's certainly true that age will reduce our certain cognitive abilities, it also brings other attributes that elude youth. It brings understanding, experience, a breadth of vision and a boldness that comes from having long since lost that concern for pleasing others or being part of the gang. Ever wonder why old people can be brutally honest and painfully crotchety? Because they no longer feel any need to make you like them. For better or worse, age allows

people to overcome the psychological frailty that guides younger folks and pushes them to lie to themselves and others about their motives.

This doesn't mean that judges who show the signs of suffering from senile dementia or Alzheimers get a pass.

The judge who patrols that highway most aggressively is Frank Easterbrook, chief of the Chicago-based 7th Circuit U.S. Court of Appeals. In the last four years, Easterbrook says, he has arranged for two colleagues to see neurologists. One was diagnosed with Alzheimer's and retired. The other insisted on returning to the bench after a stroke, but because he had difficulties "with executive function," Easterbrook said, he removed all criminal cases from the judge's docket. Easterbrook has even publicly called on lawyers to contact his chambers directly if they think a judge is exhibiting symptoms of dementia—a rare move by the bench to enlist the public in monitoring judges.

There are people, whether fellow judges or court personnel, who are well positioned to note cognitive problems and raise them. As Judge Easterbrook is open to hearing about them and dealing with them, staff will feel comfortable bringing issues to his attention. Then again, it seems rather dubious to pull a judge from sentencing for loss of "executive function" but allow him to continue to sit in other matters. Doesn't everybody deserve a judge with full faculties?

Age alone is meaningless, except as a reason to pay careful attention for a decline. So pay attention, just as one would hope that everyone is paying attention to any judge whose cognitive skills show a problem. A young senile judge is no better than an old one. We have the ability to ascertain whether a judge is losing it, young or old. Whether we have the will to call them on it, and whether the system has the will to deal with it, is another matter.

And if you want to consider a real problem with age, consider the age of David Lat's classmate "Mary," who "sits" on the 9th Circuit in her Mary-Janes and plaid jumper.

This entry was posted in Uncategorized on January 19, 2011  
[<http://blog.simplejustice.us/2011/01/19/not-getting-any-younger/>] by SHG.

---

2 comments on "Not Getting Any Younger"

Catherine Mulcahey

January 19, 2011 at 3:40 pm

Reading this brought "Appointed Forever" to my senile-demented mind:

[Edit. Note: Video embedded by special dispensation and judicial degree of the [Honorable Victoria Pynchon](#).]

---

SHG

January 19, 2011 at 3:54 pm

I wish I had remembered about that video, and I would have included it in the first place.  
Thanks, Catherine.

---

Comments are closed.