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7TH CIRCUIT, 9TH CIRCUIT, CLERKSHIPS, FEDERAL JUDGES, FRANK EASTERBROOK, OLD PEOPLE

What Is To Be Done About Super-Old Judges?

By DAVID LAT

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Judge Wesley Brown will be 104 in June.

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?"

Some of us jokingly referred to that chambers as [Weekend at Judgie's](#). What appeared to be going on over there reminded us of Justice Thurgood Marshall's famous [quip](#) to his clerks: "If I die, prop me up and keep voting!"

We joked about this delegation of Article III authority to a newly minted law school graduate. But as Joseph Goldstein suggests, in a very interesting [article](#) just published by [Slate](#) and [ProPublica](#), the issue of superannuated jurists is no laughing matter....

Over at the [WSJ Law Blog](#), Ashby Jones pulls out some key statistics from Goldstein's piece:

“

* About 12 percent of the nation's 1,200 sitting federal district and circuit judges are 80 years or older;

* Eleven federal judges over the age of 90 are hearing cases—compared with four just 20 years ago;

* The number of octogenarians and nonagenarians on the federal bench has doubled in the past 20 years.

And there's even one judge over 100, as noted by Debra Cassens Weiss over at the [ABA Journal](#). That would be [Judge Wesley Brown](#) of Kansas, 103, who was appointed to the federal bench by President John F. Kennedy.

Judge Brown still seems to [have his wits about him](#). But not every old judge seems to be doing as well. Check out the opening of Goldstein's [article](#):

“ 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.

Some of the lawyers figured that Owen, whose chambers came with a mimeograph machine when he became a judge in 1973, was just behind the times. Others wondered if the judge’s memory was failing him. After all, the most famous case in his long career—the back-to-back trials of Silicon Valley investment banker Frank Quattrone—had revolved around a single e-mail. Yet he now acted as though this was the first he was hearing about it. “He didn’t understand what was happening in his own courtroom,” said one lawyer present that day.

This is followed by a mortifying story involving Judge Owen apparently mistaking a metaphorical reference to “the key into that apartment” for a literal, physical key. Oy.

The problem of judicial dementia is prompting calls for reconsideration of life tenure for federal judges. Life tenure protects judicial independence, but it also protects senility within the federal judiciary. (It’s not as much of a problem for state courts because, as Goldstein notes, state judges “mostly occupy their office for a term of fixed years and generally have mandatory retirement ages, often in their 60s or 70s.”)

In fairness to aged jurists, sometimes being old can be a plus. As that 89-year-old liberal lion, [Judge Jack Weinstein](#) (E.D.N.Y.), told Goldstein, “My memory is not as acute as it was, [but] principles, I know, and my judgment is the same — it may be better.”

Alas, not all judges get better with age. And given the power and prestige of federal judicial office, it’s not easy to tell a judge when it’s time for him to put away his gavel. It’s like telling an old person to stop driving. As [Judge Dee Benson](#) (D. Utah) commented, “How are we going to get grandma off the highway?”

The people who are best positioned for that duty: fellow federal judges. Reports Goldstein:

“ 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.

(Readers, do you know who these two judges might be? Feel free to mention them in the comments, or [email us](#).)

There are additional juicy anecdotes in the story. Here’s one more:

“ Attorneys say [J. Thomas Greene](#), a U.S. district judge in Utah, seemed to grow more impulsive with age, a common sign that the brain’s ability to self-censor is eroding. In 2006, Greene, then 76, presided over the trial of a man charged with lying about the disappearance of a teenage girl. At a proceeding to pick a jury, the judge asked prospective jurors whether they were acquainted, a question meant to keep friends from serving on the same panel. One man answered that he knew one of the other potential jurors, a woman. “I didn’t recognize you,” the woman exclaimed.

“She didn’t recognize you with your clothes on,” Greene shot back, shocking the courtroom.



*'When 900 years old you reach,
look as good you will not ehh.'*

That might not have been a very appropriate thing for a federal judge presiding over a criminal trial to say. But, in fairness to Judge Greene, I laughed. (I wonder if anyone in the courtroom laughed that day — as litigators know, jokes by judges often get laughs, even when they're not funny and/or inappropriate.)

Read Goldstein's full piece — it's well worth your time, and contains juicy judicial tidbits not mentioned here — via the links below. And feel free to share tales of your interactions with ancient addled judges, in the comments. Thanks.

[The Oldest Bench Ever \[Slate\]](#)

[Life Tenure for Federal Judges Raises Issues of Senility, Dementia \[ProPublica\]](#)

[Has the Federal Bench Grown Too Gray? \[WSJ Law Blog\]](#)

[How to Police Judicial Dementia? One Chief Judge Plays Cop, While Others Try Gentle Persuasion \[ABA Journal\]](#)

Earlier: [Judge of the Day: Wesley Brown — He's 103!](#)

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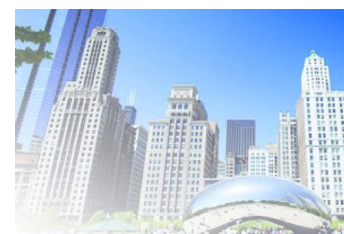
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shared her knowledge and insights as the keynote presenter.

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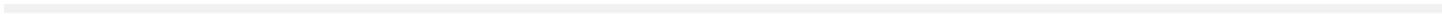
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