



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

ERSJ Blog

Journal Blogs

2-6-2023

The United States Federal Judiciary: A Perilous Gerontocracy

Zachary Verbit

Cardozo Journal of Equal Rights and Social Justice

Follow this and additional works at: <https://larc.cardozo.yu.edu/ersj-blog>



Part of the [Law Commons](#)

Recommended Citation

Verbit, Zachary, "The United States Federal Judiciary: A Perilous Gerontocracy" (2023). *ERSJ Blog*. 43.
<https://larc.cardozo.yu.edu/ersj-blog/43>

This Blog Post is brought to you for free and open access by the Journal Blogs at LARC @ Cardozo Law. It has been accepted for inclusion in ERSJ Blog by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.



The United States Federal Judiciary: A Perilous Gerontocracy

The federal judiciary was first established in 1789^[1], but the more concerning statistic regarding the age of the federal judiciary is this: the median age of sitting federal judges is 68.^[2] But even this data point belies the severity of the issue, because federal judges are given lifetime tenure.^[3] Federal judges often remain in their seats well past the average U.S. retirement age.^[4] For example, Judge Wesley E. Brown served on the bench until he died at the ripe old age of 104.^[5] More recently, Judge Jack Weinstein served on the bench until he retired in 2020 at the age of 98.^[6] In total, approximately 66% of federal judges are 65 or older, and approximately 33% of judges are 75 or older.^[7] Perhaps the most damning statistic of all is that more than nine out of ten U.S. District Court Judges die *within a year* of retiring fully.^[8]

Given that cognitive decline can begin as early as 45 years old,^[9] having judges remain on the bench far past this point can lead to gaffes that undermine the credibility of the courts, failures to adapt to technical evidentiary advancements, and worse yet, great miscarriages of justice.^[10] Take, for example, former 9th Circuit judge Alex Kozinski who, then 57, accidentally uploaded pornography onto his public website.^[11] Then there was Judge Richard Owen, who, at 84 years old, seemingly forgot what e-mails were while presiding over a case in which e-mail leaks were the primary issue.^[12] In another case, Judge Owen gave a life sentence to a defendant in connection with a murder after the prosecutor metaphorically referred to the defendant as “the key [into the apartment where the murder happened],” which Owen internalized to mean that the defendant possessed a *literal* key to the apartment.^[13] When corrected on this issue, Judge Owen appeared unfazed by the error.^[14] There was also Judge John Shabaz of Wisconsin, who, once he entered his mid-70s had trouble reading plea agreements out loud, and even forgot to offer a convicted drug dealer a chance to plea for mercy at a sentencing hearing—a right codified in the Federal Rule of Criminal Procedure.^[15]

Since the federal judiciary has no formal processes for testing the competence of its elderly judges, or requiring regular medical checkups with doctors, it is hard to know just how widespread the problem of declining mental acuity on the federal bench is.^[16] But generalized data can give us a clue: more than six million Americans are living with Alzheimer’s Disease and about 1 in 9 Americans over the age of 65 has the disease.^[17] An additional 1 million Americans have Parkinson’s Disease—75% of whom will develop dementia over time.^[18]

For these reasons, it’s time to reconsider the wisdom of giving federal judges life tenure—a decision made in 1789 when the average American life expectancy was likely around 38 years old.^[19] In its stead, federal courts should opt for either setting term limits, a mandatory retirement age, or at the very least, institute formal

procedures for monitoring sitting judges' neurological health.[20] Instituting any one of these things has precedential and prominent support. Most state courts have term limits and a mandatory retirement age,[21] and Chief Justice Roberts has expressed that 15-year term limits for federal judges would be "reasonable." [22] Additionally, the Supreme Court has already held that statutes imposing mandatory retirement ages for state judges do not constitute violations of Equal Protection, reasoning that "[the States] have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform." [23]

Moreover, instituting a mandatory retirement age for federal judges is something Congress has already considered—and came close to codifying—in 1954.[24] Because of the aforementioned prevalence of neurodegenerative diseases among elderly Americans[25] and judges' apparent reluctance to retire[26], it's high time we make life tenure for federal judges a thing of the past.

[1] *Anniversary of the Federal Court System*, U.S. Cts, <https://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/anniversary-federal-court-system>.

[2] C. Ryan Barber & Camila DeChalus, *Alzheimer's disease, retirement 'pacts,' and serving until you're 104 years old: Inside the federal judiciary's reckoning with age*, Business Insider (Sep. 27, 2022, 5:00 AM), <https://www.businessinsider.com/gerontocracy-federal-judges-red-white-and-gray-courts-supreme-2022-8>.

[3] *About Federal Judges*, U.S. Cts, <https://www.uscourts.gov/judges-judgeships/about-federal-judges>

[4] *What Is the Average Retirement Age? (Plus When to Retire)*, Indeed (Sep. 23, 2022)

<https://www.indeed.com/career-advice/career-development/average-retirement-age#:~:text=What%20is%20the%20average%20retirement%20age%3F%20According%20to,old%2C%20while%20late%20retirement%20age%20is%20over%2070>.

[5] *Wesley E. Brown, Oldest Judge in Nation's History, Dies at 104*, The N.Y. Times, <https://www.nytimes.com/2012/01/26/us/wesley-e-brown-oldest-judge-in-nations-history-dies-at-104.html>.

[6] *Longest-Serving Federal Judge, Named by LBJ, Retires at 98*, NBC New York (Feb. 13, 2020, 2:30 PM), <https://www.nbcnewyork.com/news/local/longest-serving-federal-judge-named-by-lbj-retires-at-98/2288673/>

[7] Amanda Robert, *How Can Aging Judges Know When It's Time to Hang up the Robe?*, Ctr For Law, Brain & Behavior (Dec. 1, 2020, 3:30 AM), <https://clbb.mgh.harvard.edu/how-can-aging-judges-know-when-its-time-to-hang-up-the-robe/>.

[8] *Life Tenure for Federal Judges Raises Issues of Senility, Dementia*, Pro Publica (Jan. 18, 2011, 7:30 AM), <https://www.propublica.org/article/life-tenure-for-federal-judges-raises-issues-of-senility-dementia>.

[9] *Cognitive decline can begin as early as age 45, warn experts*, The BMJ (Jan. 5, 2012)

<https://www.bmj.com/press-releases/2012/01/05/cognitive-decline-can-begin-early-age-45-warn-experts>.

[10] See NBC News *infra* note 11; Pro Publica, *supra* note 8.

[11] *Judge wants investigation into his Web porn*, NBC News (June 12, 2008, 8:12 PM),

<https://www.nbcnews.com/id/wbna25129204>.

[12] See Pro Publica, *supra* note 8.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Alzheimer's Disease Facts and Figures*, Alzheimer's Ass'n, <https://www.alz.org/alzheimers-dementia/facts-figures#:~:text=More%20than%206%20million%20Americans%20of%20all%20ages,age%2065%20and%20olde r%20%2811.3%25%29%20has%20Alzheimer%27s%20dementia>.

[18] *Parkinson's Disease Dementia*, Alzheimer's Ass'n, <https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia/parkinson-s-disease-dementia>.

[19] Frank Whelan, *IN THE AMERICA OF 1787, BIG FAMILIES ARE THE NORM AND LIFE EXPECTANCY IS 38*, The Morning Call (June 28, 1987), <https://www.mcall.com/news/mc-xpm-1987-06-28-2569915-story.html>.

[20] Currently no such procedures exist, though some judges, like John Easterbrook of the 7th Circuit, have asked lawyers to contact him if other judges are exhibiting signs of dementia. See Pro Publica, *supra* note 8.

[21] *Id.*

[22] Remy Milisky, *Why There Are No Term Limits For Supreme Court Justices*, MSN (June 27, 2022), <https://www.msn.com/en-us/news/politics/why-there-are-no-term-limits-for-supreme-court-justices/ar-AAYVo7X>.

[23] *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991).

[24] See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for A 28th Amendment*, 67 U. Chi. L. Rev. 995, 996 (2000) (the Senate adopted a resolution imposing a mandatory retirement age of 75 for federal judges; had it not been for the passage of *Brown v. Board of Education* that same year, which derailed court reform efforts, the resolution might have passed).

[25] See Alzheimer's Ass'n, *supra* note 17; Alzheimer's Ass'n, *supra* note 18.

[26] See *Pro Publica*, *supra* note 8.