

Federal Court Searches for Answers to an Aging Bench

By John Roemer
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James Browning's advancing years and declining health underscore a challenge facing the aging federal judiciary.

The bench is old. The 9th Circuit's active and senior circuit judges average about 70 years old. They range from the youngsters, Kim McLane Wardlaw and Sandra Segal Ikuta, both 54, to Browning, 89, and Robert Boochever of Pasadena, who will turn 91 on Oct. 2.

This year two of the circuit's elderly senior jurists died. Joseph Tyree Sneed of San Francisco and Warren John Ferguson of Santa Ana were both 87.

Age is said to bring wisdom, but aging is also often accompanied by physical infirmities, dimming memory and mental confusion. That's a critical problem when it applies to judges deciding cases. As Circuit Judge Richard Posner of the 7th Circuit has observed, "The judiciary is the nation's premiere geriatric occupation."

And as one judge over 80 confided - on condition of anonymity - "The hardest part of my job is staying awake."

Federal judges appointed for life at full pay under the Constitution's Article III can continue to work as long as they wish, often with reduced workloads if they elect to take senior status.

Senior judges handle about 15 percent of the federal courts' annual workload, according to the Administrative Office of the U.S. Courts in Washington, D.C. Browning did not take senior status until he was 82. Circuit Judge Stephen Reinhardt, 77, remains an active judge and so does Harry Pregerson at 85.

William Howard Taft, the only man to have served both as U.S. President and as Chief Justice of the Supreme Court, thought judges should retire at 70.

"In a majority of cases when men come to be 70," Taft wrote, "they have lost vigor, their minds are not as active, their senses not as acute... In the public interest, therefore, it is better that we lose the services of the exceptions who are good judges after they are 70 and avoid the presence on the bench of men who are not able to keep up with the work, or to perform it satisfactorily."

The 9th Circuit itself has fretted over the aging issue. Its Judicial Disability Task Force reported in 2000 that 79 percent of persons over 70 suffer chronic conditions such as hypertension, heart disease, respiratory disease, stroke or cancer. One quarter of them have Alzheimer's disease.

The study omitted another troubling statistic: by age 80 to 85 about half of all people have dementia, according to San Francisco's Institute on Aging.

The study did note ominously, "if federal judges suffer disabilities at roughly the same rate as the general population, one can expect to see similar percentages of disabilities in the population of federal judges... ."

Still, many stay on the ball. Senior District Judge Samuel P. King of Honolulu is 92. He not only hears cases at home but travels to Chicago and to California each year to sit on 7th Circuit and 9th Circuit appellate panels by designation.

How does he keep up? "Pick the right parents," he advised in a telephone interview, pointing out that his mother's brothers lived well into their 90s. And he agreed that working less helps. "I took senior status as soon as I was eligible," he said. "That opens a position for a younger active judge, while it leaves me available to hear cases as long as I can keep going."

"Every once and a while someone - usually a defense lawyer - says the judge is past it. But fortunately I haven't annoyed too many people lately."

Another elderly senior circuit judge, Thomas E. Fairchild of the 7th Circuit in Chicago, capably wrote opinions from his room in a nursing home until his death last year at 94, according to Collins T. Fitzpatrick, the circuit executive.

"His mind was sharp, but aging certainly can cause problems," Fitzpatrick said recently. "The crunch comes when someone has to talk to a judge and tell him he's not capable any more. Often the judge is an icon in the legal community, so people are reluctant to say a word."

For its 2000 study the 9th Circuit consulted Tessa ten Tusscher, a geriatric psychologist and vice president of the Institute on Aging.

In a recent interview, she recalled suggesting annual physicals for judges who reach age 70. She proposed including brain function screening tests for memory and cognitive abilities.

That was the last she heard from the circuit.

In a 2004 follow-up report, the disability task force changed its name to the Judicial Wellness Committee. Under a section discussing pitfalls encountered in its effort to shape up the judiciary, the group noted that "judges and their families are extremely sensitive about perceptions of judicial health."

Fitzpatrick at the 7th Circuit said federal courts strive to save both district and appellate judges embarrassment by dealing with senility issues privately, informally and on a case-by-case basis rather than trying to enforce reduced caseload rules or going public with problems.

That fits Tusscher's experience of working with the elderly. Many of them avoid testing for treatable conditions such as Alzheimer's disease, which respond best to medication if caught early.

There is commonly a two-year lag between the time someone perceives early symptoms of dementia and the time of diagnosis, she said.

"If you stay in a state of denial, you are going to have more and more older judges, some of whom are not going to be able to synthesize information to perform what we call executive functioning. That's the process of taking in information and abstract concepts and forming logical opinions," she said.

"It's true that half of people over 80 do not have dementia. But the condition is a very real thing, and the biggest risk factor is getting older."

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