



Why it's time for older judges to retire and make way for younger generations

By Dan Lawton

Are you a federal or state judicial officer who's at least 75 years old? If the answer is yes, then it's time for you to retire and make room for someone younger. I know – you've heard it all before. But indulge me for a minute, please.

If you're reading this, you're a lawyer or a judge, so you know the good reason for the life tenure for federal judges enshrined in Article III of our federal constitution. Alexander Hamilton, no dummy, dismissed the idea of "superannuated bench" as an "imaginary danger." And we should take for granted that some jurists perform their duties at ages far beyond many of their colleagues.

But none of that makes sense as an argument against voluntary retirement for all judges at age 75. The move would require neither constitutional amendment nor legislative action.

Does any lawyer doubt that many jurists have stayed on the bench long past their primes, causing harm to the parties and lawyers they serve? The late William O. Douglas of the U.S. Supreme Court is a poster child for this phenomenon. Justice Douglas retired at age 76, only after a debilitating stroke that paralyzed his left leg and forced him to use a wheelchair. After the stroke, Douglas insisted on continuing to work despite his disability. Seven of his fellow justices voted to postpone until the next term any argued case in which Douglas's vote might make a difference, but Justice Byron White vehemently disagreed. An outsider wonders why.

There are examples closer to hand. Ask any lawyer with longer than ten years' experience, and he or she will be able to give you some names. Among elected officials, the phenomenon also seems prevalent. Every public appearance of our president, Joe Biden, now resembles a

kind of slow-motion high-wire act, which the audience, aghast and on the edge of its seat, watches, waiting for the moment in which he falls down or stares into space with his mouth agape or loses his train of thought or mumbles incomprehensibly or calls the president of Ukraine "President Putin [sic]" into an open mic. *Don't worry*, say his sycophantic yes-men and -women of the White House – *from 10 a.m. to 4 p.m., he's fine*. I am not consoled. Will President Xi time his military assault on Taiwan to suit the president's optimal time of day, so Biden can be at his best for the crisis?

Are there octogenarians who can still perform? No question about it. With them, you must take Judge Pauline Newman, the nation's oldest active federal judge, of the Federal Circuit. Last year, the court's Judicial Council suspended her for a year, for not submitting to medical testing as part of a disability and misconduct investigation.

Other institutions have instituted mandatory retirement ages. In 1966, the Vatican, not otherwise known as an innovative or flexible organization, implemented a rule obliging all Roman Catholic bishops to submit their resignations on turning 75. Some law firms, including the powerhouse Jones Day, now end partnership status for even the most productive of its partners at age 65, with no questions asked or pushback allowed. If it's good enough for those at the Vatican and Jones Day who struggle with weighty duties and tough problems in service of their constituents every day, it's good enough for our federal and state courts.

Let me offer a baseball analogy. If you're a fan of the Los Angeles Angels, you wince a little every time you recall Albert Pujols. He was the club's first baseman and designated hitter from 2012 to 2021. His contract obliged the Angels to pay him

an average of \$25 million per year for ten years. Pujols wanted to play first base and bat third in the order. So he did, for most of his tenure in Anaheim. Any young first baseman in the Angels farm system, however talented and productive, had zero chance of promotion to the major league club during Pujols' tenure, unless he wanted to play a different position or ride the bench. The manager, Mike Scioscia, wrote Pujols' name on the lineup card in the #3 spot every night. The point should have been who was the best player – who gave the club the best chance to win. But, to the Angels and Pujols, that was *beside the point*. The point was *Pujols was there*, taking up space, and soaking up a large share of player payroll with his absurdly-excessive guaranteed salary. To justify his presence, he had to play – even though he was past his prime and deteriorating with each passing season. That was all there was to it.

And that's all there is to many public servants' continued clinging to their sinecures, and the pay, benefits, and perks of their lofty offices, while those who are younger and more fit continue to be blocked by the superannuated whose vanity won't let them say, "It's time to hang it up. I've had a good run, and I could still add a lot of value. But it's time to let somebody else do it."

Have you read of the travails of the amorous, unbinged District Judge Joshua Kindred of Alaska? Two weeks ago, the Judicial Council disciplined him for acting like an oversexed frat boy in his chambers. Because of life tenure, he couldn't be removed by the Judicial Council, or by anyone except the U.S. Senate (via impeachment). Of course, the Judicial Council knew that, and only recommended that Judge Kindred resign, which he swiftly did. He had no duty to resign. But no one, including him, doubted it was the right thing to do, so he did it.

And so it should be when it comes to federal and state officeholders, judges included, who are 75 years of age or older. The right thing to do is retire. Step aside and give younger generations a chance. Do you think you're so special that the court system can't properly function without you? Charles De Gaulle is supposed to have said that the cemeteries are filled with indispensable men. Whether he truly said it or not, the point is plain: the most proficient and accomplished of us can be replaced.

When it comes to SCOTUS, many lawyers are deeply partisan. They feel Ruth Bader Ginsburg should have retired during the Obama administration, to prevent Donald Trump from appointing someone else they didn't like. I can think of a better reason: she was old and sick, and there were other well-qualified candidates who were young and healthy. Justice Ginsburg's achievements as a lawyer and a jurist were monumental, and nobody doubts it. But those achievements weren't an argument for prolonging her tenure as long as she did. Instead, they were a *non sequitur* to it, like arguing that Albert Pujols ought to play first base in Anaheim every night because he'd won three awards and two Gold Gloves before he got there.

Do you find this a crackpot idea, dear reader? I don't mind being lumped in with a few other crackpots. They include 32 states and the District of Columbia, which impose mandatory retirement ages for their appellate jurists, with most fixing it at 70. In Ethiopia, you're gone automatically at age 60. In Brazil, Chile, Canada, it happens when you hit 75. What do they know in Ethiopia, Brazil, Chile, and Canada that we don't? Are their judiciaries failing?

Research papers have shown that older judges take longer to write their opinions, depend more heavily on heuristics and other shortcuts when making decisions, and bor-

row more heavily from briefs filed by attorneys than their younger colleagues. Are we supposed to think that is a good thing? The National Bureau of Economic Research examined data on the performance of older state supreme court justices in a working paper published in 2023. It concluded that forced retirement improved court performance as measured by output – number of published opinions – and legal influence (number of forward citations to those opinions). It also found some evidence that the "presence of older judges reduces the performance of younger judges" – a phenomenon it called the "team effect of aging."

I think I know the real, but secret, reason that so many geriatric judges and other public servants hang on so long. It is good old-fashioned *fear*. That their Honors "won't matter" anymore. That their highest and best use will have been lost. That they won't know what to do with themselves in retirement that could possibly equal or exceed the meaning they found in their public service. That they'll miss the free jet travel, hotel stays, restaurant meals, junkets to Hawaii, and pod of "judicial assistants" and law clerks who attend to their every need in posh chambers lined with their Lucite trophies, framed certificates, and *tchotchkes*.

To them, I say, "Welcome to life." My dad, Joe, was a family doctor. His peers elected him chief of staff of St. Jude Hospital in Fullerton. At age 76, he retired. Right away, he noticed changes in how his former colleagues treated him. Those who had formerly accepted patient referrals from him no longer sent him Christmas presents each year. Those who had ingratiated themselves with him, who had something to gain from good relations with him, had no time for him anymore. His home telephone rang

less. He didn't have an office to go to anymore. No wonder he felt like he no longer mattered, that patient care, one of the two great loves of his life, the other being his family, had vanished overnight. So he reinvented himself. He immersed himself more deeply in family activities, formed a jazz combo, started playing a regular paying concert series at a popular restaurant in Fullerton. There he quickly gained a loyal and adoring audience of elderly jazz lovers who filled the tip jar on the bar one Saturday every month.

In other words: he shrugged off his fear, overcame his depression, and moved on after his ego recovered from the blow of losing the prestige and influence he'd built during a fifty-year career.

You can too. A high percentage of judges die while still serving. Do you want to be one of them? If you do, why? I haven't heard a good answer to that question yet. Maybe I will someday.

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