

David J. Garrow, "Ruling Out Senility on the Bench"
Los Angeles Times, 2 February 2016, p. A11.

In a law review article I wrote 15 years ago about cognitive decline on the U.S. Supreme Court, I predicted that, in the coming years, no one would take action to mitigate the problem. Instead, another half a dozen mentally decrepit justices would join "the roster of jurists who harmed their court and hurt their own reputations by remaining on the bench too long."

Although most justices who have retired since then left with their wits (more or less) intact, I'm concerned that my prediction is about to come true.

Today we have four Supreme Court justices who are superannuated: Stephen G. Breyer is 77, Anthony M. Kennedy will turn 80 this summer, Antonin Scalia will celebrate his 80th birthday on March 11, and Ruth Bader Ginsburg will celebrate her 83rd four days later. Both Clarence Thomas, 67, and Samuel A. Alito Jr., 65, also qualify for Social Security. None of these justices has indicated that he or she will step down anytime soon, even if a like-minded individual wins the White House this year. (Officeholders in the "apolitical branch" often time their retirements for when an ideological cognate sits in the Oval Office.)

In the past, once-revered justices such as William O. Douglas and Hugo Black could at least count on relative privacy when they doddered into senility; the press didn't check behind certain closed doors. But with Justice Breyer showing up on TMZ, Justice Alito and Chief Justice John G. Roberts Jr. (age 61) regularly attending public sporting events, and Justice Sonia Sotomayor (age 61) getting spotted at Costco, a secret breakdown is no longer realistic.

That the two oldest justices, Ginsburg and Scalia, represent opposite poles of the ideological spectrum is a happy accident, as calls for reform must have a nonpartisan hue. Although neither has had a confirmed episode of cognitive decline, they're both putting themselves in the way of embarrassment. Ginsburg fell asleep during the State of the Union (twice), the papal address and even during an oral argument; she also speaks about pending cases, which, if not a sign that she's forgotten the rules, is an indication that she's beyond respecting them. Scalia once called himself an "old fogey" who doesn't understand the world in which he lives, and he sounds increasingly irritated in his opinions and public speeches.

The problem of an aging judiciary extends beyond the Supreme Court to the hundreds of elderly federal judges across the country. The average age of these jurists is now over 70, with many in their 80s and 90s. The 94 U.S. district courts and 13 courts of appeals decide more than 98% of all cases with federal jurisdiction, so the continued mental acuity of these jurists should be a concern for all of us who use interstate commerce or expect due process.

If there's a silver lining, no pun intended, it's that some of these jurisdictions have implemented programs to promote sharpness in judges as they age. The 9th Circuit Court of Appeals, for instance, offers a battery of mental health assessments, hosts discussions with neurological experts and has created a hotline where staff may report signs of cognitive

decline in their colleagues. Such measures are necessary because it's hard for friends and family members, let alone the individual in question, to know if a tendency to, say, forget one's keys is innocuous, or portentous.

Unfortunately, the 9th Circuit program and a handful of others across the country exist in isolation, as there is no judiciary-wide strategy to cope with cognitive decline. That should change. Chief Justice Roberts should use his authority as head of the federal judiciary to require his high court colleagues and others to undergo regular mental health checkups. Get your free weekly take on the most pertinent, discussed topics of the day >>

Further, he could recommend a judicial retirement age of 70 or 75, as is done in the rest of the Western world. He and future nominees to the bench could even pledge to serve for no more than 18 years, as has been suggested by constitutional scholars and interest groups on the left and right as a reasonable limit on judicial tenure.

Our court system and the law benefit from the wisdom of judges with many years of experience. But the federal judiciary, especially given congressional dysfunction, is simply too important to leave in the hands of old fogeys.

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