

KENNEDY NOMINEES STILL SERVING COUNTRY

In the fall of 1960, Ray Charles' "Georgia On My Mind" hit Number One on the charts, Allen Drury's *Advise and Consent* was a bestseller, and Senator John F. Kennedy won the presidential election. In the next few years, Kennedy would appoint 126 judges to the federal bench, including 21 court of appeals and 102 district judges.

Today, just six of President Kennedy's federal court nominees remain on the bench, all of them senior judges. Under the "Rule of 80" (28 U.S.C. §371), they could retire in senior status when they attained the age of 65 and had 15 years of service—which was decades ago for these appointees. All, in their time, have witnessed significant changes in the federal Judiciary, presided over historic federal cases, and emerged with an unshaken love of their daily work.

Of the six remaining Kennedy nominees, Judge James Robert Browning is one of two court of appeals judges. He was confirmed in 1961 to the Ninth Circuit Court of Appeals, the only former Clerk of Court of the Supreme Court to join the federal bench. He held the Bible as Chief Justice Earl Warren swore in JFK as the 35th President of the United States. A leader and visionary in the field of justice and court administration, Browning, while an attorney with the Department of Justice, also established the Executive Office for U.S. Attorneys in the 1950s and became its first chief.

During his years on the bench, including 12 years as chief judge, Browning is credited with keeping the largest of the circuits intact when there were calls to split it, a debate that continued for the next 50 years. In an article in the Spring 1989 *Arizona State Law Journal*, Judge Mary Schroeder, a former chief judge of the circuit, called Browning, "the right man in the right place at the right time." He saw the future, Schroeder recounts, in innovations still in their infancy that would revolutionize the federal courts, such as staff attorneys, telecommunications, and automatic data processing. He talked about "paperless dockets" before computers were commonplace. Fittingly, the James R. Browning U.S. Courthouse, the home to the Ninth Circuit Court of Appeals, is named in his honor. As one of the architects who helped renovate the courthouse said, "To me [the courthouse] exemplifies everything that is great about the law: honor, decency, respect, fairness ... and Judge Browning is all that ..." Browning, who is 92 years old, took senior status in 2000.

Across the country, Judge Wilfred Feinberg sits on the Court of Appeals for the Second Circuit, but he began his judicial career in 1961 with a recess appointment from JFK as a judge on the U.S. District Court for the Southern District of New York. He took senior status in 1991. One of

Feinberg's most famous cases was *United States of America v. New York Times Company, Inc.*, in which he, Judges James L. Oakes, and Irving Kaufman upheld a lower court ruling denying an injunction against the publication of the Pentagon Papers. Another case, *NLRB v. J.P. Stevens & Co.*, a famous labor union case, inspired the movie, *Norma Rae*. As Professor Maurice Rosenberg wrote in a 25th year anniversary tribute to Feinberg published in the *Columbia Law Review*, "Wilfred Feinberg is the kind of jurist the Founding Fathers must have had in mind when they bestowed life tenure on federal judges ... Judge Feinberg regards judicial office as a way to serve justice, not as a chance to wield power. And he renders his service superbly—with intelligence, understanding, kindness, and craftsmanship. ... [His] commitment to serving justice reveals itself not only in hundreds of opinions, but also in his continuing efforts to strengthen the judicial process by improving the structure and procedures of the courts and the morale of the judges. His continued service for many more years is the ardent hope of those who know his record."

Judge George Cressler Young also was nominated by JFK to the federal bench in 1961. Now a judge in the Middle District of Florida, he began as a judge in the U.S. District Court for both the Northern and Southern Districts of Florida. He assumed senior status in 1981. Young was the first federal judge to be assigned to the Orlando Division of the newly created Middle District of Florida, and he remains the only judge to serve in all three of Florida's district courts. As the area and federal caseload grew, he worked to increase the number of judges and add courtrooms. Today the George C. Young U.S. Courthouse and Federal Building bears his name. Young also oversaw the desegregation of Orange, Seminole and Brevard County schools and handled land-condemnation cases for what is now the Kennedy Space Center. He remains one of Florida's most well-respected federal judges.

Judge Wesley Brown in the District of Kansas has been a senior judge since 1979; he joined the bench in April 1962. Age has never been an issue for him. When he served in World War II as a Navy Lieutenant, he was unusually old, at 37, to enlist. Now at 103 years of age, he continues to hear cases, carrying a full load of criminal cases, just one year shy of being the oldest active federal judge ever to serve. Why does he still work? "Because I want to," Brown responds with a touch of impatience. "I was appointed for life or good behavior."

In his time, he has seen the judicial system change. Since he became a federal judge, Congress has passed, by his estimation, 675 pieces of legislation that confer federal jurisdiction. He tallies it up: "Cases are filed by email, opinions are published electronically. We have



TOP ROW, LEFT TO RIGHT: Judge Wesley Brown, U.S. District Court for the District of Kansas; Judge James Robert Browning, U.S. Court of Appeals for the Ninth Circuit; Judge Wilfred Feinberg, U.S. Court of Appeals for the Second Circuit; Judge Edward Joseph McManus, U.S. District Court for the Northern District of Iowa;

BOTTOM ROW, LEFT TO RIGHT: Judge William Joseph Nealon Jr., U.S. District Court for the Middle District of Pennsylvania; Judge George Cressler Young, U.S. District Court for the Middle District of Florida.

magistrate judges who handle discovery matters; we have mediation. The bankruptcy courts have been reorganized.” And he has embraced the change. “District courts need to do what is necessary to dispose of cases,” he says. “The federal courts have done a good job maintaining the balance between the legislative and executive branches, and in resolving the problems that arise in society. It all depends on individual judges to do their jobs.” Paraphrasing the President who appointed him: “Don’t ask what your government can do for you, ask what you can do for your government.”

Certainly senior judges “do” a great deal for the federal courts. For the 12-month period ending June 30, 2009, senior judges participated in 17.8 percent of all oral arguments and submissions of briefs in the appellate courts, terminated 21.2 percent of all civil and criminal cases in district courts, and conducted 26 percent of all trials.

“I enjoy the work so much,” says Judge Edward Joseph McManus, who will celebrate 50 years on the federal bench in 2012, with no plans to retire. He credits being around much younger law clerks and staff with keeping him young at heart. McManus was confirmed by the Senate in July 1962, just a month after his nomination to the U.S. District Court for the Northern District of Iowa by President Kennedy. He recalls that when he joined the bench there were 407 Article III judgeships;

today there are 864 (and 11 temporary) Article III judgeships. The increase in numbers has not kept up with an ever-increasing caseload.

An early case McManus decided, *Davis v. Synborst* (1963), resulted in a population-based reapportionment of the Iowa legislature. Another high-profile case for McManus involved the trial of two members of the American Indian Movement accused of killing two FBI agents at the Pine Ridge Indian Reservation in South Dakota. In the trial, a well-known attorney, the late William Kunstler, defended the accused. However historically memorable the cases may be, McManus insists: “To a judge, every case is important and of interest.”

As Democratic candidate for governor in 1960 and the Iowa lieutenant governor (1959–1961), he appeared many times with Kennedy in campaign events. “My impression of him?” asks McManus. “He was quite charming with a great sense of humor. A good companion.”

Judge William Joseph Nealon Jr. received a recess appointment to the District Court for the Middle District of Pennsylvania from President Kennedy in December 1962. He met JFK only once—in 1960 when JFK campaigned in Scranton. But Nealon had the opportunity to visit with Attorney General Robert Kennedy on several

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⁸⁶*Id.* at 236

⁸⁷*See id.*

⁸⁸The broad statutory language “in relation to or contemplation of” is unique to § 1519 of the act.

⁸⁹*Russell, supra* note 38, at 239.

⁹⁰*Id.* (citing *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006)).

⁹¹*Russell, supra* note 38, at 239.

⁹²*Id.*

⁹³*Id.* at 239–240.

⁹⁴*Id.* at 240 (emphasis added). *See also* Hill, *supra* note, 15, at 1566–67 (“An actor who destroyed documents as a matter of routine, truly without contemplating an investigation would not be held criminally liable.”).

⁹⁵*See* Sen. Leahy, *supra* note 13.

⁹⁶*Id.*

⁹⁷*See id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Hill, *supra* note 15, at 1567.

¹⁰²*Id.* at 1566. *See also* Christopher R. Chase, *To Shred or Not To Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 *FORDHAM J. CORP. & FIN. L* 721, 722 (2003) (“the best argument a corporation can make ... is that because of a consistently applied and routinely followed retention policy, the corporation did not have the specific intent to obstruct justice as required by federal law.”).

¹⁰³*Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2136 (2005).

¹⁰⁴*Id.* at 2132.

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 2132–2133. On Oct. 10, 2001, Michael Odom, a partner in the firm, stated that, “if it’s destroyed in the course of [the] normal policy and litigation is filed the next day, that’s great ... [W]e’ve followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.”

¹⁰⁷*Id.* at 2133.

¹⁰⁸*Id.* at 2137. The Supreme Court held that “[a] ‘knowingly ... corrup[t] persuad[e]r’ cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.”

¹⁰⁹Chase, *supra* note 102, at 753.

¹¹⁰*Id.* at 723.

¹¹¹*Id.* at 754.

¹¹²*Id.* at 753.

¹¹³*Id.* at 754.

¹¹⁴*See id.*

¹¹⁵*See id.*

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occasions. He convinced Bobby Kennedy to make one of his first public appearances, following the assassination of his brother, at a 1964 Friends of St. Patrick dinner in Scranton. At the conclusion of his talk, Kennedy quoted the moving Irish ballad on the assassination of Chieftain Owen Roe O’Neill by Cromwell’s agents, a lament evocative of the recent death of JFK. “There were 1,200 Irishmen, and not a dry eye in the room,” Nealon remembers.

In his career, Nealon has presided over many significant cases, but one in particular stands out for him. “The local school board adopted a program encouraging the formation of school clubs. Twenty-one clubs were formed, one of which was a Bible Club and the board refused to recognize it. The case was filed by a man who sat on the board and whose son attended a local high school.” Nealon found it was discriminatory to eliminate that one club, arguing for equal access. He was reversed by the Court of Appeals, but the Supreme Court granted cert in the case. Meanwhile, Congress passed legislation providing equal access.

Nealon, now 87, was 36 years old when he began his judicial career as a Lackawanna County judge. He is quick to point out that his district court bench includes a still active 96-year-old (Judge Malcolm Muir, a Nixon appoint-

tee) and three 85-year-old senior judges (Judges William Caldwell, Richard Conaboy and Edwin Kosik). “We keep busy and enjoy the work. And when you reach an advanced age, it is helpful to be around younger people. They help strengthen the spirit.” He has needed that energy for an ever-increasing caseload. For example, in 1963, when he began on the federal bench, there were 450 civil case filings in the district. Last year, there were over 2,500. From five motions to vacate a criminal sentence, the number of motions has risen to 57 in 2010.

But Nealon may speak for all judges who accept their President’s nomination to serve. “All our judges work hard,” he said. “Sometimes there isn’t enough time in the day. But we face challenging problems and there is a satisfaction in solving them.” **TFL**

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