

Judicial Profile

JULIA FOLLANSBEE

Hon. Edward Leavy Senior Judge, U.S. Court of Appeals for the Ninth Circuit

HON. EDWARD LEAVY, senior judge for the U.S. Court of Appeals for the Ninth Circuit in Portland, Ore., is the youngest of 10 children. He was born in 1929 to an Irish immigrant father, Patrick Leavy, and a native Oregonian mother, Ella O'Brien. Eight of the

Leavys' children were boys (one, Nicholas, died in infancy), a fact that led to some early training in mediation. Young Edward often resolved disputes among his older brothers, which sometimes brought them to serious blows. His father died when Judge Leavy was 11 years old, so Ella, who was 23 years younger than her husband, was left to run the Leavy farm with her children.

Judge Leavy's childhood speaks of a bygone era. The Leavy home had no electricity until 1934. The Leavy children attended Butteville Grade School, riding bicycles several miles to school and back each day. Reflecting the level of responsibility he was given as teenager, Judge Leavy drove the school bus to high school excursions outside Woodburn, where his high school was located. He also drove the family truck to Portland to select workers for the annual hop harvest, which was—and still is—the main crop raised on the Leavy farm. When he was in high school, Judge Leavy missed 36 days of school each year while helping his mother and siblings with the Leavy farm. Despite the Leavy children's necessary absences, seven of them graduated from high school.

Judge Leavy's mother was well informed as a result of reading newspapers every day, listening to the radio, and visiting with a neighborhood cattle buyer, a Jewish refugee from Germany. Ella O'Brien Leavy had an awareness of the world well beyond her farm. She knew early on that the United States would be involved in World War II. Her son Matthew fought in the Battle of the Bulge and her son Luke fought in Okinawa, while young Edward watched out for enemy aircraft over Oregon. Ella Leavy was highly influential in her community—no one bought or sold land without seeking her advice, and no one left the Leavy farm without Ella's gift of a good meal. No one can read about Ella without realizing that much of Judge Leavy's savvy and highly personable nature came directly from his mother.

World War II ended on Aug. 14, 1945, Judge



Leavy's 16th birthday. He had an interest in science but decided the world was well-enough endowed with scientists in the aftermath of the Manhattan Project. Instead, the idea of solving disputes that came from his years of experience at home and watching the entire world engage in devastating conflict led him to the legal profession even though he did not know any attorneys. Judge Leavy enrolled in the University of Portland in 1947, committing himself to finishing as quickly as possible by attending year-round. He took only those courses necessary for a degree in business administration, with the exception of 18 credits in philosophy reflecting his serious interest in metaphysics, and graduated in three years. He applied to Notre Dame Law School and was accepted.

Notre Dame was intimidating for a 21-year-old fresh from the farmland of rural Oregon—not to mention the fact that half the law class had flunked out the previous year! But Judge Leavy's class had many veterans of World War II, including bomber pilots who had seen much worse than the inside of a law school classroom. Judge Leavy was at the law school for 14 hours a day, and, at the end of his first year, he was fourth in his class of 65. Amazingly, Judge Leavy never took notes because doing so distracted him. He learned entirely by listening (a fact that astonishes his law clerks)—a rare gift that he says served him well as a trial judge. Unlike his high school days, in his

second year of law school, he never missed a class.

In 1950, in his first year of law school, the Korean War broke out. In August, Judge Leavy became eligible for the draft. He decided to enlist instead, applying to be an officer with the Office of Naval Officer Procurement. His application was approved for some time in the future. In the meantime, the draft board sent him a notice of induction, but after asking for Judge Leavy's law school grades, the draft board gave him a year's grace period. Ultimately, that grace period was extended until Judge Leavy reached the age of 35. The notice to report for induction into the Army required the Navy to reject Judge Leavy's application. Thus, he never entered the military.

During Christmas break of his first year in law school, Judge Leavy went home to Oregon and became engaged to Eileen Hagenauer, a classmate from Woodburn High School whom he had dated while he was a senior. Although 44 people were in their graduating class, Ed and Eileen Leavy were never in the same class. Eileen worked for a car dealership in 1951, before they married, and, after they were married, she worked in South Bend, Ind., in a credit rating office. In his third year of law school, Judge Leavy worked as an inspector of automobile brakes at Bendix Aviation. This job limited the time he had for law school studies. Judge Leavy fondly remembers his fellow Bendix workers who, when they learned he was a law student, said, "All [you're] reading is junk!" and had him study during their breaks while they worked his turn. This magnanimous attitude of local workers toward law students is difficult to imagine in today's world. In 1953, Judge Leavy graduated from Notre Dame. His mother flew to Indiana for her son's graduation—it was the first time she had ever ventured east from Oregon.

After six months of practicing law in Eugene, Judge Leavy was offered a job as a deputy district attorney in Lane County, Ore., which he did from April 1954 until December 1956. During this time, he became involved in a locally notorious case that ultimately led to his first judgeship: *State of Oregon ex. rel. Venn v. Frank B. Reid*.¹ Frank Reid was the presiding judge of the Circuit Court of Lane County. Eugene Venn, the district attorney of Lane County, brought a mandamus action in the Oregon Supreme Court asserting Reid had exceeded his jurisdiction by directing a deputy clerk to select certain jurors—consisting of labor union officials and their wives—from a previous year's list of potential jurors. Venn and his deputy district attorney, Edward Leavy, argued before the court that the jury was illegally constituted, without legal authority, and void—in simple terms, they alleged that it was a "cooked" grand jury. The underlying case involved a conversion of funds by public officials and garnered intense local interest and news. Although the Oregon Supreme Court ultimately ruled that Judge Reid had jurisdiction, Edward Leavy was appointed to the Lane County District Court in 1957

at the age of 27—an appointment that began his long judicial career. With plenty of name familiarity in Lane County, Judge Leavy, at the age of 30, ran for a seat on the Lane County Circuit Court, challenging Judge Reid. His campaign involved knocking on 3,000 doors in Lane County. With three contenders for one spot on this bench, Edward Leavy came in first; Judge Reid came in last. During Judge Leavy's 16-year tenure on the Lane County Circuit Court, he also served as a justice pro tempore on the Oregon Supreme Court.

In 1976, the Oregon federal district court judges appointed Judge Leavy to the position of magistrate judge, and he moved to Portland. He was also asked to apply for a vacancy on the Oregon Supreme Court, illustrating how much in demand an outstanding judge can be. That same year, he was voted the Number One Oregon judge on a statewide bar poll, and he won that bar poll again in 1979.

In 1984, President Reagan nominated Judge Leavy to the U.S. District Court for the District of Oregon, and he was confirmed by the Senate, taking his commission in May of that year. In 1987, President Reagan again nominated Judge Leavy, this time to a seat on the U.S. Court of Appeals for the Ninth Circuit. He was confirmed by a different Senate in March 1987, took his post at the Ninth Circuit in April, and has served in that post ever since—first as an active judge, then as senior judge as well as a sought-after mediator. He travels frequently to San Francisco to serve on motions panels. In fact, it was Judge Leavy's idea that motions coming before the court could be ruled upon expeditiously if all Ninth Circuit judges, in turn, traveled to San Francisco on a regular basis and sat on the motions panel convened there each month.

In a surprising flashback to the Manhattan Project, in 2000, Judge Leavy was selected from a group of five federal judges to mediate the matter of Wen Ho Lee—a case involving national security. Chief Judge Procter Hug of the Ninth Circuit had recommended Judge Leavy to the trial judge as one who might mediate a plea agreement with Dr. Wen Ho Lee, a nuclear scientist who had worked at the Los Alamos National Laboratory on improving the safety and reliability of the United States' nuclear arsenal. In December 1999, a federal grand jury indicted him for allegedly mishandling the United States' nuclear secrets. Dr. Lee was placed in solitary confinement for nine months and denied bail. Judge Leavy was selected by Dr. Lee's attorneys and by the Department of Justice to mediate a plea agreement. Judge Leavy was so successful in negotiating this plea agreement—which benefited both the government and Dr. Lee—that federal District Judge James A. Parker, after asking Judge Leavy to stand, stated the following in open court on Sept. 13, 2000:

At this time I want to compliment Judge Edward Leavy, who was the mediator judge in this case. Judge Leavy has worked extremely hard in this case. He has been very diligent in assisting the

mediation efforts. I was informed that he flew back to Albuquerque from his home in Portland, Oregon yesterday, late yesterday, and then met late into the night with the lawyers and Dr. Lee in an effort to revive the plea agreement. We all owe him our gratitude. I want to say personally that I am both proud and honored to be his colleague in the Federal Judiciary.

The attorneys commended Judge Leavy for his “tremendous help and tremendous patience” in reaching the agreement, which was signed at 2 a.m. that day. Wen Ho Lee pleaded guilty to only one count of the 59-count indictment; the government got the information it wanted from him; and Judge Parker apologized to Dr. Lee, chastising the government for misconduct and misrepresentation to the court in the course of trying to prove its case. Dr. Lee later settled an invasion of privacy lawsuit for \$1.65 million against the government for leaking his name to the press before formal charges were filed against him.

The Wen Ho Lee case and its attendant publicity led U.S. Supreme Court Chief Justice Rehnquist to appoint Judge Leavy to the U.S. Foreign Intelligence Surveillance Court of Review in 2001, where he served with two other federal appellate senior judges, Judge Laurence Silberman of the D.C. Circuit and Judge Ralph Guy of the Sixth Circuit. In 2002, this panel of three judges decided what Judge Leavy has called one of the most difficult cases he ever had to decide: *In re: Sealed Case*.² Not only was this case difficult, but it was also the first appeal ever brought to this special appellate court since passage of the Foreign Intelligence Surveillance Act in 1978. This decision broke down the false barrier that had prevented communication between the FBI and the Department of Justice’s Criminal Division when both agencies were investigating the same incidents of spying that could involve a criminal prosecution. Theodore Olsen, the solicitor general, argued the case for the appellant, the United States. The decision recognized that, after Sept. 11, 2001, “we have learned [that effective counterintelligence] requires the wholehearted cooperation of all the government’s personnel who can be brought to the task.” This decision, in a footnote, also explains that had this communication barrier not been in place during the investigation of Dr. Wen Ho Lee, that case might not have been pursued in such an unfortunate manner.

Judge Leavy has been a shining example of an experienced judicial officer in action at the local, state, and national level. Given the normal political ties judicial candidates must possess today, here is a judge with 55 years of experience who was first appointed by a governor, then elected twice by citizens, appointed as a pro tempore judge to the Oregon Supreme Court, appointed as a magistrate judge by Oregon’s federal district judges, nominated to the federal district court by President Reagan and

confirmed by a Republican Senate, later nominated to the Ninth Circuit by President Reagan and confirmed by a Democratic Senate, and finally appointed by Chief Justice Rehnquist to the U.S. Foreign Intelligence Surveillance Court of Review for matters involving spying on U.S. soil. Judge Leavy says his service on the judiciary was all a matter of luck, but—be it luck, raw intelligence and street smarts, or just plain wisdom gained from years of solving disputes—the citizens of Oregon and the country are the lucky ones for having this exceptional man in our midst.

Judge Leavy has won so many awards and accolades from every corner of Oregon and beyond—including from a sovereign nation, the Warm Springs Indian Tribe—that to list them all would fill the space allotted for this judicial profile. Nevertheless, Judge Leavy is very sensitive to the way he is introduced at various functions. He is relieved and always thankful that no one has echoed the sentiments in a letter postmarked from Cleveland, Ohio, in 1966. That letter was simply addressed to “Stupid Circuit Judge Edward Leavy, nationally notorious most contemptible jerk of all jackasses, Eugene, Oregon.” Inside, the writer had this to say: “It is gratifying to know that America still has people like you to remind them of what it would be like to live under tyranny.” This letter, despite the scant address, was delivered to Judge Leavy, and he has carefully saved it in a top drawer of his desk for 46 years.

In addition to a host of Oregon attorneys and state court judges, many federal district and appellate judges and U.S. Supreme Court justices have visited the Leavy farm, which is famous for its picnics and hayrides as well as its acres of beautiful hop vines and stand of tall oaks. This farm, which celebrates its 100th year in operation in 2012, and the boy who grew up there have together come full circle—a destiny chosen long ago has met the fruit of that labor. Judge Leavy remains as personable as ever because of his rural upbringing in Oregon. No one can walk down the streets of Portland without seeing him greet somebody or somebody greeting him—and laughter always ensues. **TFL**

Julia Follansbee was a career law clerk for Judge Leavy at the Ninth Circuit Court of Appeals and also clerked for him in the U.S. District Court for the District of Oregon. She specializes in federal appellate law at Follansbee & Associates in Bend, Ore.

Endnotes

¹298 P.2d 990 (Or. 1956).

²310 F.3d 717 (FISA Ct. Rev. 2002).