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BRIEFS

Happy Birthday! Now get out.

Interest in increasing or repealing mandatory judicial retirement ages is growing in the legislatures – but not among voters

Mandatory judicial retirement ages have existed in the states since the nation was founded. In 1789 Alexander Hamilton noted in Federalist No. 79 that New York had a mandatory judicial retirement age of 60 and argued against the practice for both the federal and state judiciaries. Some 225 years later, many state legislatures show continued interest in raising the mandatory retirement age or abolishing it altogether. Voters, on the other hand, remain wary.

There are in practice three forms of mandatory retirement for state judges. The first is the most direct: On the day a judge reaches the applicable age, his or her birthday party doubles as a retirement party. Some states allow for service until the end of the applicable month or year, and on rare occasions the person may serve out the term in which the specified age is reached. The second version links the retirement age to retirement benefits. A judge is not automatically removed from office on a particular birthday, but if

he or she refuses to retire on that day some or perhaps all retirement benefits may be forfeited. The third version is perhaps more accurately described as an electoral disqualifier: A judge who has reached a particular age may continue to serve but may not be elected or appointed to any additional terms.

Thirty-two states plus the District of Columbia currently impose some sort of retirement age on appellate or general jurisdiction court judges. Interestingly, most states do not impose a mandatory judicial retirement on limited-jurisdiction court judges; for that group, the states mostly are silent on the subject or allow local appointing bodies to set mandatory retirement ages. But of those 32 states with mandatory retirement ages, 70 is the most common retirement age. Some set retirement at 72, 74, 75, or, in the case of Vermont, 90.

Most states codify retirement ages in state constitutions, and both the legislature and the public must vote in order to make changes, though in some instances, the legislature has latitude to set the age. In the past two decades, the legislatures in the 32 states with mandatory retirement ages have debated



and in many instances passed efforts to raise or eliminate them. For the most part, the focus has been on efforts to raise, rather than eliminate, retirement ages, with most moving from 70 to 72 or 75.

Advocates of raising mandatory retirement ages argue that increased life expectancy and vitality, along with the oversight of disciplinary bodies that can remove a judge who has aged into — as Alexander Hamilton put it — “inability,” make later retirements feasible. Some proponents argue that mandatory retirement ages are wholly unfair, especially because the other two branches do not have similar requirements.

Those who oppose changing mandatory retirement ages generally say the loss of retiring judges does not harm the judiciary and in fact creates vacancies and opportunities ▶

for newer, younger judges. In some instances, legislators do not want to extend existing terms for a particular judge or judges and therefore vote against any change. Case in point: In New Jersey, a plan to raise the mandatory retirement age for judges met resistance until the Supreme Court was exempted. Some have voted for retirement age increases that apply only to those judges who are elected or appointed after some future date.

CHANGES IN STATUTES

Recent changes to mandatory judicial retirement ages

mostly have been in those states with statute-based policies. Indiana, where a legislatively set retirement age for trial judges was repealed in 2011, nearly repealed the mandatory retirement age for appellate judges in 2014. Virginia's legislature, after debating and voting on the subject for nine years in a row, approved a limited retirement-age increase in 2015: The retirement age for Virginia appellate judges increased from 70 to 73; the increase will apply only to those trial judges elected or appointed after July 1, 2015.

Legislatively passed constitutional amendments to raise or repeal these ages have appeared on ballots 11 times in nine states since 1995, but with little success — particularly in the last decade. Efforts to raise retirement ages failed in Arizona (2012), Louisiana (1995 and 2014), Hawaii (2006 and 2014), New York, (2013), and Ohio (2011). Also a failure: a 2012 effort in Hawaii to permit judges who were forced out by mandatory retirement to be called back into service by the chief justice for up to three months.

The 2012 Arizona proposition is of particular note: The increase to the mandatory judicial retirement age was bundled with a series of other changes to the state's judiciary article, including a plan to give the governor more power over the state's merit selection system. Opponents of Proposition 115 focused mainly on those provisions without expressing particular concern over raising the mandatory retirement age from 70 to 75. Several bills in other states have coupled increases to judicial retirement ages with increasing gubernatorial power over judicial selection.

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Generally, voters have rejected retirement-age changes. Aside from Vermont (2002), only three ballot measures have succeeded; all were in off-year elections and did not increase or repeal the ages but simply allowed judges to serve out their terms or to the end of the calendar year after reaching retirement age. Those were in Louisiana (2003), Pennsylvania (2001), and Texas (2007).

WHAT'S NEXT?

Oregon voters will decide in 2016 on an outright repeal of that state's retirement age. Pennsylvania's legislature approved an increase (to the end of the term in which a judge reaches age 75, up from the end of the term in which a judge reaches 70) in its 2013-14 session, and the state's 2015-16 House has given second-round approval. Movement toward constitutional changes occurred this year in Alabama (approved in House), Maryland (approved in Senate), and Wyoming (approved by House), and Indiana (approved by Senate) and North Carolina (approved by House) took steps to change statutes with mandatory retirement ages. Where such measures will land is unclear, but the issue of when a judge should retire seems likely to stay on the legislative and popular agenda for years to come.

— WILLIAM E. RAFTERY is the author of *Gavel to Gavel*, a newsletter of the National Center for State Courts that tracks legislative activity that affects the courts.

RESULTS OF ELECTIONS TO INCREASE OR REPEAL MANDATORY JUDICIAL RETIREMENT AGES

STATE	YEAR	PROVISION	RESULT
Louisiana	1995	Increase age from 70 to 75	Failed 38-62%
Pennsylvania	2001	Serve remainder of year reach 70	Approved 68-32%
Vermont ¹	2002	Repeal mandatory retirement age, let legislature set at least 70	Approved 64-36%
Louisiana	2003	Serve remainder of term reach 70	Approved 53-47%
Hawaii ²	2006	Repeal mandatory retirement age	Failed 35-58% (7% not voting)
Texas	2007	Serve remainder of term reach 75, but only if already served 4 years of 6 year term	Approved 75-25%
Ohio	2011	Increase age from 70 to 75	Failed 38-62%
Arizona	2012	Increase age from 70 to 75, give governor more power over judicial selection	Failed 27-73%
New York	2013	Increase age from 70 to 80 (court of last resort only); allow judges of lower trial court to be given 2-year extensions from 70 to 80 (currently up to 76)	Failed 40-60%
Louisiana	2014	Repeal mandatory retirement age	Failed 42-58%
Hawaii ²	2014	Increase age from 70 to 80	Failed 22-73% (5% not voting)
Oregon	2016	Repeal mandatory retirement age	On 2016 ballot
Pennsylvania	2016(?)	Increase age from 70 to 75	Approved by 2013-14 legislature. Must be approved by 2015-16 legislature before appearing on ballot.

¹ Vermont legislature enacted law setting age at end of calendar year judge reaches 90.

² Hawaii requires a constitutional amendment to be approved by a majority of all voters casting ballots. Non-votes are therefore tabulated and reported.