

Indiana Law Review

Volume 41

2008

Number 2

INDIANA STATE BAR ASSOCIATION CONFERENCE ON RELATIONS BETWEEN CONGRESS AND THE FEDERAL COURTS

IMPROVING RELATIONS BETWEEN CONGRESS AND THE FEDERAL COURTS: AN INTRODUCTION

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INTRODUCTION

Former U.S. Supreme Court Justice Sandra Day O'Connor wrote in a 2006 *Wall Street Journal* article, "[T]he breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."¹ The Honorable Joel Flaum, former Chief Judge of the Seventh Circuit Court of Appeals, echoed this sentiment when he stated that same year that "[i]n my 32 years as a judge I have never seen relations between the judiciary and Congress more strained."² Others have suggested, however, that court-directed animus has existed since the founding of our nation and that recent attacks by politicians against the judiciary are neither particularly alarming nor notably worse than judges might inflict against a colleague by way of a stinging dissenting opinion.³

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1. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

2. Pamela A. MacLean, *Judges Warned About Seminars: Departing Judge Notes Expense-Paid Functions Will Sour Congress More*, NAT'L L.J., May 29, 2006, at 5.

3. See, e.g., CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 2 (2006) ("Bouts of court-directed animus have come and gone at generational intervals since the founding of the nation."); Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 930 (2007) ("Public criticism of the federal courts is nothing new. For as long as there has been a Federal Judiciary, federal judges have been blasted for purportedly overstepping their bounds."); William H. Pryor, Jr., *'Neither Force nor Will, but Merely Judgment,' BENCHER*, Jan.-Feb. 2007, at 12, 12 ("To charge that the current disappointment regarding judges is unprecedented is to diminish the

It is true that attacks against the judiciary are nothing new, but a compelling argument can be made that the present relationship between Congress and the federal judiciary is strained to the breaking point. Such a conclusion seems justified on various fronts and is supported by a growing list of emotionally charged comments aptly illustrated by the chief-of-staff to Oklahoma Senator Tom Coburn who said, “I don’t want to impeach judges. I want to impale them!”⁴

In response to this type of growing and disconcerting rhetoric, the Indiana State Bar Association (“ISBA”) sponsored a “Conference on Relations Between Congress and the Federal Courts” (“ISBA Conference”) on September 14, 2007. The day-long conference, hosted by the Indiana University School of Law—Indianapolis, brought together congressmen, judges, and academics to explore the root problems of this relationship and lay a foundation for improved relations. U.S. Supreme Court Justice Samuel A. Alito, Jr. provided the ISBA Conference’s keynote address. This Article provides an introduction to and an overview of the ISBA Conference and the foregoing issues.⁵

OVERVIEW OF PROBLEMS AND POSSIBLE SOLUTIONS

To be sure, some criticism of the judiciary and judicial decisions is entirely appropriate if not essential.⁶ However, according to Justice O’Connor, “the breadth of the dissatisfaction currently being expressed—not only by public officials, but also in public opinion polls—indicates that the level of anger

sacrifices that earlier giants of the judiciary endured. . . . Many contemporary criticisms of judicial decisions by politicians are no more heated than the criticisms written by jurists in dissenting opinions.”).

4. Bert Brandenburg, *The Growing Threat to Fair and Impartial Courts: How Judges and Attorneys Can Fight Back*, BENCHER, Jan.-Feb. 2007, at 19, 20; Rick Perlstein, *Christian Empire*, N.Y. TIMES, Jan. 7, 2007, at 15 (reviewing CHRIS HEDGES, *AMERICAN FASCISTS: THE CHRISTIAN RIGHT AND THE WAR ON AMERICA* (2007)). Professor Geyh sets forth other examples:

In 1997, the Republican House majority whip proposed to “go after” liberal judicial activists in a “big way” by targeting them for impeachment. Six years later, the chairman of the Constitution Party National Committee called for the impeachment of the six-member majority of the Supreme Court that decided the homosexual sodomy case. On the other side of the political aisle, the Oregon Democratic Party initiated a campaign in 2001 to impeach the Supreme Court majority that decided *Bush v. Gore*. GEYH, *supra* note 3, at 3-4 (footnotes omitted).

5. The remarks of the speakers at the Conference appear at Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), in 41 IND. L. REV. 305 (2008) [hereinafter ISBA Conference]. However, Justice Alito requested that his remarks not be recorded, accordingly, his remarks are not set forth.

6. “Many who complain about criticisms of the judiciary concede that some criticism of judicial decisions is fair. That assessment is too mild. Occasionally criticism of judicial decisions is essential to the progress of our constitutional republic.” Pryor, *supra* note 3, at 13.

directed toward judges today exceeds that of the past.”⁷ Supreme Court Justice Stephen Breyer, among others, fears that such criticism threatens to undermine the judicial system. As Justice Breyer points out, “the judiciary is, in at least some measure, dependent on the public’s fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the rule of law, much is at stake.”⁸

Justice Alito⁹ expounded on this idea at the ISBA Conference in discussing his Supreme Court confirmation process, which he characterized as the three most difficult months of his life.¹⁰ Justice Alito was successfully guided through this difficult process by the Honorable Daniel R. Coats,¹¹ former Ambassador to the Federal Republic of Germany and former U.S. Senator from Indiana, who introduced the newest Supreme Court Justice at the ISBA Conference. Ambassador Coats used his introductory remarks to discuss and explain what he called his “sherpa” role in leading the jurist through the thorny confirmation process.¹² Picking up on the sherpa theme, Justice Alito made an analogy

7. Sandra Day O’Connor, Associate Justice, Retired, Supreme Court of the United States, Remarks at the Georgetown University Conference, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), *in* 95 GEO. L.J. 897, 898 (2007).

8. Stephen Breyer, Associate Justice, Supreme Court of the United States, Remarks at the Georgetown University Conference, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), *in* 95 GEO L.J. 903, 903 (2007). Likewise, William N. LaForge, President of the Federal Bar Association, wrote in a recent article, “At minimum, inappropriate criticism of the judiciary undermines public confidence in the judiciary and in judicial independence, regardless of whether the criticism actually influences decision-making.” William N. LaForge, *Judicial Independence: An Age-Old Concept Is Alive and Well but Has Contemporary Challenges*, FED. LAW., Nov.-Dec. 2006, at 3, 10.

9. Justice Alito joined the Supreme Court of the United States as an Associate Justice on January 31, 2006, leaving his service to the Court of Appeals for the Third Circuit to which he was appointed in 1990. Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Nov. 20, 2007). Justice Alito also served as U.S. Attorney, District of New Jersey (1987-1990); Deputy Assistant Attorney General, U.S. Department of Justice (1985-1987); Assistant to the Solicitor General, U.S. Department of Justice (1981-1985); and Assistant U.S. Attorney, District of New Jersey (1977-1981). *Id.*

10. Samuel Alito, Associate Justice, Supreme Court of the United States, Keynote Address at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007).

11. Daniel R. Coats served as the Ambassador to the Federal Republic of Germany from August 2001 to February 2005. King & Spalding Homepage, Lawyers/Professionals, Biography, <http://www.kslaw.com/portal/server.pt?space=KSPublicRedirect&control=KSPublicRedirect&BioId=5884> (last visited Jan. 3, 2008). He represented Indiana in the U.S. Senate from 1989 to 1999 and in the U.S. House of Representatives from 1981 to 1988. *Id.*

12. Former Ambassador Dan Coats, Introduction to Justice Samuel Alito at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305, 337-38 (2008). Former Ambassador Coats’s article, *Anatomy of a*

between the Supreme Court confirmation process and climbing Mount Everest: both experiences require the climber-nominee to pass dead bodies of failed climbers-nominees on the dangerous yet exhilarating ascent to the summit.¹³

Justice Alito focused his keynote remarks on three primary areas where he believes Congress should concentrate its efforts: (1) increasing judicial salaries, (2) managing growing caseloads, and (3) avoiding ambiguities in statutes.¹⁴ Justice Alito also set forth three suggestions to help bridge the gap between what he termed the two cultures of legislators and judges.¹⁵ First, legislators and judges need to make an effort to understand each other and the pressures facing each branch of government.¹⁶ Second, members of both branches must exercise self-restraint with respect to their powers.¹⁷ Justice Alito specifically recognized that judges must avoid catching what he referred to as “black robe disease,” whereby judges overstep their authority after donning their judicial robes.¹⁸ Third, Justice Alito stated that both branches must rise above the public cynicism of government.¹⁹

In addition to Justice Alito, the judiciary’s perspective was further refined by a distinguished panel²⁰ of judges consisting of Chief Judge Larry J. McKinney of the Southern District of Indiana;²¹ Judge Sarah Evans Barker of the Southern District of Indiana and President of the Federal Judges Association (“FJA”);²²

Nomination: A Year Later, What Went Wrong, What Went Right and What We Can Learn From the Battles over Alito and Miers, 28 *HAMLIN J. PUB. L. & POL’Y* 405 (2007), contains the statesman’s insights into the brief, failed effort to confirm Harriet Miers to the Supreme Court and Justice Alito’s successful nomination.

13. Alito, *supra* note 10.

14. *Id.* One example Justice Alito gave was lawmakers’ failure to consistently indicate whether statutes should be applied retroactively. *Id.*

15. *Id.*

16. *Id.* Justice Alito correctly pointed out that legislators do not enjoy lifetime appointments as do Article III judges. *Id.* Moreover, legislators must be very visible and reach out to their constituents, whereas federal judges tend to operate largely out of the public eye. *Id.* Thus, the pressures and demands facing legislators and judges vary significantly and impact the manner in which they view one another and even themselves. *Id.*

17. *Id.*; see also Dinh, *supra* note 3, at 929.

18. Alito, *supra* note 10.

19. *Id.*

20. This Author moderated the panel, entitled “The View From the Courthouse.”

21. Chief Judge McKinney was appointed U.S. District Court Judge for the Southern District of Indiana in July 1987 and served as Chief Judge from January 2001 to December 2007. U.S. District Court, Southern District of Indiana, Judges and Courtrooms, http://www.insd.uscourts.gov/Judges/bio_ljm.htm (last visited Nov. 20, 2007). Prior to serving on the U.S. District Court, he served as a judge on the Johnson Circuit Court in Indiana for eight and a half years. *Id.*

22. Judge Barker was appointed U.S. District Judge for the Southern District of Indiana in March 1984 and served as Chief Judge from 1994 to 2001. U.S. District Court, Southern District of Indiana, Judges and Courtrooms, http://www.insd.uscourts.gov/Judges/bio_SEB.htm (last visited Nov. 20, 2007). From 1981 to 1984, Judge Barker served as the U.S. Attorney for the Southern

Chief Judge Robert L. Miller of the Northern District of Indiana;²³ and Chief Justice Randall T. Shepard of the Indiana Supreme Court.²⁴ District Judges McKinney, Barker, and Miller echoed many of the concerns set forth by Justice Alito, but from a trial court perspective.²⁵

Judge Barker called bills designed to strip lower federal courts of jurisdiction to hear particular types of cases a “distraction.”²⁶ As discussed at the ISBA Conference, despite the introduction of many such jurisdiction-stripping bills, they generally have failed to be passed into law. Moving beyond this issue, Judge Barker used the ISBA Conference to emphasize the need for a substantial pay raise for federal judges.²⁷ In June 2007, Senator Patrick Leahy introduced legislation that would do just that.²⁸ The FJA is a strong advocate of the need for

District of Indiana. *Id.*

23. Chief Judge Miller was appointed U.S. District Judge for the Northern District of Indiana in December 1985 and began serving as Chief Judge in 2003. U.S. District Court, Northern District of Indiana, <http://www.innd.uscourts.gov/judges/miller/millerbio.shtml> (last visited Nov. 20, 2007). He served as a judge for the St. Joseph Superior Court in Indiana from 1975 to 1986. *Id.*

24. Chief Justice Shepard was appointed to the Indiana Supreme Court in 1985. Indiana Supreme Court, Justice Biographies, <http://www.in.gov/judiciary/supreme/bios/shepard.html> (last visited Nov. 20, 2007). Justice Shepard served as Judge of Vanderburgh County Superior Court from 1980 until his appointment to the Indiana Supreme Court. *Id.*

25. Judge Sarah Evans Barker, Chief Judge Larry McKinney, Chief Judge Robert Miller, and Chief Justice Randall Shepard, View from the Courthouse Panel Discussion at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), in 41 IND. L. REV. 305, 353-79 (2008). The ISBA Conference was held on September 14, 2007, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

26. *Id.* at 370. Examples of such bills include: Marriage Protection Act of 2007, H.R. 724, 110th Cong. (2007); Pledge Protection Act of 2007, H.R. 699, 110th Cong. (2007); We the People Act, H.R. 300, 110th Cong. (2007); and Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005). These bills, introduced in the House in various forms over the past couple of years, would generally have foreclosed or greatly limited lower courts’ jurisdiction over issues such as the Pledge of Allegiance and same-sex marriage. See Kenneth M. Duberstein, Chairman and CEO, The Duberstein Group, Moderator of Panel on Interbranch Relations at Georgetown University Conference, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), available at <http://www.law.georgetown.edu/news/documents/COJ092806-panel3.pdf> (“[S]ome politicians have called [for] legislation that would strip the federal courts of jurisdiction over particular issues. Congressman Hostettler of Indiana advocated a bill that would bar the federal courts from hearing lawsuits related to gay marriage. Tom DeLay would have barred the courts from hearing cases regarding the constitutionality of the phrase, ‘Under God,’ in the pledge of allegiance.”).

27. Barker, *supra* note 25, at 376.

28. The Federal Judicial Salary Restoration Act of 2007, S. 1638, 110th Cong. (2007) (referred to the Committee on the Judiciary on June 15, 2007). The Act would increase the salary of district judges from \$165,200 to \$247,800 and of circuit court judges from \$175,000 to \$262,700. *Id.* Supreme Court Justices would earn \$304,500 under the proposed legislation, which also calls for the Chief Justice to earn a bump in pay to \$318,200. *Id.*

a judicial pay raise, and as president of the FJA, Judge Barker has championed that message. Chief Justice John Roberts has likewise embraced this issue and repeatedly warned, “The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge.”²⁹ Justice Shepard also spoke in favor of a judicial pay raise, noting the benefits of a recent pay increase for state court judges in Indiana.³⁰

Another highlight of the ISBA Conference was a distinguished panel³¹ of U.S. Congressmen from Indiana, consisting of Representatives Mike Pence,³² Baron Hill,³³ and Brad Ellsworth.³⁴ Representative Pence, who sits on the House Judiciary Committee, spoke candidly about his view that judges have overstepped their authority, particularly with respect to what he termed banning religion from “the public square.”³⁵ Representative Pence stated that the greatest threat to the judiciary in the twenty-first century is “elitism.”³⁶ Representative Pence cited as an example of elitism the fact that the Ten Commandments are depicted at the U.S. Supreme Court and that prayer opens legislative and judicial proceedings, yet court decisions have prohibited such religious conduct in small

29. Chief Justice John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2007, at 1, 3. Others, however, remain unconvinced that judges need a pay raise. See also Erika Lovley, *Why Bankruptcy Judges Face Financial Dilemma*, WALL ST. J., July 25, 2007; Bill Mears, *Increasing Justices’ Federal Judges’ Pay a Tough Sell*, CNN.COM, July 9, 2007, <http://www.cnn.com/2007/US/07/09/judges.pay/index.html>.

30. Shepard, *supra* note 25, at 377.

31. The panel, entitled “The View From the Capitol,” was moderated by Professor Jeffrey W. Grove of the Indiana University School of Law—Indianapolis. Representative Brad Ellsworth, Representative Baron Hill, Representative Mike Pence, View from the Capitol Panel Discussion at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), in 41 IND. L. REV. 305, 316-37 (2008).

32. Representative Pence represents the Sixth Congressional District of Indiana in the U.S. House of Representatives, where he has served since November 2000. Congressman Mike Pence: 6th District of Indiana, <http://mikepence.house.gov/Biography> (last visited Nov. 20, 2007). He describes himself as “a Christian, a conservative and a Republican, in that order.” *Id.*

33. Representative Hill represents the Ninth Congressional District of Indiana in the U.S. House of Representatives. Congressman Baron Hill, Representing the 9th District of Indiana, <http://baronhill.house.gov/bio.shtml> (last visited Nov. 20, 2007). He serves on the House Energy and Commerce Committee and the House Science and Technology Committee, and is part of the Blue Dog Coalition and the New Democrat Coalition. *Id.*

34. Representative Ellsworth represents the Eighth Congressional District of Indiana in the U.S. House of Representatives. The Online Office of Congressman Brad Ellsworth, <http://www.ellsworth.house.gov> (follow “About Brad” hyperlink) (last visited Nov. 20, 2007). Like Representative Hill, Representative Ellsworth also is a member of the Blue Dog Coalition. *Id.* Representative Ellsworth sits on the Armed Services, Agriculture, and Small Business Committees. *Id.*

35. Pence, *supra* note 31, at 328-29.

36. *Id.*

towns such as Winchester, Indiana.³⁷ All three federal legislators voiced support for a judicial pay raise, including Representative Ellsworth, who has personally vowed not to accept a pay raise until the federal budget is balanced.³⁸

Two notable academics rounded out the ISBA Conference. First, Professor Gerard N. Magliocca of Indiana University School of Law—Indianapolis spoke on the topic: “The Chief Justice on Capitol Hill: Opening a Dialog Between the Branches.”³⁹ Professor Magliocca proposed that relations between Congress and the judiciary could be improved by utilizing an approach similar to that undertaken by the chairman of the Federal Reserve Board.⁴⁰ Pursuant to the Humphrey-Hawkins Full Employment Act,⁴¹ the chairman of the Federal Reserve Board provides testimony to the Senate and House Banking Committees twice a year on the state of monetary policy.⁴² Professor Magliocca suggested that the Chief Justice of the Supreme Court provide similar testimony on the state of the judiciary in order to improve communications and relations between Congress and the Supreme Court.⁴³ Professor Magliocca’s proposal was discussed and considered by several conference speakers, including Chief Justice Shepard, who delivers an annual State of the Judiciary speech to Indiana legislators.⁴⁴

Finally, Professor Charles Gardner Geyh of Indiana University School of Law—Bloomington spoke on the topic: “Judicial Independence: Does the Public Really Care?”⁴⁵ He discussed whether, in the grand debate of attacks against the

37. *Id.* at 328.

38. Ellsworth, *supra* note 31, at 334.

39. Gerard N. Magliocca, The Chief Justice on Capitol Hill: Opening a Dialog Between the Branches, Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), in 41 IND. L. REV. 305, 307-16 (2008). Professor Magliocca, Professor of Law at the Indiana University School of Law—Indianapolis since the fall of 2001, teaches torts, constitutional law, intellectual property law, legal history, and admiralty. Indiana University School of Law—Indianapolis, <http://indylaw.indiana.edu/people/profile.cfm?Id=40> (last visited Nov. 20, 2007).

40. Magliocca, *supra* note 39, at 308-09, 312-14.

41. 15 U.S.C. § 3101 (2000).

42. *Id.*

43. Magliocca, *supra* note 39, at 308-09, 312-14. Professor Magliocca readily conceded that, due to separation of powers, Congress could not compel the Chief Justice to give such sworn testimony, as the Humphrey-Hawkins Act requires of the chairman of the Federal Reserve Board. *Id.* at 312.

44. Shepard, *supra* note 25, at 357-58.

45. Charles Gardner Geyh, Judicial Independence: Does the Public Really Care?, Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), in IND. L. REV. 305, 339-53 (2008) [hereinafter Geyh, Judicial Independence]. Professor Geyh is the John F. Kimberling Professor of Law at the Indiana University School of Law—Bloomington, where he has taught since 1998. Charles Geyh, John F. Kimberling Professor of Law, Indiana University School of Law Bloomington, <http://www.law.indiana.edu/directory/cgeyh.asp> (last visited Nov. 20, 2007). Professor Geyh has authored, among other works, *When Courts and Congress Collide: The Struggle for Control of America’s Judicial System*. GEYH, *supra*

judiciary and threats to judicial independence, the public really cares. Ultimately, Professor Geyh surmised that the public really is concerned about these issues, though this conclusion was hardly foregone. Professor Geyh also noted that “if Congress wanted to drive the federal judiciary to its knees, it could do it tomorrow” but has not done so due to a custom of judicial independence that has developed over the past 230 years.⁴⁶

CONCLUSION

Relations between Congress and the federal judiciary need to be improved. This need is not altogether surprising. As discussed at the ISBA Conference, these branches of government have experienced strained relations throughout the nation’s history.⁴⁷ Nor is this friction altogether bad, for the Constitution “creates somewhat of a built-in tension between the concepts of judicial independence on the one hand and judicial accountability on the other hand.”⁴⁸ To some degree, such tensions are part of the genius of the checks and balances of America’s tripartite system of government.

But if allowed to simmer unchecked, such built-in tensions will boil over, resulting in a dysfunctional government that threatens the very fabric of the republic. The ISBA Conference presented an opportunity for legislators and judges to put aside their differences, to examine the root causes of this strained and delicate relationship, and to begin mending relations. Justice Alito rightly acknowledged during his keynote remarks that the ISBA Conference could help improve relations between Congress and the federal courts.⁴⁹ Now, it is up to Congress and the federal judiciary to build upon this foundation and nurture this relationship back to health.

note 3.

46. See Geyh, *Judicial Independence*, *supra* note 45, at 342-43.

47. See generally ISBA Conference, *supra* note 5.

48. LaForge, *supra* note 8, at 9. LaForge explains that the Constitution makes the federal judiciary independent of the political branches by giving judicial power exclusively to the judiciary. *Id.*

But, at the same time, the Constitution makes the judiciary dependent on . . . the political branches of government by giving the other two branches the powers to nominate and confirm . . . federal judges, to impeach and remove federal judges, to establish the lower federal courts, to regulate court jurisdiction, and to make any laws necessary and proper for the exercise of the foregoing powers, including the powers to fund and oversee court operations.

Id.

49. See Alito, *supra* note 10.