

## TRIBUTE TO JUDGE JOHN DANIEL TINDER

DANIEL E. PULLIAM\*

I had the distinct privilege, along with more than forty other attorneys, of serving as a law clerk for Circuit Judge John Daniel Tinder. I lacked any particular awareness of Judge Tinder before his nomination to the Seventh Circuit Court of Appeals, which was announced just weeks before I started law school.<sup>1</sup> Since then, I have learned through personal interactions, news articles, discussions with others, and of course, legal research, of the respect and loyalty Judge Tinder holds for the institution of the law.

### I. BEFORE THE ROBES

Judge Tinder's experience in the practice of law began in varied circumstances—as he started as an Assistant U.S. Attorney, later served as a public defender in the Marion Superior Court, and then became the Chief Trial Deputy in the Marion County Prosecutor's Office.<sup>2</sup> In these roles, Judge Tinder took all manner of cases to favorable jury verdicts, including high-profile murder and rape cases.<sup>3</sup>

As his career progressed, Judge Tinder was often compared to his father, “Honest” John G. Tinder.<sup>4</sup> Perhaps through his father's experience as Marion County Prosecutor from 1955-58, Judge Tinder learned the importance of the law as a foundation for society. So vigorous was John G. Tinder's prosecution of corruption, a sniper was once found in a haystack near the family home in an apparent assassination attempt.<sup>5</sup> The *Indianapolis Times* named him Man of the Year in 1958 for battling corruption<sup>6</sup> and he led a commission to reform the Marion County Prosecutor's Office.<sup>7</sup>

The early years of Judge Tinder's career found him teaching trial advocacy at the Indiana University School of Law-Indianapolis, including when he was being considered for, and ultimately appointed to, the position of U.S. Attorney

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\* Daniel Pulliam is an associate in the business litigation group at Faegre Baker Daniels, LLP. B.A., 2004, *cum laude*, Butler University, Indianapolis; J.D., 2010, *magna cum laude*, Indiana University Robert H. McKinney School of Law.

1. Michael W. Hoskins, *President Picks Judge Tinder for 7th Circuit Seat*, IND. LAW. (July 18, 2007), <http://www.theindianalawyer.com/president-picks-judge-tinder-for-7th-circuit-seat/PARAMS/article/22727> [<http://perma.cc/YEE8-ZRPE>].

2. *Tinder Nominated for U.S. Attorney*, INDIANAPOLIS STAR, June 6, 1984, at 1; Dave Stafford, *Judge Tinder's Retirement Plans Leaked*, IND. LAW. (Mar. 12, 2014), <http://www.theindianalawyer.com/judge-tinders-retirement-plans-leaked/PARAMS/article/33639> [<http://perma.cc/G53B-2J7R>].

3. William E. Anderson, *Baldwin Found Guilty in Pizzeria Murder*, INDIANAPOLIS STAR, May 5, 1979, at 1; *Rape Case Comes to Trial*, INDIANAPOLIS STAR, Apr. 3, 1979, at 19.

4. David L. Haase, *Tinder Draws Praise*, INDIANAPOLIS NEWS, July 22, 1987.

5. *John G. Tinder, 80, Led Probe of 1950s State Highway Scandal*, INDIANAPOLIS STAR.

6. Ted Knap, *John Tinder is Named Man Of the Year for 1958*, INDIANAPOLIS TIMES.

7. William E. Anderson, *Panel Urges Prosecutor Reforms*, INDIANAPOLIS STAR, Feb. 4, 1975, at 1.

for the Southern District of Indiana in February 1984.<sup>8</sup> He was practicing commercial litigation at the time of his U.S. Attorney appointment, but had honed his craft practicing criminal law, where he was known for his “stern determination and quick mind.”<sup>9</sup> Judge Tinder was a trial lawyer<sup>10</sup>—he was at his best in the courtroom, guiding fact finders (often jurors) through his keen understanding of what evidence would influence results favorable to his client.<sup>11</sup>

Judge Tinder described his post as U.S. Attorney as “perhaps the best and most fun job that a lawyer can have.”<sup>12</sup> As U.S. Attorney, a position to which the U.S. Senate unanimously confirmed him,<sup>13</sup> Judge Tinder brought a succession of white collar prosecutions against individuals and entities in the business, political, banking, and legal communities.<sup>14</sup> His office made national news after the 1984 election when it indicted eight Crawford County individuals for voter fraud.<sup>15</sup>

After three years as U.S. Attorney, Judge Tinder went through an elaborate merit selection process that developed judicial nominees to send to the Reagan White House.<sup>16</sup> The process took about eighteen months, which for Judge Tinder meant being one of the last nominees considered by the Senate Committee on the Judiciary and the entire Senate before the Robert Bork nomination to the U.S. Supreme Court in the fall of 1987.<sup>17</sup> Judge Tinder was once again unanimously

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8. *Reagan Must Choose, 3 Names For U.S. Attorney*, INDIANAPOLIS STAR, Feb. 4, 1984. Judge Tinder was also one of the top three candidates for U.S. Attorney when President Ronald Reagan ultimately appointed District Judge Sarah Evans Barker in 1980. *See Field for U.S. Attorney Position Narrowed to 3*, INDIANAPOLIS STAR, Jan. 23, 1981, at 26.

9. *4 in Race for U.S. Attorney Post*, INDIANAPOLIS STAR, Jan. 22, 1981, at 29. Judge Tinder was forced by reporters to deny that seeking the U.S. Attorney post had anything to do with political ambition: “I have no desire to run for any political office at all.” *Id.* As history has shown, Judge Tinder is true to his word.

10. Diane Frederick, *Tinder in Familiar Setting in New Job*, INDIANAPOLIS STAR, May 31, 1984.

11. Judge Tinder was once himself a juror. Associated Press, *Judge Chosen for Jury*, CHI. DAILY L. BULL., Jan. 2, 1992; Susan Schramm, *Judge Calls Jury Experience ‘Enlightening,’* INDIANAPOLIS STAR, Jan. 1, 1992, at D-4.

12. *See Questions Presented: Judge John D. Tinder!!! (Part 1)*, UNDERNEATH THEIR ROBES BLOG (Mar. 4, 2015), [http://underneaththeirrobes.blogspot.com/main/2005/03/questions\\_prese.html](http://underneaththeirrobes.blogspot.com/main/2005/03/questions_prese.html) [<http://perma.cc/PM3D-JYJ2>].

13. *Senate Oks Tinder’s Nomination*, INDIANAPOLIS STAR, June 5, 1984.

14. Diane Frederick, *Porn, White Collar Crime Top Court Stories in ‘84*, INDIANAPOLIS NEWS, Dec. 31, 1984, at 26.

15. Edward Walsh, *Eight Indicted in Indiana on Charges of Buying Votes*, WASH. POST (June 28, 1986), <https://www.washingtonpost.com/archive/politics/1986/06/28/eight-indicted-in-indiana-on-charges-of-buying-votes/a2ddae4e-9bc6-4d02-a3fd-7ca650670d9e/> [<https://perma.cc/CNH4-PU5G>].

16. *U.S. Judge Seat Open, Apply Now*, INDIANAPOLIS NEWS, July 19, 1986.

17. *Questions Presented: Judge John D. Tinder!!! (Part 1)*, *supra* note 13.

confirmed.<sup>18</sup>

## II. DISTRICT COURT YEARS

Judge Tinder disclaimed holding any particular judicial philosophy.<sup>19</sup> He sought to be thorough, prepared, accurate, and fair,<sup>20</sup> but ultimately, his work was driven by his respect and devotion to deciding cases as he understood the law to instruct. Determining what the law directed in any given case was no easy task, consuming many hours of research, analysis, and writing. But in all cases, Judge Tinder left preconceptions behind; his decisions rested on the evidence and the law.

As a judge, both district and circuit, Judge Tinder authored 1078 opinions reported by Westlaw.<sup>21</sup>

But the bulk of those opinions—777 opinions according to Westlaw—were issued over the course of his twenty years serving as a district judge. Consistent with Judge Tinder’s firm understanding that district court opinions did not create binding law, most went unreported. Of the 153 opinions that were reported, the Seventh Circuit reversed only three.<sup>22</sup>

Judge Tinder admitted, even in decisions, that the emotional impact of a case could impose a burden. For instance, in a case about coverage for a cancer treatment the insurer argued was experimental and thus not covered, Judge Tinder wrote:

Despite rumors to the contrary, those who wear judicial robes are human beings, and as persons, are inspired and motivated by compassion as anyone would be. Consequently, we often must remind ourselves that in our official capacities, we have authority only to issue rulings within the narrow parameters of the law and the facts before us. The temptation to go about, doing good where we see fit, and to make things less difficult for those who come before us, regardless of the law, is strong. But the law, without which judges are nothing, abjures such unlicensed

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18. Associated Press, *Senate Confirms Tinder Nomination*, INDIANAPOLIS STAR, Aug. 8, 1987, at 41.

19. Brian J. Paul, *An Interview with Judge John D. Tinder*, CIRCUIT RIDER 11 (Dec. 2011), available at <http://www.icemiller.com/MediaLibraries/icemiller.com/IceMiller/PDFs/publications/An-Interview-with-Judge-John-D-Tinder.pdf> [https://perma.cc/4HF6-Z2NX].

20. *Id.*

21. This number was taken from Westlaw by searching within Seventh Circuit cases using the search term “ju(Tinder).”

22. Perhaps most famously, the Seventh Circuit reversed Judge Tinder’s decision upholding then-Mayor Bart Peterson’s curfew law as constitutional. *Hodgkins ex rel. Hodgkins v. Peterson*, 175 F. Supp. 2d 1132, 1136 (S.D. Ind. 2001), *rev’d*, 355 F.3d 1048 (7th Cir. 2004). The others, in no order of importance, are *United States ex rel. S & G Excavating, Inc. v. Seaboard Surety Co.*, 93 F. Supp. 2d 968, 969-70 (S.D. Ind. 2000), *rev’d*, 236 F.3d 883 (7th Cir. 2001), and *Ellis v. City of Indianapolis*, 800 F. Supp. 733, 734 (S.D. Ind. 1992), *rev’d sub nom., Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993).

formulation of unauthorized social policy by the judiciary.<sup>23</sup>

Focused solely on the fact that “the law only permits the court to look at the insurance plan and the materials involved in the review of the denial of coverage,” Judge Tinder concluded that “a greater fairness or more equitable result” was beyond the court’s grasp.<sup>24</sup>

Judge Tinder sat by designation at the Seventh Circuit, hearing an oral argument by future President of the United States Barack Obama.<sup>25</sup> Yet his most prominent case as a district judge was likely about trash—the interstate importation of trash.<sup>26</sup> Judge Tinder’s decision in the trash case drew harsh criticism from local newspaper editorial boards<sup>27</sup> and went against then-Governor Evan Bayh’s policies, which were under the keen legal oversight of the Governor’s then-Chief Counsel, David F. Hamilton,<sup>28</sup> who would later serve with Judge Tinder on the district and circuit courts.

But Judge Tinder’s years as a district judge will be remembered most for his manner on the bench. He was respectful of attorneys. He had great esteem for the “remarkably talented and civil group of people practicing law” in Indiana.<sup>29</sup> He served as a district judge as the consummate “generalist[]” and was driven by the “[g]uilt learned from 12 years in Catholic schools” combined with a sizeable caseload.<sup>30</sup>

This reputation, as a fair and dedicated jurist committed to the institution of the law, led to his nomination to a vacant spot on the Seventh Circuit Court of Appeals at the close of an unpopular Republican presidency<sup>31</sup> with the

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23. *Harris v. Mut. of Omaha Cos.*, No. IP 92-1089-C, 1992 WL 421489, at \*1 (S.D. Ind. Aug. 26, 1992), *aff’d*, 992 F.2d 706 (7th Cir. 1993).

24. *Id.*; see also Eric B. Schoch, *Cancer-stricken Woman Takes Her Battle to Court*, INDIANAPOLIS STAR, August 1992, at 20.

25. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994). President Obama’s client prevailed in the appeal, in a decision authored by then-Chief Judge Posner. *Id.* Of particular interest to the editors of this law review, the opinion praised a student note in the *Indiana Law Review*. See *id.* at 706 (citing Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the ‘Manifest Disregard’ of the Law Standard*, 27 IND. L. REV. 241, 251-54 (1993)).

26. *Gov’t Suppliers Consolidating Servs., Inc. v. Bayh*, 734 F. Supp. 853, 855 (S.D. Ind. 1990).

27. *Dumping in Indiana*, MUNCIE STAR, Apr. 1990; *Stop This Shame!*, INDIANAPOLIS STAR, July 3, 1990, at 14.

28. James G. Newland, Jr., *Lawyer Says Fear Behind Trash Case*, INDIANAPOLIS STAR, Aug. 29, 1991, at 36.

29. *Questions Presented: Judge John D. Tinder!!! (Part 1)*, *supra* note 13. He also recognized that a “small crowd” could be “rude, overreaching and sloppy.” *Id.*

30. *Id.*

31. See *Presidential Approval Ratings—George W. Bush*, GALLUP, <http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx> [<http://perma.cc/XJF2-RAHR>] (last visited Apr. 1, 2016).

confirming legislative body, the U.S. Senate, only recently changing control from Republican to Democrat.<sup>32</sup> The prospect of any bipartisan confirmations occurring in this fraught political environment seemed uncertain.<sup>33</sup>

### III. CIRCUIT COURT YEARS

Just before Christmas 2007, Judge Tinder was confirmed—once again unanimously.<sup>34</sup> On the Circuit Court, Judge Tinder authored 301 opinions.<sup>35</sup> As a former state and federal prosecutor with twenty years on the district court bench, Judge Tinder brought unique and profound insight to the appellate bench.

In *Harris v. Hardy*,<sup>36</sup> Judge Tinder authored an opinion for the court that held that an Illinois's state court's conclusion that prosecutors did not purposefully discriminate in peremptorily striking potential African American jurors rested on an unreasonable determination of facts. Nearly thirty years had passed since the crime was allegedly committed.<sup>37</sup> But the detailed, thoughtful opinion laid out the troubling nature of the prosecutors' use of fifteen of twenty peremptory strikes on potential African American jurors.<sup>38</sup>

Judge Tinder's opinions for the court had strong persuasive effect, only rarely drawing a dissent.<sup>39</sup> He also rarely found reason to dissent himself.<sup>40</sup> An example of Judge Tinder's ability to persuade his colleagues can be found in *Bloch v. Frischholz*.<sup>41</sup> Judge Tinder's opinion for the court, en banc, turned a split panel decision into a unanimous 11-0 opinion in a Fair Housing Act case.<sup>42</sup>

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32. Associated Press, *Congress 2007: Democrats in Charge*, CBS NEWS (Dec. 18, 2007, 4:46 PM), <http://www.cbsnews.com/news/congress-2007-democrats-in-charge> [<http://perma.cc/8YZT-DNCU>].

33. Rob Schneider, *Senate Approval May Not Be Swift*, INDIANAPOLIS STAR, Aug. 13, 2007, at B5.

34. Maureen Groppe, *Indiana Judge Gets OK for Appeals Court Seat*, INDIANAPOLIS STAR, Dec. 20, 2007, at B3.

35. Judge Tinder was also the first-ever jurist to go to the Seventh Circuit from the Southern District of Indiana, or at least since Indiana's federal districts were split in two in 1928. See Michael W. Hoskins, *Jurist Poised to Make History*, IND. LAW., July 25, 2007, at 26.

36. 680 F.3d 942 (7th Cir. 2012).

37. *Id.* at 945.

38. *Id.* at 951.

39. *Sweeney v. Pence*, 767 F.3d 654, 671 (7th Cir. 2014) (Wood, C.J., dissenting); *United States v. Hunter*, 708 F.3d 938, 948 (7th Cir. 2013) (Tharp, J., dissenting); *Lane v. Williams*, 689 F.3d 879, 884 (7th Cir. 2012) (Wood, J., concurring in part and dissenting in part); *Freda v. Comm'r of Internal Revenue*, 656 F.3d 570, 577 (7th Cir. 2011) (Manion, J., dissenting); *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010) (Rovner, J., dissenting in part).

40. *Jensen v. Clements*, 800 F.3d 892, 908 (7th Cir. 2015), *reh'g denied* (Oct. 9, 2015); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 530 (7th Cir. 2012); *United States v. Conrad*, 673 F.3d 728, 737 (7th Cir. 2012); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 728 (7th Cir. 2009).

41. 587 F.3d 771, 772 (7th Cir. 2009).

42. *Id.*

The panel decision had affirmed the district court's grant of summary judgment, over a dissent, because the plaintiffs failed to present sufficient evidence of intentional discrimination.<sup>43</sup> After extensive analysis, the opinion for the court concluded otherwise—a combination of “facts and inferences” pushed the case beyond the summary judgment stage.<sup>44</sup>

Another example can be found in *United States v. Bohman*.<sup>45</sup> Judge Tinder's opinion for the court reversed the denial of a motion to suppress on the basis that the police may not stop a vehicle only because it emerged from a site suspected of drug activity. At issue was whether police had sufficient suspicion under the Fourth Amendment to stop the vehicle.<sup>46</sup> At argument, Circuit Judge Posner expressed views that the officer had an informer supporting his suspicion and the stop was not particularly intrusive—“a little reason for a little stop.”<sup>47</sup> But after careful analysis, the panel concluded unanimously that the absence of any suspicion related to the vehicle, beyond its emergence from the suspected meth site, failed to justify the stop.<sup>48</sup>

In other opinions, Judge Tinder took difficult legal issues, framed them in the practicalities of life, and came to a common sense result. For instance, Judge Tinder's opinion for the court in *Parker v. Franklin City Community School Corp.*<sup>49</sup> held that a girls' basketball team suffered harms based on a disparity in scheduling—the boys' team's games were scheduled for primetime matchups 95% of the time while the girls' team's games received primetime scheduling only 53% of the time. Under Title IX, this constituted disparate treatment resulting in the possibility that “girls might be less interested in joining the basketball team because of a lack of school and community support, which results in the perception that the girls' team is inferior and less deserving than the boys'.”<sup>50</sup>

Many of those who worked for Judge Tinder like myself characterize their time in his chambers at the district or circuit court (and for a few, both courts) as one of the best job of their lives. Judge Tinder mentored us in our development as lawyers during our time in chambers.<sup>51</sup> The opportunity to work under Judge Tinder's instruction laid the foundation for our futures in all manner of legal practice ranging from the large and small law firms, public service, prosecutors'

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43. *Bloch v. Frischholz*, 533 F.3d 562, 563 (7th Cir. 2008), *on reh'g en banc*, 587 F.3d 771 (7th Cir. 2009).

44. *Bloch*, 587 F.3d at 786.

45. 683 F.3d 861, 862 (7th Cir. 2012).

46. *Id.* at 864-867.

47. Oral Argument at 3:50, *United States v. Bohman*, 683 F.3d 861, 862 (7th Cir. 2012) (No. 10-3656).

48. *Bohman* relied on the holding in *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999), that drew a strong dissent from Circuit Judge Easterbrook in that case.

49. 667 F.3d 910, 923 (7th Cir. 2012).

50. *Id.*

51. Regular outings, especially to celebrate birthdays, ranged from trips to the Indianapolis Motor Speedway to the Indiana University Maurer School of Law.

offices, professorships, and even judgeships. Although expectations were high for everyone, Judge Tinder also showed exceptional patience and consideration.<sup>52</sup> Judge Tinder showed us by example, with careful deliberation, rigorous preparation, a meticulous eye, and keen judgment, respect for the institution of the law.

#### IV. RETIREMENT

Judge Tinder's plans for retirement famously leaked when he gave a prospective law clerk the courtesy of knowing why no interview would be forthcoming—"I recently decided that I will be leaving the court in 2015 so I will not be hiring any additional clerks."<sup>53</sup> With his judicial robes set aside after an extraordinary twenty-eight-year career, Judge Tinder's next move awaits.<sup>54</sup>

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52. Jason Basile, who served with Judge Tinder two stints on the district court and once on the circuit court, characterized him as "easily approachable, the kind of guy who often ate lunch with his staff and helped the clerks without making them feel like he was teaching." Rob Schneider, *Legal Profession Praises Nominee to Appeals Court*, INDIANAPOLIS STAR, Aug. 13, 2007, at B1.

53. Stafford, *supra* note 3.

54. Patricia Manson, *Ready to Leave, But Not Disappear*, CHI. DAILY L. BULL., May 7, 2014.