

# Indiana Law Review

Volume 46

2013

Number 1

## TRIBUTES

### FRANK SULLIVAN, JR., THE VERY MODEL OF A MODERN JUSTICE

RANDALL T. SHEPARD\*

It is in the nature of modern leadership style to talk about enterprises as being led forward by virtue of collective judgment and the shared commitment of all those who are engaged in the endeavor. Still, there are those among us whose individual approach to improving the institution places them conspicuously above the crowd.

So it is with the American judiciary. One can acknowledge both the benefit of collegial leadership and the importance of impartial decisionmaking, while still admitting that some among us have mattered more than the rest of us.

No one has done more to advance a modern judiciary in this state and elsewhere than Justice Frank Sullivan, Jr. From the courts of small towns to discussions on an international stage, Frank Sullivan has been a figure who mattered.

There are at least two reasons why we ought pause to celebrate the contributions of such a transformative leader. First, there is the matter of simple justice. Equity commands that we take the time to recognize great achievers for what they have done. Second, public recitation of their superb leadership may well inspire the rest of us to reach for higher goals in light of the inspiration they have provided.

While there are many prisms through which one might view the multiple contributions of Frank Sullivan to the American bench, I choose here to focus on four.

#### I. "JUDGING *IN* INDIANA"

There was a time within memory when nearly all the work done by judges was undertaken by single judicial officers sitting as the sole arbiters of cases in each of the nation's courthouses. The system of justice proceeded one case at a time, decided by one judge at time, and judges seldom had reason to do business with other judges, save perhaps very occasionally those in the county next door.<sup>1</sup>

---

\* Chief Justice of Indiana, 1987-2012. A.B., Princeton University, 1969; J.D., Yale Law School, 1972; LL.M., University of Virginia, 1995.

1. See, e.g., John Baker, *The History of the Indiana Trial Court System and Attempts at Renovation*, 30 IND. L. REV. 233, 250-51 (1997) (discussing the general assembly's tendency "to create an autonomous court . . . [w]hen a need for additional judicial resources arose," leading to

Even our vocabulary has long emphasized the value of such individual decisionmaking. For example, we often speak of fostering “judicial independence” as assuring fair and impartial decisionmaking, and by this we mean decisions made by the judge alone without participation by anyone outside the courtroom.<sup>2</sup>

The evolving nature of the nation’s court systems has altered how we go about the business of running them and improving them. In this state, for example, the annual caseload has grown from less than a million a year during the early 1980s to roughly two million a year by the time the first decade of the new century ended.<sup>3</sup> Likewise, the number of judges at work on this mass of disputes has grown from perhaps two hundred just thirty-five years ago to some five hundred in the present moment. The complexity of the work has surely grown at rates that match the increase in the quantity of the work. The judiciary has thus accelerated the means and expanded the institutions by which it works to devise more effective and efficient techniques.

The changes in how courts function have demanded a higher level of collaboration and purposefulness than would have been adequate even half a century ago. Frank Sullivan has lived this idea, and he has preached it.

It was Justice Sullivan who devised a phenomenally good description of the ways by which a modern judge might decide to pursue his or her work. Addressing judges who were about to begin their careers after the elections of 2006, he told them he intended to describe “not what it is to be a judge in Lake or Cass or Clark County—or, for that matter, to be a judge in a broad, transcending jurisprudential sense—but what it is to be a judge in the statewide system of approximately 350 men and women, now including each of you.”<sup>4</sup> He outlined the ways trial judges were involved in the many instrumentalities of the profession and the courts, focusing on what Sullivan often labeled “Supreme Court Enterprises,” activities like those in bar admission, lawyer discipline, the Indiana Judicial Center, and the Division of State Court Administration. All these, he pointed out, make it possible for today’s Indiana judges to devise and

---

a proliferation of courts at the end of the 20th century “which included: [t]he supreme court, court of appeals, circuit, superior, criminal, juvenile, probate, municipal, justice of the peace, city, town, and magistrate courts”).

2. See Matthew W. Green, Jr. et al., *The Politicization of Judicial Elections and its Effect on Judicial Independence*, 60 CLEV. ST. L. REV. 461, 470-71 (2012) (discussing the widely accepted virtues of judicial independence to upholding fair and impartial rulings).

3. See Niki Kelly, *Trial Courts’ Caseload Slips for a 3rd Year*, J. GAZETTE (Oct. 30, 2012, 10:08 AM), <http://www.journalgazette.net/article/2012/1030/LOCAL/310309969/-1/LOCAL11> (noting the 2011 caseload to be at “[a]bout 1.68 million cases,” which is down from “a peak of 2 million new cases in 2008”); see also Maureen Hayden, *Case Load: Indiana Court Filings on the Rise*, NEWS & TRIB. (Apr. 22, 2010), <http://newsandtribune.com/local/x1612547671/Case-load-Indiana-court-filings-on-the-rise/> (recognizes a 29% increase in criminal and civil cases and a 25% increase in child services cases over the span of a decade).

4. Justice Frank Sullivan, Jr., Ind. Supreme Court, Remarks to the Indiana Judicial Center New Judges Orientation: Judging in Indiana (Jan. 26, 2007) (transcript on file with the author).

implement new methods for pursuing justice, like court-appointed special advocates, mediation, senior judgeships, public defender improvement, court interpreters, drug courts, and trial court technology. He highlighted the fact that much of the reform in such fields “represents the implementation of discrete ideas first offered up by Indiana judges.”<sup>5</sup>

And then he wrapped up by exhorting the class of new recruits to be a certain kind of judge:

I have concluded that there are two types of Indiana judges. One, I must say rapidly diminishing in number, views his or her courtroom as a castle neither to be breached nor ventured out of. I could say more but you get the idea. The second type of Indiana judge is of the kinds of have described in my remarks: one who views himself or herself as an integral member of a statewide judicial family, a family not bounded by courtroom or courthouse or county or judicial district. These Indiana judges are deeply engaged in the work of the Indiana Judicial Center and Judges Association. They are a font of new ideas. They recognize that both the adjudicative work, and the administrative work of our judiciary is statewide in nature and they are totally committed to a vision at least similar to that I have described—that vision becoming a reality not just for their court or for their county but for our entire state.<sup>6</sup>

Sullivan’s conviction about the value of statewide collaboration in court reform, often led by judges, was a hallmark of his work in juvenile justice and in court technology, to name two fields where he has been especially important. Most justice happens in the county courthouses, after all, because 98% of all litigation begins and ends in the county courthouse without ever seeing an appellate tribunal. Sullivan’s energetic approach to modernizing trial court technology led Marion County prosecutor Scott Newman to say, “The Supreme Court cares about the cases it never sees.”

As I shall argue later, Frank Sullivan magnificently enriched our jurisprudence, but his approach to being a justice reflected a broad idea of the good he could do for the whole of the bench. In this respect, his judicial career echoed what a member of the Massachusetts Supreme Judicial Court once wrote: “No judicial system can be stronger than its trial judges. A learned and brilliant court of last resort can give a system a high reputation abroad, but that reputation will be hollow unless nearly equal merit is found in the trial court.”<sup>7</sup>

## II. SULLIVAN ON THE NATIONAL STAGE

Frank Sullivan’s achievements during his career as a justice have been such that reformers in other states have found them to be valuable guidance. One could mention, for instance, the dramatic improvement in the representativeness

---

5. *Id.* at 5.

6. *Id.* at 5-6.

7. HENRY T. LUMMUS, *THE TRIAL JUDGE* 7 (Foundation Press 1937).

of juries, achieved by the Judicial Technology and Automation Committee, which he chaired. This achievement, completed with important leadership from Justice Theodore Boehm and others, has led to more representative juries in thousands of trials in hundreds of courtrooms.<sup>8</sup> It has been a monument to reinvigorating trial by jury, resulting in national recognition for Indiana and emulation elsewhere.<sup>9</sup>

I choose to record here, however, a heroic rescue engineered by Sullivan that has fostered better judging in virtually every state of the union. Only a few people in Indiana know the story.

For at least several decades, the Appellate Judges Conference of the American Bar Association has staged national educational events for members of the state and federal judiciary. These opportunities were particularly valuable because the relatively small number of judges who hear appeals in any given state or circuit meant that it was economically difficult for individual court systems to sustain ongoing judicial education designed for appellate judges. Staging such educational events for a national market, however, made is feasible.

Around the turn of the century, however, subsidies from the State Justice Institute and other financial supporters waned to the point that it seemed these valuable national sessions might disappear altogether. The team of judges who had originally engineered these events had dispersed or gone far enough into retirement that the cause seemed all but lost.

Fortunately, as this crisis loomed, Frank Sullivan served on the executive committee of the Appellate Judges Conference, and indeed served as the chair of the conference. Sullivan rallied an army of the willing to redesign and rescue this important national asset. He forged a new alliance between the ABA and the Dedman School of Law at South Methodist University, one that has persisted to this day.<sup>10</sup> He engineered a collaboration with leading appellate practitioners that has broadened the audience for these events, and he connected these seminars with the national group that trains the lawyers who staff appellate courts. All in all, the enterprise has found a solid new footing and continues to serve the American bench and bar. It has happened only because of the talent and determination of Frank Sullivan. This has not been front page news anywhere,

---

8. See, e.g., *Jury Management System*, COURTS.IN.GOV, <http://www.in.gov/judiciary/jtac/2647.htm> (last visited Dec. 5, 2012); see also *Statewide Jury Pool Projects*, COURTS.IN.GOV, <http://www.in.gov/judiciary/jtac/2645.htm> (last visited Dec. 5, 2012).

9. See Nina Settappa, *Court Receives Award for Improving Jury Selection*, IND. NEWS CTR. (2009), <http://www.indiananewscenter.com/news/local/78509562.html?m=y> (noting the Indiana Supreme Court's receipt of "the 2009 G. Thomas Munsterman Award for Jury Innovations" from the "National Center for State Courts" for work done by "the Judicial Technology and Automation Committee" in its efforts "to create a broader, more accurate jury system including a statewide master jury pool list that's available to courts through a secure Web site") (last visited Dec. 1, 2012).

10. See APP. JUDGES EDUC. INST., <http://www.law.smu.edu/AJEI/Home> (last visited Dec. 5, 2012) (advertising the co-sponsorship of the SMU Dedman School of Law for the November 2012 summit).

but it is an achievement that has made for better justice throughout the whole country.

Achievements of national scope are the most that many can manage, but Frank Sullivan has also been tapped for international activities in the name of legal reform and public policy. Britain's legendary Ditchley Foundation, created in 1958, assembles small groups of the highest-level leaders from the worlds of politics, business, the academy, and the media.<sup>11</sup> The objective is to analyze the challenges of modern society and build bridges of understanding across the Atlantic. Ditchley's work now reaches beyond this original foundation to take up issues of concern from all over the globe. Justice Sullivan and his wife, Cheryl Sullivan, have been called upon to confer with international partners on subjects ranging from devolution and subsidiarity, to the role of the family in public policy, to society's resilience in withstanding disasters. Indeed, Justice Sullivan served as a director of the American Ditchley Foundation, where he sat alongside such figures as John Brademas, Joseph Califano, and Donald McHenry.

In the course of his associations with so many global leaders from many walks of life, Frank Sullivan has built special connections with people who serve the judiciary in places like Scotland, England, and Germany. He has tapped these connections over and over in recruiting scholars and judges to participate in law-related events here in Indiana and elsewhere in America. I think it fair to say that no one since Justices Shake and Richmond at Nuremberg<sup>12</sup> has been so integrally connected to the legal profession overseas as Frank Sullivan.

### III. WALKING THE WALK OF EQUAL OPPORTUNITY

The bench and bar and the nation's law schools rightly celebrate the fact that graduating classes of recent decades have been demographically vastly more diverse. Still, the reality is that helping the large numbers of women, African-Americans, Asians, and Hispanics move up the ladders of success and influence is a task with plenty remaining to be done.

Frank Sullivan has toiled in this vineyard on the national stage and in his own backyard. One need only have observed who worked in his office to see his appreciation of how the credential of an appellate court clerkship can help propel a young lawyer's career. The long line of women and minority graduates whom Justice Sullivan recruited to his chambers was a vivid demonstration of an influence of Sullivan that will last for decades to come.<sup>13</sup> Fully half of the Sullivan clerks were minority lawyers. No trumpets sounded; no press releases came out of the machine. Just solid and demonstrable progress at the hands of a judge determined to find good talent and nurture it.

---

11. DITCHLEY FOUND., <http://ditchley.co.uk/> (last visited Dec. 4, 2012).

12. See SUZANNE S. BELLAMY, *HOOSIER JUSTICE AT NUREMBERG* (Ind. Historical Soc'y Press 2010).

13. *Indiana Law—Justice Sullivan Chairs National Program Urging Minority Law Students to Seek Judicial Clerkships*, IND. LAW BLOG (Feb. 10, 2004), [http://www.indianalawblog.com/archives/2004/02/indiana\\_law\\_jus.html](http://www.indianalawblog.com/archives/2004/02/indiana_law_jus.html).

This commitment reached across the country, as with so much else that Frank Sullivan has touched. He has been a leading figure in promoting minority clerkships since the American Bar Association began its Judicial Clerkship Program in 2001.<sup>14</sup> Alternately recruiting schools, judges, and students, Sullivan assisted and inspired others to add to the progress he so demonstrably made here at home.

For all these reasons and more, the ABA Section of Litigation named Frank Sullivan an early winner of its Diversity Leadership Award, recognizing those whose special efforts make the professional “more welcoming, inclusive, and truly representative of the population we serve.”<sup>15</sup> Receiving this award in New York City in the presence of his wife, Cheryl, and a number of his clerks, Justice Sullivan gave a compelling explanation of why he thought this important:

It assures that where we have the power to select, or to mentor, or to promote, we will consider men and women different than ourselves, not just those who are the same. To be sure, this is a moral imperative, if not a legal one. But beyond that, when we do bring into our professional and personal orbit men and women different than ourselves, we invariably enrich ourselves by their markedly different experiences and perspectives.<sup>16</sup>

The remarkable young men and women who were Sullivan recruits over the nineteen years of his service as a Justice have now begun to achieve and contribute in their own right. Others who are still just beginning their careers will doubtless add value that is yet unimagined, doing so partly because of the chance Frank Sullivan gave them. This will be what Holmes called “the subtle rapture of a postponed power.”<sup>17</sup>

#### IV. SCHOLARSHIP AND SULLIVAN AT THE CONFERENCE TABLE

For the equivalent of nearly a whole generation, I spent most of my Thursdays sitting down the table from Frank Sullivan in the conference room where the Indiana Supreme Court actually makes decisions. Around that table,

---

14. See Justice Frank Sullivan, Jr., Ind. Supreme Ct., Remarks to Judges and Faculty at the University of St. Thomas School of Law (Feb. 1, 2011), available at <http://blogs.stthomas.edu/ethicalleadership/2011/03/09/remarks-of-indiana-supreme-court-justice-frank-sullivan-jr-to-judges-and-faculty-at-ust/>.

15. Press Release, A.B.A., Second Annual Diversity Leadership Awards Recognizes Indiana Justice Frank Sullivan, Jr. and the Coca-Cola Company Legal Division (Mar. 2, 2010), <http://www.abanow.org/2010/03/second-annual-diversity-leadership-awards-recognizes-indiana-justice-frank-sullivan-jr-and-the-coca-cola-company-legal-division/>.

16. Frank Sullivan, Jr., Justice, Ind. Supreme Court, Remarks Accepting the ABA Section of Litigation 2010 Diversity Leadership Award (Apr. 21, 2010).

17. G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1467 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 73 (M. Howe ed. 1962)).

the state's court of last resort decides which of the thousand annual petitions for further appellate review will be granted—and then deliberates on the results after those cases have been argued. Over time, those discussions have become more regular and more fulsome, such deliberations having dwindled nearly to extinction during the decades when the court was constitutionally obliged to spend nearly all its time on mandatory direct criminal appeals.

When it came to discussing legal issues around the conference room table, Frank Sullivan was both a master at describing where we had been before and an engaging contributor who enriched the discussion about where we should go next. Aside from his own impressive memory, his command of our recent past flowed from the individual memoranda he wrote about every single case that was the subject of a petition to transfer. He had prepared each of these himself (the first person I knew who mastered voice recognition software), and he could search them all on his computer while the discussion progressed. As best I can recall, I never actually saw one of these memos, but they were Justice Sullivan's record of where we had encountered similar issues to the ones we were debating on any given conference day. He could let us know why the former case was similar or a little dissimilar and, more importantly, how each of us had voted and often what we had said in casting our votes. It was a powerful tool in the hands of a gifted combatant (I use that last word without meaning to suggest that the proceedings were other than cordial, though Justice Brent Dickson once said to his staff while headed out the door, "I'm going to a wage conference.").

While I remember Justice Sullivan's memos fondly, far more important was the intellectual power and curiosity that Frank Sullivan brought to the court's weekly discussions. Over and over again, these encounters led to writing opinions of some elegance. Sometimes they produced both an elegant majority opinion and a first-rate dissent. The higher caliber of the written product led to more and more Indiana Supreme Court opinions being cited by courts in other states and to more Indiana entries in legal texts used to train the next generation of lawyers. It had not always been so.

A satisfactory accounting of Frank Sullivan's contribution to this improving body of work will need to await another day, so I will content myself with praise for one of his later opinions, which I think illustrated the remarkable caliber of his thinking and his craftsmanship.

The appeal of *Snyder v. King*<sup>18</sup> arose because David Snyder, convicted of misdemeanor battery, was dropped from the voter registration rolls while incarcerated for his crime. Rather than simply re-register as he was entitled to do, Snyder filed a civil rights action in U.S. District Court. He claimed that he was wrongly dropped because battery was not an "infamous crime" for which the Indiana General Assembly was empowered to disenfranchise him under article II, section 8 of the Indiana Constitution. The issue of what constituted an "infamous crime" came to the Indiana Supreme Court as a certified question. This avenue itself was an innovation that took full bloom during the Sullivan era; in earlier years, the Indiana Supreme Court accepted questions only from the

---

18. 958 N.E.2d 764 (Ind. 2011).

federal circuits.

Justice Sullivan's opinion for a unanimous court was a work of art. The state's existing decisional law, going back the better part of a century, meandered a bit. The notion of disenfranchisement for certain offenses had ancient origins, and to examine whether Indiana caselaw was on respectable footing, Sullivan examined authority from the likes of Lord William Eden Auckland, the English Reports, the works of Jeremy Bentham, and the debates of Indiana's constitutional convention. This was no mere frolic and detour; it was an important step in deciding whether *stare decisis* should carry the day or whether we needed a fresh start.

Aside from this substantial venture in legal history, Justice Sullivan did three things that reflected the care and thoughtfulness of his judicial craftsmanship. For one thing, he identified issues the litigants themselves had not raised but which seemed very important to the question sent over by the district court. Even if battery was not an infamous crime, as the court finally concluded, it was not unconstitutional to remove Snyder from the registration rolls while he was in prison and leave it to him to re-register when he was out of jail. After all, nearly all states disqualify incarcerated convicts from voting while they are imprisoned. The real upshot of Snyder's claim, Justice Sullivan wrote, was in effect a contention "that the Indiana Constitution compels the General Assembly either to release imprisoned convicts on Election Day so that they may vote at the polls, to provide polling places at the myriad correctional and jail facilities throughout the State, or to provide incarcerated convicts with absentee ballots."<sup>19</sup>

Second, Justice Sullivan took time to outline the disadvantages of resolving issues of constitutional law through the technique of certified questions. Among other things, it runs counter to the judicial principle of examining the constitutionality of a decision by one of the other branches of government only when a live dispute cannot be resolved through non-constitutional means.

Third, Sullivan laid out in vivid detail how Snyder's decision to file in federal court when his only real question was one of state constitutional law was an unattractive circumvention of the regular course of litigating in Indiana courts.<sup>20</sup> He described the disadvantages of the technique employed and urged litigants to consider the other tools available to them.

Frank Sullivan's opinion in *Snyder v. King* will rightly be cited multiple times in many future cases for its elegant explication of the question at hand. It will also stand as a roadmap for future judges on prudential issues and judicial behavior worthy of emulation.

I lift up the *Snyder* opinion while holding firmly to the view that it was not, as the saying goes these days, a "one-off." It stands alongside scores of superb pieces of scholarship and judicial craftsmanship that will continue to shed light on important questions for decades to come.

---

19. *Id.* at 785.

20. *Id.* at 787-88 ("Thus, both parties wanted this Court to resolve at least a part of their dispute but apparently did not want to go through the 'trouble' of developing the issues in lower state courts, preferring to litigate the matter in the first instance here.").



## CONCLUSION

So what to make of these few accounts that only begin to outline the many ways Indiana and its lawyers and judges have benefitted from the service and the leadership of Frank Sullivan, Jr.?

I say this. As Indiana closed in on celebrating its first hundred years of statehood, the prevailing judgment of scholars and close observers was that the most impressive period in the Indiana Supreme Court's history had been a time in the 1840s that coincided with the service of Indiana's earlier Justice Sullivan, or rather of Judge Sullivan, as the Indiana Supreme Court members were then called.<sup>21</sup> As a friend of mine might have said, it was more than a golden moment.

The judicial career of the present Justice Sullivan stands as proof that we have once again been the beneficiaries of an extraordinary talent.

---

21. *See, e.g.*, HUGH McCULLOCH, MEN AND MEASURES OF HALF A CENTURY 48 (Scribner's, New York, 1900); JOHN B. STOLL, HISTORY OF THE INDIANA DEMOCRACY 389 (Indiana Democratic Publishing Co., Indianapolis, 1917); ILEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 204-05 (Federal Publishing Co., Indianapolis, 1916). Judge Jeremiah Sullivan contributed even more by inspiring his son Algernon to become a lawyer and found the legendary New York firm of Sullivan & Cromwell. Brandon T. Rogers, *Jeremiah C. Sullivan*, in JUSTICES OF THE INDIANA SUPREME COURT 30-31 (Linda C. Gugin & James E. St. Clair eds., 2010).