



CHIEF JUSTICE RICHARD M. GIVAN, 1921-2009

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TRIBUTE

A TRIBUTE TO RICHARD M. GIVAN, 1921–2009 JUSTICE, INDIANA SUPREME COURT, 1969–1994 CHIEF JUSTICE OF INDIANA, 1974–1987

JUSTICE BRENT E. DICKSON*

With the recent death of Richard M. Givan,¹ Indiana has lost one its most important jurists. He was the third-longest serving Justice in Indiana Supreme Court history,² the second-longest serving Chief Justice,³ and the Supreme Court's most prolific author of majority opinions in the past 130 years.⁴ Noteworthy also is his transitional role when the appellate judicial selection system underwent massive constitutional revision and as the court began to substantially expand its administrative responsibilities.

Dick Givan's life was enormously rich and memorable in many ways apart from his noteworthy legal career. He was a loving and devoted husband, the father of four daughters, a stalwart of his church, the Fairfield Friends Meeting in Camby, Indiana, a mainstay of his local Lions Club, a U.S. Army Air Corps pilot during World War II, an avid Arabian show horse trainer, a photographer at the Indianapolis 500 automobile race, and a person with numerous other passions.⁵ His folksy, plain-spoken, and unpretentious manner resulted in many

* Justice, Indiana Supreme Court. B.A., 1964, Purdue University; J.D., 1968, Indiana University School of Law—Indianapolis. Justice Dickson and Chief Justice Givan served together on the Indiana Supreme Court for six years.

1. Richard M. Givan died July 21, 2009. He was born June 7, 1921.

2. Justice Givan's length of service (9,125 days) is presently exceeded by only Judge Isaac Blackford (1817–53, 12,899 days) and Justice Roger O. DeBruler (1968–96, 10,174 days).

3. Richard M. Givan's thirteen years as Chief Justice of Indiana is eclipsed only by current Chief Justice Randall T. Shepard, who is presently in his twenty-third year in the position.

4. Justice Givan's 1,571 majority opinions are surpassed only by the 1,573 majority opinions authored by Judge Samuel Perkins during his two terms in office in 1846–65 and 1877–79. Justice DeBruler authored 889 majority opinions and Judge Blackford 874. During his twenty-five years on the court, Justice Givan participated in 5,983 cases.

5. Further details may be found at JEROME L. WITHERED, *HOOSIER JUSTICE: A HISTORY OF THE SUPREME COURT OF INDIANA* 147–48 (1998); Jerome L. Withered, *Richard M. Givan: Justice, Indiana Supreme Court 1969–1994, Chief Justice of Indiana 1974–1987*, 30 *IND. L. REV.* 35 (1997) [hereinafter *Withered, Richard M. Givan*]; Greg Kuesterman, *Justice Givan Nearing End of Brilliant Legal Journey*, *IND. LAW.*, July 13, 1994, at 6; and the Indiana Supreme Court Legal History Lecture Series, Justice Richard M. Givan, <http://www.in.gov/judiciary/citc/cle/givan/index.html> (last visited Nov. 9, 2009).

devoted friends and admirers from all walks of life. This tribute, however, focuses on Richard M. Givan, the ninety-sixth Justice of the Indiana Supreme Court.

Justice Givan's judicial service was richly colored by his forbearers and his own exceptionally broad legal and political experiences. He was a fourth-generation Hoosier lawyer, and both his father and great-grandfather had been Indiana trial court judges.⁶ A graduate of this law school in 1951, Dick Givan's own sixteen and one half years of law practice included work as a state public defender, a Marion County deputy prosecutor, and an Indianapolis trial lawyer whose extensive jury trial experience included twenty-eight jury trials in eighteen Indiana counties outside Marion County.⁷ Givan also argued more than fifty appellate cases before the Indiana Supreme Court and two cases before the U.S. Supreme Court.⁸ Before becoming an Indiana Supreme Court justice and eventually the Chief Justice of Indiana, Richard Givan had already served in the other two branches of state government. He served in the executive branch from 1953 to 1964 as a Deputy Attorney General and was then elected to the Indiana House of Representatives in 1966.⁹

During his legislative service, the General Assembly gave the first of two required approvals for a comprehensive amendment to the Judicial Article of the Indiana Constitution.¹⁰ Among other things, the amendment discarded appellate judicial selection by frequent partisan political elections in favor of a system of gubernatorial appointment following an evaluative selection process, with each appointee's retention subject to non-partisan approval votes by the electorate every ten years.¹¹ One of the associated revisions changed the title of Indiana Supreme Court "judge" to "justice." Before the constitutional amendment process was completed, Richard Givan was nominated at the state Republican Convention, and subsequently elected, to the position of Judge of the Indiana Supreme Court. After the adoption of the amendment, Justice Givan was

6. His great-grandfather Noah S. Givan had been a circuit court judge in Dearborn County before 1900; his grandfather Martin J. Givan was a noted Dearborn County trial lawyer; and his father, Clinton H. Givan, an Indianapolis lawyer, served for one term (1924-28) as judge of the Marion Superior Court, Room 4.

7. Richard M. Givan, *The Fun of Being a Lawyer and a Judge*, IND. LAW., Jan. 11-24, 1995, at 5. His two U.S. Supreme Court arguments were in *Irvin v. Dowd*, 359 U.S. 394 (1959), and *Irvin v. Dowd*, 366 U.S. 717 (1961) (following remand).

8. *Id.*

9. Withered, *Richard M. Givan*, *supra* note 5, at 35.

10. Article 16 of the Indiana Constitution prescribes that constitutional amendments must be "agreed to by a majority of the members elected to each of the two houses" in each of two consecutive sessions of the General Assembly, and thereafter approved by "a majority of the electors voting" at the next general election. The comprehensive amendments to Article 7 first passed the General Assembly on March 6, 1967, and were subsequently reapproved March 10, 1969. They were ratified by Indiana voters on November 3, 1970, and became effective on July 1, 1972.

11. IND. CONST., art. VII, § 10.

repeatedly successful in seeking retention, receiving favorable state-wide voter approvals of 64.7% in 1974 and 66.1% in 1984. He and Justice Roger O. DeBruler were the only two Supreme Court judges elected under the former political election system and thereafter retained under the nomination/appointment system.

As Chief Justice, Richard Givan shepherded substantial enhancements of the court's administrative functions. During his tenure, statutory authorization was received for the creation and funding of the offices of Supreme Court Administration and State Court Administration.¹² He was also instrumental in convincing the legislature to provide new statutory authority and substantial assured funding for the Indiana Judicial Center as a Supreme Court agency, in order to provide Indiana trial judges with a valuable research function and continuing judicial education.¹³ Also under his direction as Chief Justice, the court in 1986 adopted Indiana's first program for the continuing legal education of Hoosier lawyers.¹⁴ These developments were a stark contrast to Dick Givan's law school days when he served as the court's first law clerk (serving all five judges) and as its assistant law librarian.

Dick Givan highly valued lawyers and considered them the principal audience for his written opinions. He often reminded his colleagues of the need for brevity in our opinions to minimize the burden on lawyers' time. His own opinions were characteristically short, succinct, and unencumbered by extensive legal analysis. For him, the principal task of an appellate judge was to decide cases promptly, fairly, and without unneeded expounding or pondering about the legal principles involved. Dick Givan's frugality with the written word and his plain-spoken practicality is particularly evident from his notoriously sparse use of footnotes. His 1,571 majority opinions collectively contained a total of only fourteen footnotes,¹⁵ an average of one footnote approximately every 112 opinions, or one every 1.9 years. During an eight-year period from December 14, 1977 until January 24, 1986, he authored 500 consecutive majority opinions without using a single footnote.

Dick Givan's work ethic was legendary. He would arrive at the court early each day (after feeding his horses) and attend to his judicial duties very purposefully. I recall his advice to me shortly after my appointment to the court, encouraging me always to postpone working on my own opinions until after I completed reviewing and voting on everything submitted from my colleagues. This was his practice. And when his colleagues' proposed opinions were circulated for vote, Dick Givan was inevitably the first to respond.

Although not reluctant in conference discussions to label some legal

12. *See* 1975 Ind. Acts 1661. The administration of the court had previously been performed by court employees since the mid-1960s. The function of the office of State Court Administration, in distinction to the office of Supreme Court Administration, focuses upon Indiana's trial courts.

13. *See* 1977 Ind. Acts 1498.

14. IND. ADMISSION AND DISCIPLINE R. 29.

15. This total excludes two opinions which, in accordance with prevailing practice, adopted and reiterated verbatim another court's appellate decision, including its footnotes.

propositions as “asinine,” “absolutely ludicrous,” or “egregious error,” and occasionally refusing to be persuaded because “We’d look like Ned in the Third Reader,” Dick Givan was at the same time unpretentious and humble. I recall one incident in September of 1992 when he wrote an internal memorandum to his colleagues recommending the denial of a petition to transfer. Even though one of his own prior opinions was cited in support of transfer, Givan described it as “my convoluted case,” and pointed out that he later made a “180-degree turn”¹⁶ and declared “even Givan cannot understand an insurance policy” and that “based on my meager understanding of insurance policies and their intent, I recommend we deny transfer in this case.”

Likely a product of his extensive experience as a trial lawyer, Justice Givan spoke with high regard for the wisdom of juries and their verdicts. Not infrequently, his opinions affirmed or reinstated jury verdicts.¹⁷ He didn’t hesitate to dissent when concluding that “the majority has transcended the bounds of appellate review and has engaged in a weighing of the evidence.”¹⁸

Having served in both the legislative and executive branches before he came to the Court, it is particularly noteworthy that in his judicial leadership and case decisions, Richard Givan was a tenacious defender of the separation of powers between each branch of government. Several of his opinions asserted the independence of the judicial branch by striking down legislation to the contrary.¹⁹ Not only did he persistently resist legislative attempts to engage in court functions, but also he opposed judicial attempts to engage in social policy determinations that he viewed as proper for legislative decision-making. For example, in *State ex rel. Masariu v. Marion Superior Court No. 1*,²⁰ which issued a writ of prohibition barring prosecution of an action seeking to compel the Principal Clerk of the Indiana House of Representatives to make public certain voting records of the House, he wrote that further litigation “would amount to

16. The case to which he was referring was *Meridian Mutual Insurance Co. v. Richie*, 540 N.E.2d 27 (Ind.), *vacated on reh’g*, 544 N.E.2d 488 (Ind. 1989).

17. *See, e.g.*, *Star Bank, N.A. v. Laker*, 637 N.E.2d 805 (Ind. 1994) (affirming a verdict awarding punitive damages even though actual damages to personal and real property were nominal); *S&S Truck Repairs v. Mofield*, 556 N.E.2d 1313 (Ind. 1990) (reinstating a plaintiff’s verdict in a damage action for faulty repair of a truck); *Evans v. Palmeto*, 521 N.E.2d 316 (Ind. 1988) (reinstating a defense verdict in a negligence action); *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985) (affirming a plaintiff’s verdict in a personal injury action).

18. *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 366 (Ind. 1982) (Givan, J., dissenting).

19. *See, e.g.*, *In re Pub. Law No. 305 & Pub. Law No. 309 of Ind. Acts of 1975*, 334 N.E.2d 659 (Ind. 1975) (holding unconstitutional a statutory provision for taking judicial notice of ordinances that conflicted with procedural rules adopted by the Indiana Supreme Court); *In re Judicial Interpretation of 1975 Sen. Enrolled Act No. 441*, 332 N.E.2d 97 (Ind. 1975) (holding unconstitutional a statutory provision that would have required the Supreme Court to enact rules and administer examinations to qualify persons, including non-lawyers, for the position of county court judge).

20. 621 N.E.2d 1097, 1098 (Ind. 1993).

constitutionally impermissible judicial interference with the internal operations of the legislative branch.”²¹

Justice Givan’s strong sense that judicial obligation supersedes personal ideology is strikingly illustrated in his handling of capital cases. Active in his Quaker church, he was also personally opposed to the death penalty. While serving in the Indiana legislature, Dick Givan had sponsored legislation that would have abolished capital punishment in Indiana.²² Thirty-two years later, following his retirement from the bench, he appeared before the Indiana Senate’s Committee on Corrections, Criminal and Civil Procedures and testified in favor of Senate Bill 298, which again sought to abolish capital punishment in Indiana.²³ In contrast to his own deep personal convictions, Justice Givan authored sixty-five opinions in death penalty cases, each of which affirmed the death sentence. When I asked him about this apparent difference between his beliefs and his actions, he replied that his sworn judicial duty was to uphold the constitution and laws, whether he liked them or not.

In areas subject to proper judicial oversight, such as the common law, Justice Givan was not hesitant to embrace and advocate change. He concurred in several opinions abrogating outmoded common law doctrines.²⁴ And he authored, over a strident dissent, the Court’s opinion in *Petition of Hauptly*²⁵ that recognized the right of a married woman to change her legal name from her husband’s surname to her own maiden name. Justice Givan was also the first Indiana justice to hire an African-American lawyer to serve as his law clerk for a regular term.²⁶ He was

21. *Id.*; see, e.g., *State v. Alcorn*, 638 N.E.2d 1242, 1245 (Ind. 1994) (“We find no reason to interfere with the province of the legislature.”); *Ind. State Highway Comm’n v. Morris*, 528 N.E.2d 468, 476 (Ind. 1988) (Givan, J., dissenting) (“This is a matter exclusively within the province of the legislature.”); *Ind. Dep’t of Pub. Welfare v. Chair Lance Serv., Inc.*, 523 N.E.2d 1373, 1380 (Ind. 1988) (Givan, J., dissenting) (“Although I agree that the rationale of the majority makes a great deal of sense, I would not presume to invade the province of the legislature and change the law in this manner.”); *Starks v. State*, 523 N.E.2d 735, 737 (Ind. 1988) (Givan, J., dissenting) (“[T]he opinion on rehearing chooses to readjust the law in this matter and from my point of view in fact invades the province of the legislature and adds a restriction to the statute by judicial fiat. If such a change is to be made, it should be made by the legislature not by this Court.”).

22. Givan was one of two co-sponsors of House Bill 1145, introduced on January 13, 1967, which sought to abolish capital punishment and to replace it with life imprisonment. *Indiana House Journal*, 1967, Regular Session, at 84. The bill was not enacted.

23. See Stephen Beaver, *Death Penalty Repeal Rejected*, INDIANAPOLIS STAR, Feb. 18, 1999, at 1C. The bill was not enacted.

24. See also *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972) (abrogating interspousal immunity); *Campbell v. State*, 284 N.E.2d 733 (Ind. 1972) (abrogating sovereign immunity), *superseded by statute*, IND. CODE § 34-4-16.5-3 (2009); *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969) (abrogating a common law doctrine that denied a wife’s cause of action for loss of consortium of her husband).

25. 312 N.E.2d 857 (Ind. 1974).

26. Howard Stevenson, who had previously worked while a law student for the Indiana Supreme Court Disciplinary Commission, was admitted to practice on October 22, 1993, and then

not hesitant to defy gender and racial discrimination and spoke with pride of his father's resistance to judicial bigotry in the 1920s.²⁷ Justice Givan was gratified that, when he retired, his replacement was Myra Selby, the first woman and the first African-American to serve as a justice on the Indiana Supreme Court.

Dedicated, industrious, prolific, practical, straight-forward, plain-spoken, candid, highly-principled, humble, respectful of the past but open to change, Justice Richard M. Givan is an enormous transitional presence in the history of the Indiana Supreme Court. He left an indelible impression on the State of Indiana, on its bench and bar, and on each of his colleagues.

served a one-year term as one of Justice Givan's law clerks from November 22, 1993 to November 4, 1994. Another African-American, Charlotte Westerhaus, had previously served from May 10, 1990 to August 10, 1990 as a student law clerk for another justice.

27. Talking about the era of Ku Klux Klan influence in Indiana politics, Dick Givan recalled that, when anti-Jewish and anti-Catholic prejudice were rampant, there was a prevailing general practice in the Marion County courts that no Jewish or Catholic lawyer could appear without white Protestant co-counsel. But Givan's father, Judge Clinton Givan, who served as an elected Marion Superior Court judge, refused to go along. According to Dick Givan, because of his father's insistence on opening his court to full and unencumbered participation by Catholic and Jewish lawyers, the "kluxers" faction successfully opposed Judge Clint Givan's renomination for a successive term of office.