

# Indiana Law Blog Newsletter

## ***Welcome to the first issue of the ILB Newsletter***

Invite your friends and colleagues to [sign up to receive this free weekly newsletter](#), emailed every Monday morning. These issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate.

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## ***Judge Posner abruptly retires; the pro se problem; and the status of the 7th Circuit***

In an unexpected move, 7th Circuit Judge Richard Posner announced in a Friday, Sept. 1 statement (via the [Chicago Daily Law Bulletin](#)) that he was retiring effective the following day.

An excellent Sept. 6 article, also in [the Bulletin](#), quotes Posner's reason for retirement: "clashes with his fellow judges over the way the 7th U.S. Circuit Court of Appeals treats litigants who represent themselves led him to retire from the bench earlier than he planned." More:

About 55 percent to 60 percent of the litigants who file appeals with the 7th Circuit represent themselves without lawyers. Very few pro se litigants are provided the opportunity to argue their cases in court. The 7th Circuit rules on most of those cases based on the briefs.

Posner wrote that he has a book coming out soon that explains his views on the topic — as well as the views of his former colleagues — “in considerable detail.”

[Serendipitously, the Sept. 7th issue of the WSJ had [a long review](#) by Jonathan Adler of a new book, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* by Benjamin H. Barton, Stephanos Bibas, that also addresses the pro se problem. A [freely accessible PDF](#) of the review is available, and portions of the book are [available online here](#) and also on the Amazon site. (I think Adler's review, headed "*Why We Need Fewer Lawyers*," is an essential read.)]

**Posner's retirement leaves the 11-member court with four vacancies.** Until

June, there were just two vacancies, the fourth and the ninth seats, previously held by Judges John Tinder and Terence Evans, respectively.

President Obama nominated former Indiana Supreme Court Justice Myra Selby for the Tinder seat, but the Senate Judiciary Committee never moved the nomination forward. President Trump has nominated Notre Dame law professor Amy Coney Barrett on May 8th. See May 9th [Indianapolis Star story](#). The [Washington Examiner reported](#) Sept. 6 on the controversy at her hearing before the Senate Judiciary Committee, also noting:

Barrett, if confirmed, would serve as the first Indiana woman on the 7th Circuit Court of Appeals, which Indiana Sen. Todd Young noted in his introduction of her at Wednesday's hearing while recommending Barrett with his "strongest support."

(ILB: Several women do serve on the 7th Circuit, including Diane Wood, the chief judge.)

The Indiana seat has been vacant since Judge Tinder assumed senior status on Feb. 18, 2015. Wisconsin's seat has been vacant *for over seven years*, since Judge Evans assumed senior status on Jan. 7, 2010.

A good current story on the Wisconsin vacancy, from the [Milwaukee Journal Sentinel](#): "*Wisconsin seat on U.S. appeals court remains a symbol of partisan judicial wars.*" Another, from [Wisconsin Public Radio](#), "*Trump Appoints Milwaukee Attorney To Long-Standing 7th Circuit Vacancy: President Bypasses State Nominating Commission To Fill Seat.*" Michael B. Brennan was nominated by Trump on Aug. 3rd.

The two newest vacancies came this June 5th, when Judge Ann Williams assumed senior status, and then when Judge Posner retired September 2nd.

In addition to the seven active judges, there are currently four judges serving on senior status: Kenneth Ripple, who assumed senior status in September, 2008; Daniel Manion, December, 2007; William Bauer, October 1994, and Williams, June, 2017.

But shortly the number of senior judges will be reduced to three. The **Chicago Daily Law Bulletin** reports that Judge Williams intends to retire by the end of the year. This practice would be in line with that of another former 7th Circuit judge, John Tinder, who took senior status for a few months, using the time to finish writing remaining the opinions assigned to him, and then took retirement.

Traditionally, Indiana has had three seats on the Court, Wisconsin, two, and Illinois, six. But Seat 9, created in 1978, was filled until 1994 by Judge Cudahy of Illinois. His replacement, appointed in 1995, was Judge T. Evans of Wisconsin. As noted earlier, this seat has now been vacant since 2010. Seat 2 was originally an Indiana seat, but now is known as an Illinois seat. The same goes for seat 3. However, seat 4 started out as an Illinois seat and became an Indiana seat in 1957. (See [Wikipedia succession chart](#)) A former member of the court explained to me:

My understanding is that the assignment of seats is accomplished by custom, sort of a "gentleman's agreement" between the Executive and Legislative branches. I think it is roughly based on the proportionate populations of the states in the circuit. I know that there are no statutes controlling the subject. The only statutes involved are those which designate the total number of active judges in the various circuits.

Finally, the conservative **Washington Examiner** had an [informative article](#) on Dec. 29, 2016, headed "*Appeals Court vacancies could give Trump the chance to transform the judiciary*" that reported:

The 7th, 6th, and 5th circuit courts have the possibility for greatest turnover at the beginning of Trump's presidency. About 82 percent of seats on the 7th Circuit Court are vacant or eligible to be on Inauguration Day. \* \* \*

Many of the potential vacancies come because of judges eligible for "[senior status](#)," a form of semi-retirement in which senior judges take on a lighter workload voluntarily while receiving retirement compensation.

Beginning at age 65, judges are eligible for senior status if their age combined with their years of active service equals 80, commonly referred to as the "Rule of 80," according to the Administrative Office of the U.S. Courts.

Two of the current Court's active judges were appointed by Democratic presidents, the other five by Republicans. Of the currently four senior judges, only one, the soon to retire Judge Williams, was appointed by a Democrat.

**Quick Update.** Before I send this out this morning, the [NY Times' Adam Liptak today](#) has an exit interview with Judge Posner, wherein he reiterates his concerns about pro se litigants, and also is quoted: "I pay very little attention to legal rules, statutes, constitutional provisions." Also on the 7th Circuit, [Politico has a story](#) on Notre Dame law professor Amy Barrett's Judiciary interview, headed "*Senators take fire over questions for Catholic judicial nominee.*"

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## ***A CA 7 ruling we are anticipating any day now...***

***Judge to Indiana same-sex couples: 'You can't overcome biology'*** - that was the headline to this [May 23, 2017 Indianapolis Star story](#) by Stephanie Wang, reporting on the **May 22nd, 2017** 7th Circuit oral argument:

In oral arguments Monday, a panel of three judges for the Seventh Circuit Court of Appeals examined whether Indiana discriminates by not recognizing two married women both as parents on their children's birth certificates without having to adopt.

Judge Diane S. Sykes drew distinctions between biological parentage and parental rights, and which of the two should be represented on birth

certificates. "You can't overcome biology," Sykes said. "If the state defines parenthood by virtue of biology, no argument under the Equal Protection Clause or the substantive due process clause can overcome that."

Plaintiffs' attorney responded: "Your Honor, with all due respect, we maintain that parenthood is no longer defined by biology."

You may [listen to the oral argument here](#). Solicitor General Thomas Fisher represented the State of Indiana, Karen Celestino-Horseman the plaintiffs. On the panel in addition to Judge Sykes (who has been mentioned as a potential Trump nomination to the SCOTUS) were Judges Frank Easterbrook and Joel Flaum.

Indianapolis U.S. District Court Judge Tanya Walton Pratt's June 30, 2016 decision in the case, [Henderson v. Adams](#), permitted female same-sex spouses both to be listed on their children's birth certificates.

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### ***Looking a little deeper: DOJ buckles under state AGs' threatened lawsuit***

I was interested to read last week that Attorney General Sessions elected to phase out DACA (Deferred Action for Childhood Arrivals) after receiving no more than a letter from a group of state attorneys general threatening to sue, so I decided to dig deeper ...

Here is the [June 29th letter](#) signed by ten Republican attorneys general, who identify themselves as "The State plaintiffs that successfully challenged the Obama Administration's DAPA [Deferred Action for Parents of Americans and Lawful Permanent Residents] and Expanded DACA programs." From the letter:

If, by September 5, 2017, the Executive Branch agrees to rescind the June 15, 2012 DACA memorandum and not to renew or issue any new DACA or Expanded DACA permits in the future, then the plaintiffs that successfully challenged DAPA and Expanded DACA will voluntarily dismiss their lawsuit currently pending in the Southern District of Texas. Otherwise, the complaint in that case will be amended to challenge both the DACA program and the remaining Expanded DACA permits.

The letter from AG Paxton is signed by the AGs of Texas, Alabama, Arkansas, Idaho (plus the Idaho governor), Kansas, Louisiana, Nebraska, South Carolina, Tennessee, and West Virginia.

However, the [NY Times reported](#) Sept. 1: "On Friday, one of the attorneys general, Herbert H. Slatery III of Tennessee, said in a letter to Senator Bob Corker, another Republican of Tennessee, that he no longer supported moving forward with a legal challenge to DACA."

Note that the threatened lawsuit would be filed in the same Texas federal district court where 26 states on Feb. 16, 2015 successfully had Obama's broader immigration program

(DAPA executive order) enjoined *nationally*. Subsequently the 5th Circuit affirmed and the SCOTUS tied 4-4, thereby leaving the ruling in place. (For more, see the [June 23, 2016 Texas Tribune story](#), headed "*Dealing a blow to President Obama's executive immigration order, the U.S. Supreme Court has deadlocked on a lower court's decision to block the plan, which would've provided relief from deportation and work permits to millions of people.*")

Re the Texas suit, Adam Liptak wrote in the [NYT on June 23, 2016](#):

Judge Hanen grounded his injunction on the Obama administration's failure to give notice and seek public comments on its new program. He found that notice and comment were required because the program gave blanket relief to entire categories of people, notwithstanding the administration's assertion that it required case-by-case determinations about who was eligible for the program.

The appeals court affirmed that ruling and added a broader one. The program, it said, also exceeded Mr. Obama's statutory authority.

**Democratic AGs respond.** Per the [Sept. 6th, 2017 NY Times](#), "a group of 16 attorneys general — all Democrats — filed suit in Federal District Court in Brooklyn, claiming that Mr. Trump had improperly upended the policy known as Deferred Action for Childhood Arrivals or DACA," the group "led by Attorneys General Eric T. Schneiderman of New York, Maura Healey of Massachusetts and Bob Ferguson of Washington."

The list of 16 states whose AGs have signed the pro-DACA suit: New York, Massachusetts, Washington, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia. (Here is the [58-page lawsuit](#) and [news release](#).)

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## ***Recommended books and podcasts***

### **Books:**

- [The Gatekeepers: How the White House Chiefs of Staff Define Every Presidency](#), April 4, 2017, by Chris Whipple. A fascinating behind-the-scenes review of White House operations from Nixon through Obama. It serves as a companion to one of my earlier favorites,
- [The Presidents Club: Inside the World's Most Exclusive Fraternity](#), February 12, 2013 by Nancy Gibbs and Michael Duffy, a "history of the private relationships among the last thirteen presidents—the partnerships, private deals, rescue missions, and rivalries of those select men who served as commander in chief."

### **Podcasts:**

- "[Coal country is ready for tech jobs — if techies will just give them a chance](#)"

- "[The promise and peril of synthetic biology in 78 minutes](#)" - Related, but not a podcast: "[Cell engineering: How to hack the genome.](#)"
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