Legislator's Thoughts on Judges as Tort Lawmakers

Henry Hyde
Rod Blagojevich
John McCain
Richard Durbin

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INTERVIEWER (Stephan Landsman): Last month I had the opportu-
nity to travel to Washington to interview some of the country’s top
elected officials on the issue of how Congress and the Judiciary should
interact in the area of tort lawmaking.

Congressmen Henry Hyde and Rod Blagojevich from Illinois spoke
on these questions, as well as Senators John McCain of Arizona and
Dick Durbin from Illinois. All were open and direct in their re-
sponses. We would like to share with you some of their responses to
our tough questions.

Both the legislators and the courts have had a significant hand in
creating tort law. How do you think the two branches ought to inter-
act in fashioning such law in the future?

REP. HYDE: Well, I think they both have an important role to play in
the development of tort law. The courts can fine-tune and anticipate
situations that the legislature did not. They can interpret the law.
They can be a progenitor for rules and regulations and things like that.
So there’s an important interrelationship between the courts and the
legislature.

The courts usually are confined or focused to a particular fact situa-
tion brought to them by a set of lawyers on both sides.

The legislative aspect of tort law is much broader, where we here
have committee hearings from trade associations, lawyers, interested
parties on both sides, and input from legislators who, in Congress’
case, are from all over the country.

So we have a much broader view. The Court has a much more fo-
cused view. And the two should interrelate as best they can.

SEN. DURBIN: There are times when the courts are really pushing pol-
icy when the legislators failed. I don’t find that to be a problem. I
think it is a natural outgrowth of our system of government.

SEN. MCCAIN: There’s no doubt that the courts play a role in the
formulation in the advancement, because Congress can only make, I
believe, sort of overall policy. And it is the proper role for the courts
to interpret some of those, especially as they interface with the Consti-
tution of the United States.
But I would also point out, it is the clear duty of the courts to follow the statute rather than reinvent the law as it applies to a specific case.
**Rep. Blagojevich:** We, in the legislative branches of government, I think, need to be very careful that we don’t overlegislate, because of the fact that we have a long historical tradition with our common law system of seeing the evolution of our case law working its way through the courts. Because the courts are, probably, in my judgment better at doing that based on the fact that they can make determinations of law, based on the uniqueness of the facts of particular cases. The legislative bodies don’t deal that way.

**Landsman:** What problems do you think are posed when judges make tort law?

**Rep. Hyde:** Well, the difficulty is the development of tort law in a nonuniform manner. You have a different set of rules and regulations and interpretations within a particular jurisdiction.

Whereas, when the legislature, particularly the federal legislature, Congress, adopts a law, or promulgates rules and regulations, they have a uniform character throughout the country.

So that’s one of the big differences, is the lack of uniformity between the courts and the legislature.

**Rep. Blagojevich:** Well, I think the problems of judges making tort law are less, frankly, than the legislators making tort law. I think one of the problems with the legislative bodies making tort law is the fact that, again, we’re not determining the law based on individual cases, but we are more likely to make these determinations based on the lobbying of different special interest groups that have a vested interest in one view or another.

**Sen. McCain:** The judgments that the — is made still must lie within the letter of the law, unless that law is unconstitutional. So, I think that legislators are better equipped because they are not driven by the facts of one case, but the overall policy implications.

**Sen. Durbin:** Well, it depends on, frankly, whether the judges are following precedent, of course we want them to do that, that’s very fundamental and basic, and whether they are doing their best to follow legislative intent, if they’re dealing with a legislature.

But they are bound by other things, as well. I mean, we’ve seen in the State of Illinois, for example, when there was a momentary change in leadership in the General Assembly and you had massive changes in tort reform that were proposed, when it went into the court system, the court stepped back and said, you violated basic constitutional principles. You thought you were doing the right thing in your judgment, dealing with legislation directly, but you violated some very funda-
mental things when it came to federal and state constitutional principles.

So I think the courts really can watch carefully when legislators do get carried away, and occasionally they do.
LANDSMAN: What problems do you think are posed when the legislature is making tort law?

SEN. MCCAIN: There's huge influence of special interest here. Sometimes special interests write law. And when that happens then the good of the average citizen is sometimes disregarded. It's a compelling argument for campaign finance reform, by the way.

But then I think there is a legitimate role of the courts, because the courts really are there to protect the citizen. And if legislators act in what is not the best interest of all the citizens as opposed to a special interest, then I think the courts have a legitimate role.

REP. BLAGOJEVICH: When you have a free flow set of facts and courts being motivated by a — the foundation and the principle of trying to do what is just, I think that dynamic is far healthier for a socially just result than a legislative body that, again, is, unfortunately, all too often driven by the politics of the immediate now, the here and now, as well as by the different special interest groups that are competing.

We're just not as equipped to address some of these issues, I think, as the courts are.

REP. HYDE: The legislature can't always anticipate the future, can't anticipate circumstances where, perhaps, the law they've adopted is too rigid. So you have to have a constant ongoing revision of what you're doing, and, of course, that happens because the Bar is very active, and not only the American Bar Association, but the plaintiffs' lawyers and the — all sorts of different groupings of lawyers around particular aspects of tort law. So they work together pretty well.

SEN. DURBIN: Well, you know, I've been around legislators for thirty years. I worked in the Illinois General Assembly for fourteen, and now I've been out in Washington for over sixteen years, and I've seen and written laws at every level. And, I think, we've done a good job, but this is not holy writ. We're not writing the Ten Commandments here. We make mistakes. I've seen it happen time and again. And we have to come back and reconsider things that look to be so simple, when, in fact, real life suggests they're much more complex.

And so legislators have an appropriate role. I value it very much. That's what I do with my life. But I don't believe that we're perfect, and I think the courts need to step in, and many times even the Executive Branch, to step in and say, we have to look at this from a different angle.
LANDSMAN: The legislators of our country have enacted to resolve the asbestos and the tobacco problems. Isn’t it fair to criticize them, particularly, in those areas?

SEN. MCCAIN: Yes, I think it is fair to criticize them for different reasons. I think, perhaps, the asbestos issue was incredibly complex, very, very difficult. And if we had to do it all over again, I think we would do it differently both from a congressional and a judicial side.

In the tobacco bill, look, let’s be honest, it was the tobacco company spending more money than any expenditure in the history of this country.

SEN. DURBIN: Definitely, there’s no question about it. And it reflects the fact that we have hot political issues that the legislature tries to avoid, and, yet, the problems are out there.

Whether it’s the issue of tobacco, one that I’ve been personally involved in for many, many years, fighting the tobacco companies when it came to smoking on airlines or the federal subsidies or advertising to appeal to children.

Despite my best efforts on Capitol Hill, there’s very little to show for it, because the tobacco lobby is very powerful. We beat them when it came to smoking on airlines. We got nowhere when it came to restricting their advertising to appeal to children, and so the courts stepped in. Forty-two, if I’m not mistaken, different State Attorneys General came together and said, we want to try to construct causes of action that will resolve these difficulties, and they did, and thank goodness they did. It really brought about dramatic changes. You’re now seeing billboards, paid for by tobacco companies, telling kids not to smoke. I’ve seen advertisements on television now, paid for by tobacco companies, telling kids not to smoke. That isn’t because a law was passed. It was because lawyers went into courtrooms and judges said, we’re going to stand by these lawyers. This concept of law is a solid one.

REP. BLAGOJEVICH: We’re just not as equipped to address some of these issues, I think, as the courts are. And when you have people dying of cancer because of tobacco, and people dying of cancer because of asbestos, and the legislative bodies are slow to act, then, I think it’s the moral thing to do, for courts to intervene and to do something.

REP. HYDE: Is there a tobacco problem? You have to reconcile the zealous crusades of people who want to stop people from smoking
tobacco with civil liberties, with the fact that people have smoked for years.

You also bump into the reality that it is a cash crop that helps people survive in certain states of the union. And until you can have a crop substitution that is as effective and is as profitable or reasonably so, it's a very complicated problem.

So I think we have responded. I've sat in many meetings where we've talked about tobacco legislation, and it becomes very fashionable to have a quick solution for these complicated problems, and we haven't come up with it, yet.

But, again, it depends on whether you think there is a real problem and where the equities lie, whether civil liberties, the right of consumers, if they want to be foolish and smoke, or we should manage their personal behavior.

LANDSMAN: Hasn't the court intervention in these areas been, essentially, salutatory?

SEN. DURBIN: Well, it has been, you know. And I think there are other areas that we're looking at now. The gun lobbies, another illustration. This is an issue in which the vast majority of the American people believe there should be sensible gun control. And they say to their congressmen and to their senators, pass the law, and, yet, we don't. Why? Because the National Rifle Association and a former Moses, named Charlton Heston, get up every day and say, this is wrong, we're talking about violation of constitutional rights, and browbeat some congressmen and senators into not passing laws that America needs to make it a safer place to live.

Now, Mayor Daley in Chicago, other mayors, Mayor Morial in New Orleans, for example, the mayor of Atlanta, have said, we're going to file lawsuits. We're going into court because we're tired of the carnage in our city brought on by these guns.

And I think they can create, as we did in the tobacco situation, pressure on the gun lobby to do more responsible things, basic things.

I mean, it is a fact of life now that the federal government can regulate the safety of toy guns, given away as gifts at Christmas, but cannot regulate the safety of guns sold, that can be used to kill somebody. They cannot impose any requirement on the manufacturer to have the most up-to-date safety device on a gun, and there are many things that can be added to make guns safer. These are things that are just obvious that any industry would be held to as a standard and, yet, this industry has escaped it, because they have such powerful lobbyists in Washington.
SEN. MCCAIN: I think court intervention, on occasion, particularly where the interpretation of the Constitution has been salutatory. There have been some egregious cases and they get a lot of publicity. The guy in Alabama, that the paint job on his Mercedes was danged up.

And one thing that I think disturbs us all is the desire on the part of juries to do social justice, to award huge settlements knowing full well that they’ll be cut back, but quote, send the message to whoever these bad guys are.

So there are some problems in that direction.

LANDSMAN: Courts invented the idea of products liability. Were they wrong to do so?

SEN. MCCAIN: No, because wherever there’s a vacuum, it will be filled. And I believe that Congress should have acted and Congress should still act. And we need to clean up some of the more egregious aspects of culmination of judicial decisions. But if Congress isn’t going to act, then others will, including the Judicial Branch.

REP. HYDE: I think the courts are there to fill any vacuum like that. They’re there to achieve justice and if, in fact, a real cause of action exists, if there has been negligence or some other actionable misconduct, misfeasance, nonfeasance by tobacco companies, then the courts are the only remedy. And if the courts are doing it wrong, then it’s up to the legislature to get it right.

SEN. DURBIN: I think they do have to step in. And I am just absolutely amazed when — I sat on the Senate Judiciary Committee, and we bring in these prospective judges, and the republicans would just browbeat them on this whole question of being strict constructionists. Are you going to be a strict constructionist? Will you just follow precedent? Do you promise not to have any rational thoughts on your own?

You know, that just really defies logic. We expect these men and women, who assume the bench, to follow the law as it is written, as court cases are decided. We cannot ask them to be blind to the reality of life in America.

One of the senators, a senator from Missouri, a very conservative man said, do you think there is any right that an American has that isn’t specifically enumerated in the Constitution? And this judicial nominee said, I can’t think of a one. And I said to the nominee, does the word privacy come to mind here? Is there a word in the Constitution of privacy? No. Do you think we have a right of privacy? Well,
of course, we do. And I said, how did we reach that conclusion? Didn’t we have to take a look at the language in the Constitution and the reality of life in America and say that our privacy, as individuals, was an important issue? Isn’t that a construction of the words in the Constitution that we would expect of any reasonable judge? That’s just one illustration.

I expect men and women on the bench will not always agree with me politically, but I expect them in good faith to try to find reasonable answers to the challenges facing America.

**LANDSMAN:** Where, if anywhere, do you think judges have overreached their lawmaking mandate?

**SEN. DURBIN:** Well, you know, you can see in some cases, in isolated cases, where judges may have made a bad decision. But, you know, I really think that the fair way to judge is to step back and look at the entire body of law and say, are we in America where we want to be?

If I want to start a company today, a manufacturer of product, do I understand going in that there are certain rules I have to play by? The answer is, yes. And the courts played a big role in creating that standard. I know that if I don’t do my job, and I end up selling a product that is dangerous and harms someone, I’m going to be held liable for it. And so I’ll be more careful in the product that I make and sell, and the representations I make about its safety.

So I’d say in a given case there might be an argument that a court has gone too far. But looking at the body of law that we face, I think America has really led the world in standards of safety and in the kind of sensitivity we should have toward consumers and users.

**REP. HYDE:** The law of product liability is evolving and it is a subject of great concern to us in the House Judiciary Committee. And we are constantly looking at the issue and trying to put some equity and fairness, so that a person who is injured or a class of people who are injured, gets adequate protection but that we don’t stifle the economy and innovation and the development of new products. So it’s looking for that balancing point that we spend most of our time.

**SEN. MCCAIN:** It’s not so much the courts have overreached, as much as it is there’s a tremendous unevenness now. And we see that, not only in tort reform, but in other issues, as well.

**LANDSMAN:** Are there times when the legislators ought to show deference to the courts on these sorts of matters?
**Rep. Hyde:** Yes. I don’t think the legislature should draft entire tort codes at all. I think legislation can address key aspects of the legal system and provide essential or a necessary predictability.

**Sen. Durbin:** Well, you know, we’re going the opposite direction. You look at so many areas. In the criminal area, mandatory sentencing guidelines, we’re stepping back and saying we want to take discretion away from judges. And you hear that more and more from people in the legislature when they’re unhappy with the court decision. They say, well, we just can’t let these judges make these decisions. I think that’s a mistake. There’s a human element in here.

You know, I’ve heard a lot of people make arguments, for example, about product liability reform and tort reform in the legislature and in Congress. I can’t recall a single one of them, who had my experience as a trial lawyer, really facing a client who had been injured, who had a child who was seriously ill because of something that had been done wrong. It really changes it when you have a human face on it. The judges see those faces. The jury will see those faces. And they’ll make decisions that reflect the reality. We can’t be so generic as to say, well, there’s just no amount of pain and suffering that’s worth more than $250,000.

You know, that may sound like a good objective standard, wait until you face the person who gets up every morning in pain because of the negligence of someone else. Tell them $250,000 is enough for a lifetime. That’s pretty hard to explain.

**Rep. Blagojevich:** We have a system of checks and balances in our Constitution. We have a separation of powers. And I think while the legislative body ought to have the same amount of deference to the courts as it has to any other branch, and that the three branches of government are there to check one against the other. And I don’t know if deference is just the polite way of handling, but handling that separation, but I think that the legislative body, you know, appropriately can be critical of the judicial system when the legislative body thinks that it’s wrong. And the legislative bodies are, essentially, the voice of the people. We’ve been elected by the people to, essentially, speak for them and represent them. And to the extent that we think the courts have overreached or have done something erroneous, let those of us in these bodies have a discussion and debate, dialogue, on behalf of our constituents. And, I think, to a certain extent then, I think, democracy is well served.

But I like the idea of having separate branches. And I think that while I’m more comfortable, personally, with the idea that the courts
are in a much better position to establish law in certain areas than legislative bodies, I do think, however, that there is no particular body or branch of government that is perfect, and we're all apt to make mistakes. And because the Founding Fathers were wise enough to see that, they set the system up of separation of powers and checks and balances so that we all keep an eye on the other branches.

**Sen. McCain:** When they're talking about the Constitution of the United States, whether I happen to agree with it or not, I have to abide by it and respect it. And I think sometimes legislators forget that that's their constitutional responsibility. And our constitutional responsibility is to respect it.

**Landsman:** When ought the courts show legislators deference on these questions?

**Sen. Durbin:** We do have attention here because of the separation of powers. But I think there is also a healthy respect. We understand the courts' responsibility to look at the basic law, whether it's constitutional law or the statute, and to try to interpret it.

Understanding, as I said earlier, there are times when the courts do move beyond the legislators. And I think the legislators, as well, whether it's in Congress or at the state level, have to be respectful of the courts' approach. You know the courts have a very slow and methodical approach, generally. Legislators can move more quickly, if they want to. And we have to respect the fact that each operates in a little different context.

**Rep. Hyde:** I think courts ought to adjudicate and the legislature ought to legislate, and sometimes those two functions get blurred.

**Rep. Blagojevich:** Well, I have my own biases. I mean, if it became an issue, for example, of holding the tobacco industry more responsible, I would argue that the courts should — you know, if the legislative body were moving in that direction, then I would argue the courts should be deferential to that.

I clearly have a bias regarding the ability for municipalities to sue gun manufacturers because of their distribution practices of guns in society, which they either knowingly or willfully and wantonly allow it to happen, where they flood the market with guns that only criminals and gangbangers use, and ultimately, those guns are the result for violence in our communities.

So I like the idea of seeing the legislative body move in a direction that gives people access to the courts in that regard. And I would like, of course, the court system to be deferential.
On the other hand, in fairness to people on the other side of the position, if the courts are — or if the legislative body is trying to foreclose access to the courts of those who want to seek address against the tobacco industry or the gun manufacturers, and the legislative body supports that, then I think, the Court should be less deferential.

I don’t really know what the fair answer to that is. Those of us who are here with a certain set of beliefs, in a legislative environment, are ironing those decisions out amongst ourselves here in Congress, and there’s a big debate going on here.

And, I think, you know, when the courts are on our side, we think they should be deferential. When the courts are on their side, we think that that’s overreaching.

**Landsman:** Are there any areas where courts should be developing new tort law, for example in the field of domestic violence or governmental misconduct?

**Rep. Hyde:** The courts should be developing — I wouldn’t — I would prefer that the legislature do the developing of the law and that the courts interpret that, and then if there are gaps, let us know and we should fill in the gaps.

But I am, basically, uncomfortable with the courts making law, because I think they should adjudicate, really, and not legislate.

**Sen. Durbin:** We can’t get the most basic things done in Washington in terms of trying to track guns used in crime and reduce their likelihood of being used. And, frankly, I think the courts are showing initiative, I hope they do, to hold these gun manufacturers, and gun salesmen, responsible.

**Sen. McCain:** I’d like to see the Congress act and I’d like to see it done in a bipartisan fashion. Everybody knows there are some egregious aspect of tort practice, not tort law, today. In that the whole system loses credibility when there are egregious decisions which are all out of proportion to any concept we might have had about fair compensation.

And so I think most of the people that I respect, who are in that business, realize that it’s in their interest to bring this back into, at least to some degree, into a situation where when a decision is made all Americans can respect it.

**Landsman:** Well, I would like to thank you for sharing your time with us and your thoughts. It’s really a very helpful and thoughtful response to these questions.
JUDGES AS LAWMAKERS

SEN. MCCAIN: Could I just finally say this?

LANDSMAN: Absolutely.

SEN. MCCAIN: I want to thank Bob Clifford. I want to thank all the people at DePaul College of Law, who are amongst the most respected institutions in America. And I also want to say that it's very helpful to me to have this kind of interchange because I'm not burdened with a law degree or a legal background. And there's many times where I turn to the respected people in the profession, especially on this issue, which is going to be continued to be one that will be attempted, at least, to be addressed in the legislative process.

So it's not only helpful to me to have this interview, but it's helpful to me to have the kind of interface with the legal profession, that I think is necessary for me to really address this very important issue in a measured fashion which my constituents expect of me.

LANDSMAN: Well, thank you very much. And I hope we can keep the dialogue going.

SEN. MCCAIN: Thank you very much.