

# INDIANA CONSTITUTIONAL DEVELOPMENTS

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In the most recent year, Indiana's appellate courts continued to interpret the structural provisions of the Indiana Constitution, addressing the gubernatorial veto, education, home rule, and other topics.<sup>1</sup> The Indiana Court of Appeals was especially active in the most recent year addressing provisions of the constitution having to do with individual rights, including the right to privacy and the rights of criminal defendants.<sup>2</sup> The Indiana Supreme Court had fewer opportunities to address individual rights claims under the Indiana Constitution than it had in some other recent years.

The court of appeals applied the supreme court's recent decisions relating to double jeopardy and search and seizure in several cases, coming to results different than those mandated by the Federal Constitution in some instances.<sup>3</sup> In applying the equal privileges and immunities clause in several cases, the court of appeals avoided the conflicting interpretations of the applicable test that have marked decisions in previous years.<sup>4</sup>

Also in the most recent year, Hoosier voters enacted three amendments to the Indiana Constitution, and all three branches of government cooperated to apply the constitutional framework for gubernatorial succession upon the death of Governor Frank O'Bannon.<sup>5</sup>

## I. THE STRUCTURAL CONSTITUTION

### A. Article V, Section 14

The holdings in *D & M Healthcare, Inc. v. Kernan*,<sup>6</sup> are important in preserving the balance between the three branches of state government.<sup>7</sup> This case is even more useful, however, in exposing the manner in which the Indiana Supreme Court analyzes constitutional questions, especially those involving separation of powers principles.

The nursing home companies that initiated this litigation raised the question whether a governor's veto was invalidated because it was returned to the legislature "too early" under the standard created by the constitution.<sup>8</sup> The bill

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1. Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929-30 (2004) (setting forth the distinction between the structural constitution (generally articles III through XV) and the rights constitution (generally articles I, II and XVI)). See *infra* Part I.

2. See *infra* Part II.

3. See *infra* Part II.F-G.

4. See Laramore, *supra* note 1, at 961-62; *infra* Part II.B.

5. See *infra* Parts III, IV.

6. 800 N.E.2d 898 (Ind. 2003).

7. The author of this Article was one of the counsel in this case for Governor Joseph Kernan, an appellee.

8. *D&M Healthcare*, 800 N.E.2d at 898.

in question would have increased Medicaid reimbursement of the nursing homes, enlarging their revenues.<sup>9</sup>

The General Assembly passed the bill on April 29, 2001, the last day of the legislative session. The Clerk of the House of Representatives presented the bill to Governor Frank O'Bannon five days later, on May 4.<sup>10</sup> On May 11, seven days after being presented with the bill, Governor O'Bannon vetoed it.<sup>11</sup> The governor delivered the vetoed bill back to the House of Representatives the same day he vetoed it.<sup>12</sup> The House next met on November 20, 2001.<sup>13</sup>

The nursing homes argued that these actions violated the constitutional provisions regarding vetoes and rendered Governor O'Bannon's veto ineffective, so that the bill became law.<sup>14</sup> Article V, section 14 of the Indiana Constitution states:

- (a) Every bill which shall have passed the General Assembly shall be presented to the Governor. The Governor shall have seven days after the day of presentment to act upon such bill as follows:

...

- (2) He may veto it:

...

- (D) In the event of a veto after final adjournment of a session of the General Assembly, such bill shall be returned by the Governor to the House in which it originated on the first day that the General Assembly is in session after such adjournment . . . . If such bill is not so returned, it shall be a law notwithstanding such veto.<sup>15</sup>

In a nutshell, the nursing homes' argument was that the governor failed to comply with constitutional requirements by returning the vetoed bill on May 11 instead of November 20, which was "the first day that the General Assembly [was] in session after . . . adjournment."<sup>16</sup> Because the governor did not comply, the nursing homes argued, the bill became "a law notwithstanding such veto."<sup>17</sup> The trial court found in favor of the governor, but the court of appeals reversed, invalidating the veto.<sup>18</sup>

9. H.E.A. 1866, 112th Gen Assem., 1st Reg. Sess. (Ind. 2001).

10. *D&M Healthcare*, 800 N.E.2d at 900.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 903.

15. IND. CONST. art. V, § 14.

16. *D&M Healthcare*, 800 N.E.2d at 900.

17. *Id.*

18. *Id.* at 898.

Justice Boehm, writing for a unanimous court, began his analysis by determining that the nursing homes pointed to no actual harm that befell them as a result of the governor's action, so the court could determine not to address the issue under the doctrine *de minimis non curat lex*, the law does not redress trifles.<sup>19</sup> The doctrine applied to this case because "[p]laintiffs cite no practical consequences of the Governor's delivery of the vetoed bill before the first day the legislature reconvened, rather than on that date. And it is obvious there were none."<sup>20</sup>

The court indicated that the nursing homes were seeking to capitalize on what was at most a technical defect that, in actuality, harmed no one. The court noted that achieving the purpose of the legal language at issue is "by far the most significant factor" in applying the *de minimis* doctrine.<sup>21</sup> Because a primary purpose of article V, section 14 was to provide the legislature with the maximum possible time to determine whether to override a veto, the governor's action was not inconsistent with the statutory purpose, but rather provided the maximum possible time for the legislature to act. The court declined to "attribute undue importance to form as opposed to substance,"<sup>22</sup> and applied the *de minimis* doctrine to validate the governor's veto.<sup>23</sup> The nursing homes argued that the plain constitutional language required a contrary result, but the court disagreed with this technical argument, countering that "common sense has driven our constitution from the earliest time."<sup>24</sup>

The court went on, however, to analyze the merits of the case although its application of the *de minimis* doctrine would have been sufficient to decide it. The court looked at the meaning of the phrase in article V, subsection 14(a)(2)(D), "returned by the Governor to the House in which it originated on the first day that the General Assembly is in session after such adjournment," particularly emphasizing the meaning of "returned."<sup>25</sup> Although the nursing homes argued that "returned . . . on" could only mean that the governor had to deliver the bill on the precise day when the legislature next met, the court found that the provision was not so clear.<sup>26</sup>

The governor argued that "if a veto is returned before a given date, in one sense it remains returned at all times after that."<sup>27</sup> The court pointed out that this interpretation "turns on whether 'is returned' is a verb (the equivalent of 'to be returned') or a description of its status (it shall be a returned bill on this date)."<sup>28</sup> The court looked at the history of the provision—which was enacted in 1972—to

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19. *Id.* at 900.

20. *Id.*

21. *Id.* at 902.

22. *Id.*

23. *Id.* at 903 (quoting JOHN SALMOND, JURISPRUDENCE § 10, at 25 (6th ed. 1920)).

24. *Id.* at 901.

25. *Id.* at 906.

26. *Id.*

27. *Id.* at 903.

28. *Id.* at 903-04.

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assist in interpreting it. The provision was enacted after the decision in the 1968 "pocket veto" case.<sup>29</sup> The 1972 amendment clarified that the governor possessed no "pocket veto" (a tool killing a bill by a governor's mere failure to act when his deadline for signing the bill occurred when the legislature was not in session). The amendment was aimed at establishing procedures for the General Assembly to have the maximum time to determine whether to override or sustain a governor's veto.<sup>30</sup>

The court noted that the provision's particular phrasing arose from the factual situation at the time the 1972 amendment was adopted. At the time the 1972 amendment was framed, it would not have been possible for a governor to return a bill vetoed after legislative adjournment *before* the next day the legislature met because the legislature lacked a full-time staff.<sup>31</sup> There would literally have been no one to accept a returned bill after legislative adjournment. Thus, "at the time it was written, Section 14 was seen as both setting a deadline [delivery on the next day the legislature was in session] and requiring that the vetoed bill be available at the earliest possible date to allow the legislature to override it."<sup>32</sup>

The court also noted that Governor O'Bannon's construction of the statute was supported by the practices of the legislative and executive branches over the years since 1972. The two houses' journals supported the governor's contention that many vetoed bills had been returned at the time of the veto rather than several months later, at the beginning of the next session.<sup>33</sup> While the factual record was a bit ambiguous, the court concluded that "it is clear that for many years, beginning within a decade of the effective date of the current section 14, at least some vetoes were delivered before the next session without objection by the legislature."<sup>34</sup> The General Assembly could have objected, raising the same objection as the nursing homes in this case, in an effort to invalidate previous vetoes. But it did not.

The court found that the governor's practice and the legislature's acquiescence "can build a patina on the constitutional framework."<sup>35</sup> The court also noted that section 14 was amended in 1990—after the practice of immediate return of vetoes was well established—and "a subsequent amendment without change in language that has been construed in practice suggests satisfaction with the governors' and the General Assembly's view of how the provision applies."<sup>36</sup> That is, if the framers of and voters on the 1990 amendment did not act to correct the manner in which the governor and legislature were applying the language, it can be assumed that they approved that application.

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29. *State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Ind. Revenue Bd.*, 242 N.E.2d 642 (Ind. App. 1968), *trans. denied by an equally divided court*, 244 N.E.2d 111 (1969).

30. *D&M Healthcare*, 800 N.E.2d at 904.

31. *Id.* at 905.

32. *Id.* at 906.

33. *Id.* at 907.

34. *Id.* at 908.

35. *Id.*

36. *Id.* at 908-09.

The court also construed the constitutional provision in light of a practical problem raised by the nursing homes' construction. If, as the nursing homes argued, a veto in the spring after the legislature adjourned could not be finalized until the legislature next met—usually the following November—citizens could not be sure exactly what the law was during the intervening months.<sup>37</sup> That is, if a veto was not fully effective until it was returned on the “next” legislative session day, those affected by laws could not be sure they would “remain vetoed” during the period between the actual veto in the spring and the return the next winter because the governor could choose not to deliver them or could inadvertently fail to deliver them.<sup>38</sup> In a system in which the great majority of statutes go into effect no later than the July 1 after their passage,<sup>39</sup> this uncertainty is problematic and the court should not add to the uncertainty by agreeing with the nursing homes' interpretation.<sup>40</sup>

In light of the history of the amendment, the framers' purpose in enacting it, and the practical problems that would be created by adopting the nursing homes' interpretation, the court ruled that Governor O'Bannon followed the constitutional language when he delivered the vetoed bill on the day he vetoed it, rather than waiting until the next legislative session day.<sup>41</sup>

The court's decision in *D & M Healthcare* not only resolved the issue in the individual case, it also went far to explicate the court's approach to constitutional litigation. First, the court indicated that it will not intervene in hypothetical disputes or reach out to take positions in cases where the result has no real world consequences.<sup>42</sup> This clear position instructs litigants—and lower courts—that they should use the judicial system only when the outcome of cases has real meaning to real people, and it reasserts the supreme court's oft-stated position that it will hesitate to intervene in the affairs of the other branches absent a true dispute.<sup>43</sup>

Second, the court displayed its practical approach to adjudicating controversies involving the other branches. In determining how article V, section

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37. Statutes establish that the General Assembly's “organization day” occurs in November, with the first regular session day no later than the second Monday in January. IND. CODE § 2-2.1-1-2 (2004). By statute, the session ends no later than April 29 in odd-numbered years and March 14 in even-numbered years. *Id.* §§ 2-2.1-1-2 to -3. At the time the 1972 amendment was written, however, the legislative session was limited to 61 days every other year and the starting date was constitutionally established in January. IND. CONST. art. IV, § 9 (1970). These provisions dictated, at the time the 1972 amendment was written, that the last session day would usually occur in March or April with the next session beginning the following January.

38. *D&M Healthcare*, 800 N.E.2d at 911.

39. IND. CODE § 1-1-3-3.

40. *D&M Healthcare*, 800 N.E.2d at 911.

41. *Id.* at 911-12.

42. *Id.* at 901-03.

43. *See, e.g.,* Pence v. State, 652 N.E.2d 486 (Ind. 1995) (rejecting taxpayer standing, reasoning that it would invite the court to become overly involved in the sphere of the legislative branch absent direct injury to a party).

14 should operate, the court looked at the practical consequences of the alternatives. The court based its decision in part upon the practical construction placed on the provision by the entities most affected by it—the governor and the members of the General Assembly.<sup>44</sup> Those officials had construed the provision in a particular manner over a period of years, and the court gave weight to that construction. The court also looked at the practical problems that would have been created by departing from that longstanding construction.<sup>45</sup> The court adopted the construction placed on the provision by the other branches, an approach that precluded the practical problem of uncertainty about which bills would take effect on what dates. The court noted that this approach was consonant with one interpretation of the constitutional language, and it adopted the interpretation that coincided with the other branches' actions and was most workable in practice.<sup>46</sup>

A sidelight to *D & M Healthcare* was its potential effect on judicial pay. Had the nursing homes prevailed, many dozens of other vetoes would have been called into question.<sup>47</sup> One of the vetoes likely to have been invalidated if the nursing homes had prevailed was the veto of a judicial pay increase.<sup>48</sup> The court's majority, and Chief Justice Shepard in concurrence, wrote about the importance of a judicial pay increase, which the majority viewed as "long overdue."<sup>49</sup> The Chief Justice called the absence of a pay raise "ruinous to the state's judiciary."<sup>50</sup> They noted that there had been no pay increase of any kind in seven years, while other state employees had received cost-of-living increases and health-care costs had risen for all state employees, effecting a reduction in actual judicial pay. Despite the judicial interest in the pay increase, the court adjudicated the appeal "because there is no one else to do it."<sup>51</sup> In upholding Governor O'Bannon's veto, the court acted against its own self-interest because *D & M Healthcare*'s precedent precluded the judicial pay increase.<sup>52</sup>

### B. Separation of Powers

Two court of appeals cases dealt with separation of powers principles. Article III, section 1 of the Indiana Constitution states "[t]he powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged

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44. *D&M Healthcare*, 800 N.E.2d at 906-09.

45. *Id.* at 910-11.

46. *Id.* at 911-12.

47. The court enumerated those vetoes in an appendix to its decision. 800 N.E.2d at 912-17.

48. H.E.A. 1856, 112th Gen. Assem., 1st Reg. Sess. (Ind. 2001). This bill was enacted in the same session, and vetoed in the same manner, as the nursing homes' bill.

49. *D&M Healthcare*, 800 N.E.2d at 899.

50. *Id.* at 917.

51. *Id.* at 899.

52. The 2005 General Assembly enacted a judicial pay raise that became law. S.E.A. 363, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”<sup>53</sup>

*O'Bannon v. Schindler*<sup>54</sup> was a lawsuit challenging the closing of a state facility for developmentally disabled individuals. Family members of individuals residing at the Muscatatuck State Developmental Center challenged aspects of the center's closing and obtained a preliminary injunction.<sup>55</sup> The injunction precluded transfer of patients from the facility without providing specified notice to, and obtaining permission from, the patients' guardians.<sup>56</sup> It also precluded state officials from “pressuring” family members into authorizing transfers and mandated that existing staff at the center could not be removed or reduced.<sup>57</sup>

State officials appealed, and the court's review of the injunction against changing staffing levels at the facility implicated constitutional principles of separation of powers.<sup>58</sup> Referring to *Logansport State Hospital v. W.S.*,<sup>59</sup> the court noted that the responsibility for providing facilities for persons with mental illness belongs to the legislative department and that decisions about staffing levels involve the appropriation of state funds.<sup>60</sup> *W.S.* held that “it is the express duty of the Indiana General Assembly and not of the courts to provide for the staffing and maintenance of facilities” such as Muscatatuck.<sup>61</sup> The *Schindler* court concluded that the judicial requirement that a certain staffing level be maintained constituted improper interference with the legislative task of appropriating funds for the operation of facilities for the mentally ill.<sup>62</sup> The court therefore vacated the portion of the injunction requiring maintenance of a particular staffing level.<sup>63</sup>

A second case implicating separation of powers, *Woolley v. Washington Township Small Claims Court*,<sup>64</sup> addressed the application of the Indiana Access to Public Records Act.<sup>65</sup> Woolley asked the small claims court for a copy of an affidavit the judge had executed that described certain court procedures. The court apparently did not have a copy of the affidavit and denied the request for

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53. IND. CONST. art. III, § 1.

54. 796 N.E.2d 335 (Ind. Ct. App. 2003), *clarified on reh'g*, 801 N.E.2d 189 (Ind. Ct. App. 2003).

55. *Id.* at 337-38.

56. *Id.* at 338.

57. *Id.*

58. *Id.* at 340.

59. 655 N.E.2d 588 (Ind. Ct. App. 1995).

60. The Indiana Constitution requires the provision of mental hospitals. IND. CONST. art. IX, § 1. This provision does not, however, convey to any individual a right to be treated in such a hospital. *Y.A. v. Bayh*, 657 N.E.2d 410 (Ind. Ct. App. 1995).

61. *W.S.*, 655 N.E.2d at 590.

62. 796 N.E.2d at 340.

63. *Id.*

64. 804 N.E.2d 761 (Ind. Ct. App. 2004).

65. IND. CODE §§ 5-14-3-1 to -10 (2004).

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the reason that the affidavit was not a public record as defined by the Act.<sup>66</sup>

The Indiana Court of Appeals ruled that the affidavit was not a public record as defined by the statute because the small claims court did not retain a copy.<sup>67</sup> The document therefore did not fit within the statutory definition of public record.

The court went on, however, to state that applying the Indiana Access to Public Records Act to require disclosure of the affidavit would violate separation of powers principles.<sup>68</sup> Courts speak through their record books, the court of appeals held, so requiring the court to produce an affidavit describing its internal procedures would interfere with the administration of justice.<sup>69</sup> Moreover, the court wrote, the trial rules describe which documents constitute court records, and the legislature could not interfere with the internal workings of the judicial branch by changing that definition.<sup>70</sup> To enforce the Indiana Access to Public Records Act in the manner Woolley sought, the court reasoned, would "hamper the courts in the exercise of their lawful duties."<sup>71</sup>

### C. Education

The Indiana Supreme Court granted transfer in a case addressing the meaning of article VIII's requirement that, in public schools, "tuition shall be without charge."<sup>72</sup> At issue in *Nagy v. Evansville-Vanderburgh School Corp.*<sup>73</sup> was a twenty dollar student activity fee imposed on all students from kindergarten through twelfth grade. The school corporation stated that the fee was designed to pay for a coordinator of student services; elementary school counselors; media specialists; school nurses; alternative education; police liaison; and extracurricular activities.<sup>74</sup> The fee was created as part of an agreement between the school corporation and teachers' union to balance the corporation's budget.<sup>75</sup> There was no provision to waive the fee based on inability to pay.<sup>76</sup>

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66. *Woolley*, 804 N.E.2d at 762, 765.

67. *Id.* at 765.

68. *Id.* at 767.

69. *Id.* at 766.

70. *Id.* at 766-67.

71. *Id.* at 767.

72. IND. CONST. art. VIII, § 1.

73. 808 N.E.2d 1221 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 977 (Ind. Ct. App. 2004). A link to the oral argument on transfer may be found at <http://www.indianacourts.org/apps/webcasts/>. This Article contains discussions of three cases in which the court of appeals' opinions have been vacated by grant of transfer: *Nagy*, 808 N.E.2d 1221; *Clinic for Women v. Brizzi*, 814 N.E.2d 1042 (Ind. Ct. App. 2004), *trans. granted*, (Ind. Jan. 27, 2005); and *Ledbetter v. Hunter*, 810 N.E.2d 1095 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 982 (Ind. 2004). Although these three opinions have been vacated, they are discussed in the Article because they raise important constitutional issues and their reasoning is original and provocative.

74. *Nagy*, 808 N.E.2d at 1223.

75. *Id.*

76. *Id.*



Judge Sullivan's court of appeals opinion (vacated by the transfer grant) invalidated the fee, concluding that the purpose of the constitutional provision was to encourage learning and literacy, and that fees of the sort charged by the school were inimical to that purpose. Parsing the meaning of "tuition" as used by the framers, the court concluded that "Article 8, Section 1 must be interpreted to mean that not only must Indiana public schools not charge for 'tuition' in the sense of the services of a teacher or instruction, but also must not charge for those functions and services which are by their very nature essential to teaching or 'tuition.'"<sup>77</sup> The majority opinion also cast doubt on *Chandler v. South Bend Community School Corp.*,<sup>78</sup> an earlier case analyzing the same constitutional provision and approving Indiana's ubiquitous textbook rental fees.<sup>79</sup> The majority opinion also hinged on the fact that the school placed the proceeds of the activity fee in its general fund, so the uses made of the activity fee could not be distinguished from other purposes of the fund, such as teacher salaries, that clearly qualified as "tuition."<sup>80</sup> Because the activity fee could not be segregated from other school revenue, the school was unable to prove that the activity fee was used only for non-essential school programs.<sup>81</sup>

In dissent, Judge Bailey emphasized Indiana's long history of local control of schools and educational spending decisions. He also concluded that the majority's interpretation of "tuition" in article VIII, section 1 was too broad.<sup>82</sup> He stated that the majority's fear that school boards would charge high fees, effectively excluding some students from public education, would not come to pass because local school boards must be sensitive to political concerns in their communities.<sup>83</sup>

#### D. Home Rule

The Indiana Supreme Court analyzed a local ordinance regarding state acquisition of land in *Indiana Department of Natural Resources v. Newton County*.<sup>84</sup> Apparently motivated by its desire to keep land on the tax rolls, Newton County enacted ordinances designed to inhibit the State from purchasing land for conservation purposes. The ordinances required the state, before purchasing land in Newton County, to file a statement of intent describing the effect of the purchase on the county's economy, environment, and tax base.<sup>85</sup> Filing the statement would trigger a one-year process of public hearings by local

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77. *Id.* at 1230.

78. 312 N.E.2d 915 (Ind. Ct. App. 1974).

79. *Nagy*, 808 N.E.2d at 1230.

80. *Id.* at 1233.

81. *Id.* at 1234-35.

82. *Id.* at 1236.

83. *Id.* at 1237.

84. 802 N.E.2d 430 (Ind. 2004).

85. *Id.* at 432.

governmental bodies.<sup>86</sup> Violating the ordinances would subject the state to fines.<sup>87</sup> The state wished to acquire a particular parcel in Newton County as game bird habitat.<sup>88</sup>

The supreme court invalidated the ordinances. The county attempted to defend the ordinances under the Indiana Home Rule Act,<sup>89</sup> but that statute does not allow local governments to regulate state conduct, the court concluded.<sup>90</sup> The Indiana Home Rule Act does not explicitly exempt state agencies from local regulation, but a local ordinance impermissibly conflicts with state law if it purports to restrict an activity specifically authorized by a statute, as state acquisition of game bird habitat is statutorily authorized.<sup>91</sup>

The court also reversed the trial court's holding that the game bird habitat act is invalid because it is unconstitutionally vague. The county alleged vagueness because the statute did not define "game bird habitat" (although it did define "game bird") or "willing seller."<sup>92</sup> The court rejected this argument, holding that "statutory terms must be understandable, but they need not be rigorously precise."<sup>93</sup> The court also rejected the county's "parade of horrors" as to the misdeeds the state could undertake pursuant to the statute, noting the absence of any evidence of misconduct in this case.<sup>94</sup> The court further rejected the county's argument that the legislation could not be effective without interpretive rules defining the terms, as none were required by the statute nor, the court ruled, were they necessary to provide sufficient specificity.<sup>95</sup>

#### E. Election Fraud

*Pabey v. Pastrick*<sup>96</sup> is not a constitutional case, but it illustrates the Indiana Supreme Court's willingness to enter a largely political conflict to apply rules of law. The court acted similarly in the 2003 Indianapolis City-County Council redistricting case, *Peterson v. Borst*.<sup>97</sup> George Pabey, challenging longtime incumbent Mayor of East Chicago Robert Pastrick, lost the initial count in the election but filed a contest, alleging widespread fraud.<sup>98</sup> The trial court found many instances of blatant fraud and illegality and invalidated many votes, but not

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86. *Id.*

87. *Id.*

88. *Id.*

89. IND. CODE § 36-1-3-4 (2004) (giving local governments "all other powers necessary or desirable in the conduct of its affairs").

90. *Newton County*, 802 N.E.2d at 433.

91. *Id.*

92. *Id.* at 434.

93. *Id.*

94. *Id.*

95. *Id.* at 434-35.

96. 816 N.E.2d 1138 (Ind. 2004).

97. 786 N.E.2d 668 (Ind. 2003). See Laramore, *supra* note 1, at 942-45.

98. *Pabey*, 816 N.E.2d at 1140, 1144.

a sufficient number of votes to give Pabey the majority.<sup>99</sup> The question for the supreme court was whether, under the applicable statute, there was a “deliberate act or series of actions . . . making it impossible to determine the candidate who received the highest number of votes cast in the election.”<sup>100</sup>

In a 3-2 decision, the court invalidated the election results based on the widespread fraud. The court relied on the trial court’s lengthy and detailed findings that: non-English speakers were taken advantage of in absentee voting; absentee voters were unlawfully compensated; absentee voters were unlawfully “assisted” to vote for the incumbent; voters used vacant lots as voting addresses; the incumbent’s supporters possessed many unmarked absentee ballots without authorization; the incumbent’s supporters routinely filled out absentee ballots for others; voters violated the absentee voting statute by stating false reasons why they would be qualified to vote absentee; votes were cast by individuals not living in the city; and other irregularities occurred.<sup>101</sup> The trial court also noted Pabey’s difficulty in finding evidence because of intimidation and because many potential witnesses would be admitting illegal acts if they testified.<sup>102</sup>

Admitting that the statutory language was ambiguous, the court nonetheless invalidated the result and ordered a special election. It concluded that a challenger in Pabey’s position was required to prove that acts occurred to make it impossible to determine which candidate received the most legal votes cast and the actions “so infected the election process as to profoundly undermine the integrity of the election and the trustworthiness of its outcome.”<sup>103</sup>

The court ruled that the election was characterized by “a widespread and pervasive pattern of deliberate conduct calculated to cast unlawful and deceptive ballots” so that the election results were unreliable.<sup>104</sup> Pabey did not have to disqualify sufficient specific ballots to give himself the highest number of votes in the context of this widespread and difficult to prove corruption.

Justice Boehm dissented, joined by Justice Sullivan. Analyzing the statute, Justice Boehm concluded that it was not “impossible” to determine which candidate received the highest number of legal votes.<sup>105</sup> The trial judge had disqualified many ballots, but Pastrick still had the highest number. He also criticized the court’s construction of the absentee ballot statute, concluding that some ballots invalidated by the trial court should have been counted.<sup>106</sup> Because Pabey failed to prove that he actually received the most legal votes, the dissenters would not have upset the election result.<sup>107</sup>

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99. *Id.* at 1140.

100. IND. CODE § 3-12-8-2 (2004).

101. *Pabey*, 816 N.E.2d at 1145.

102. *Id.* at 1146-47.

103. *Id.* at 1150.

104. *Id.* at 1151.

105. *Id.* at 1155.

106. *Id.*

107. *Id.* at 1156.

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## II. THE RIGHTS CONSTITUTION

### A. *Privacy and Free Expression*

In *Clinic for Women, Inc. v. Brizzi*,<sup>108</sup> the Indiana Court of Appeals invalidated portions of Indiana's eighteen-hour waiting period statute for abortions, basing its decision in part on a right to privacy in article I, section 1 of the Indiana Constitution.<sup>109</sup> The challenged statute requires women seeking abortion to obtain in-person counseling at least eighteen hours before the abortion is performed, with counselors providing certain information mandated by law.<sup>110</sup> In practice, the statute generally requires a woman to travel to the abortion-providing facility at least twice.<sup>111</sup>

Plaintiffs alleged that the statute violated their privacy rights, and the court of appeals agreed. "We find that privacy not only animates article I, sec. 1, but permeates the atmosphere created by our constitution and extends to all our citizens, including women seeking to exercise their right to obtain an abortion."<sup>112</sup> The court labeled privacy a "core value," a concept used in previous cases to identify rights that can be legislatively regulated, but not abridged.<sup>113</sup> The court found that privacy concepts abide not only in article I, section 1 but also in portions of the constitution relating to religion (article I, sections 2, 3, and 4), speech (article I, section 9), search and seizure (article I, section 11) "and numerous other rights enumerated in the Indiana Constitution."<sup>114</sup> The court found privacy concepts undergirding previous case law, especially *In re Lawrance*,<sup>115</sup> which held that an individual has a right to make decisions about his or her own health care.<sup>116</sup> Cases under article I, section 1 holding that individuals have a right to engage in lawful businesses also are rooted in privacy concepts,

108. 814 N.E.2d 1042 (Ind. Ct. App. 2004), *trans. granted* (Ind. Jan. 27, 2005).

109. The text of article I, section 1, is as follows:

WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

IND. CONST. art. I, § 1.

110. IND. CODE § 16-34-2-1.1 (2004).

111. *Clinic for Women*, 814 N.E.2d at 1045-46 (referring to two-trip requirement).

112. *Id.* at 1047.

113. *Id.* at 1049. *See also* City Chapel Evangelical Free Inc. v. City of South Bend *ex rel.* Dep't of Redev., 744 N.E.2d 443 (Ind. 2001) (discussing concept of core value); Price v. State, 622 N.E.2d 954 (Ind. 1993).

114. *Clinic for Women*, 814 N.E.2d at 1047.

115. 579 N.E.2d 32 (Ind. 1991).

116. *Clinic for Women*, 814 N.E.2d at 1047 (citing *Lawrance*, 579 N.E.2d at 38-39).

the court found.<sup>117</sup> The court found privacy concepts animating various Indiana statutes on subjects ranging from employment records to voting rights.<sup>118</sup>

The court “ma[d]e explicit what heretofore has been implicit: The citizens of Indiana have a fundamental right of privacy inherent in and protected by our state constitution.”<sup>119</sup> The court did not fully define that right, but stated that “it extends to the right to make decisions about our health and the integrity of our minds and bodies.”<sup>120</sup> The privacy right, the court ruled, encompasses the right to abortion.<sup>121</sup>

Applying the “core value” analysis to the 18-hour waiting period statute, the court considered whether the law “materially burdens” the exercise of the constitutional right. The “material burden” analysis, originating in *Price*, seeks to determine whether a “right, as impaired [by a challenged statute], would no longer serve the purpose for which it was designed.”<sup>122</sup> If the right no longer serves its purpose, it is “materially burdened,” and the impairment violates the constitution.<sup>123</sup>

The court ruled that the case must be remanded to the trial court for a factual determination whether the challenged statute materially burdens the core value of privacy found in article I, section 1.<sup>124</sup> The court recounted factual findings from cases analyzing similar statutes in other states, which indicate that waiting periods lead to stress and physical symptoms for women who must undergo them, with few offsetting benefits.<sup>125</sup> Quoting Justice Stevens’s opinion in a federal decision on abortion waiting periods, the court also noted that the waiting period “appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women,” so that the waiting period for abortions—mandated only for abortions and for no other medical procedures—may infringe women’s liberty without any factual basis.<sup>126</sup>

The court also analyzed a free expression issue raised by the statute, applying article I, section 9.<sup>127</sup> The statute compels physicians to provide certain state-mandated information to women before abortions can be performed.<sup>128</sup> Plaintiffs

117. *Id.* at 1047-48.

118. *Id.* at 1048.

119. *Id.*

120. *Id.*

121. *Id.* at 1049.

122. *Id.* at 1050 (citing *Price v. State*, 622 N.E.2d 954, 960 n.7 (Ind. 1993)).

123. *Id.*

124. *Id.* at 1052.

125. *Id.* at 1051.

126. *Id.* at 1052 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 918 (1992) (Stevens, J., dissenting)).

127. *Id.* at 1053. The text of article I, section 9, is as follows: “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” IND. CONST. art. I, § 9.

128. IND. CODE § 16-34-2-1.1 (2004).

challenged this provision of the statute, arguing that the "compelled speech" violated physicians' rights to free expression.<sup>129</sup> No Indiana court previously had addressed whether "compelled speech" was protected by article I, section 9.

The court ruled that "compelled speech" is covered by article I, section 9, noting that the constitutional provision has broad scope—broader than the first amendment.<sup>130</sup> Because the first amendment addresses "compelled speech" and section 9 is even broader, the court ruled that section 9 also encompasses "compelled speech" within its scope.<sup>131</sup>

But the court ruled that the particular provisions of the abortion-waiting-period statute do not violate section 9. The "core value" in section 9 is political speech.<sup>132</sup> The court ruled that the speech compelled by the abortion statute is not political in nature.<sup>133</sup> Rather, the "compelled speech" is an appropriate exercise of the state's police power, exercised to protect the citizenry's health, safety, comfort, morals and welfare.<sup>134</sup> Because the "compelled speech" falls under the state's regulatory or police power, it is upheld so long as it is supported by a rational basis. In this case, the court ruled, the "compelled speech" "does tend to promote the health and welfare of women seeking to obtain an abortion, which is a legitimate state interest, by advising women of the risks of the procedure."<sup>135</sup>

Judge Baker dissented in part from the court's opinion. He disagreed with the court's placement of a right to privacy in article I, section 1, instead of grounding it in article I, section 21.<sup>136</sup> He agreed with the court's result relating to privacy, however, concurring that the waiting period statute transgressed that right.<sup>137</sup> He also dissented as to the need to remand the case for additional factfinding. Because the Indiana Constitution requires that men and women be treated equally, Judge Baker argued, the abortion statute must be invalidated because it requires certain warnings to be provided only to women and, thus, "inherently treats men and women differently."<sup>138</sup> Indiana law mandates specific informed consent procedures only for abortion, and abortions can only be obtained by women.

A woman's ability to make an informed decision about her own health is not affected by the fact that she is pregnant, and, therefore, there is no rational relationship to the legitimate government interest of providing medical information in requiring women to receive that information

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129. *Clinic for Women*, 814 N.E.2d at 1053.

130. *Id.*

131. *Id.*

132. *Price v. State*, 622 N.E.2d 954, 964-65 (Ind. 1993).

133. *Clinic for Women*, 814 N.E.2d at 1056.

134. *Id.*

135. *Id.* at 1057.

136. *Id.* at 1058. Judge Baker believed that the Indiana Supreme Court, in *State ex rel. Mavity v. Tyndall*, 74 N.E.2d 914 (Ind. 1947), found a right to privacy grounded in section 21.

137. *Id.*

138. *Id.* at 1059.

differently than men. Nothing indicates that women must receive medical information differently than men, and to suggest so is facially discriminatory.<sup>139</sup>

The facial discrimination required the law to be invalidated, Judge Baker argued.

In its recounting of privacy protections under the Indiana Constitution, the court omitted *Doe v. O'Connor*,<sup>140</sup> a case the Indiana Supreme Court decided just a few months before the court of appeals handed down *Clinic for Women*. In the context of a challenge to Indiana's sex offender registry,<sup>141</sup> the Indiana Supreme Court ruled that article I, section 1 was not, in and of itself, the source of a right to privacy.<sup>142</sup> Relying on construction of similar provisions in other state constitutions, the Indiana Supreme Court ruled that article I, section 1 cannot be "the sole basis" for a constitutional challenge on privacy grounds because it "is not so complete as to provide courts with a standard that could be routinely and uniformly applied."<sup>143</sup> It is not clear whether the court of appeals' invocation of other provisions of the constitution protecting privacy is sufficient to satisfy the supreme court's concern that section 1 not be the "sole basis" for state constitutional privacy rights.

### B. Equal Privileges and Immunities

In *Kelver v. State*,<sup>144</sup> an individual argued that the requirement that he wear a seat belt violated article I, section 23 because it applied only to passenger cars and not to trucks.<sup>145</sup> Kelver was convicted of failing to wear a seat belt in his GMC "Jimmy," and he then challenged the constitutionality of the law under which he was convicted.

Under the applicable statutes, individuals in the front seat of "passenger motor vehicles" are required to wear seatbelts, but persons in "trucks" are not.<sup>146</sup> Under applicable law, a "truck" is a "motor vehicle designed, used or maintained primarily for the transportation of property."<sup>147</sup> Kelver argued that trucks have no characteristics inherently different from passenger motor vehicles, so that there is no basis for different treatment that passes muster under section 23. The Indiana Supreme Court has posited a two-part test to analyze classifications under section 23: "First, the disparate treatment accorded to the legislation must be reasonably related to inherent characteristics which distinguish the unequally

139. *Id.* at 1060.

140. 790 N.E.2d 985 (Ind. 2003).

141. IND. CODE §§ 5-2-12-1 to -14 (2004).

142. *See* Laramore, *supra* note 1, at 962-63.

143. *O'Connor*, 790 N.E.2d at 991.

144. 808 N.E.2d 154 (Ind. Ct. App. 2004).

145. *Id.* at 157. The text of article I, section 23, is as follows: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.

146. IND. CODE §§ 9-19-10-2; 9-13-2-123.

147. *Id.* § 9-13-2-188(a).

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treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.”<sup>148</sup> Kelter introduced evidence from law enforcement officers showing that various officers applied different standards to distinguish between trucks and passenger motor vehicles for purposes of enforcing the seat belt law.<sup>149</sup>

The State defended the differential treatment, arguing that trucks are different in several ways, including that they provide more structural protection in collisions.<sup>150</sup> The court agreed that there are inherent differences between passenger motor vehicles and trucks allowing different treatment under the seat belt law.<sup>151</sup> The court noted that the Bureau of Motor Vehicles determines what constitutes a truck for licensing purposes, undermining Kelter’s argument that it is difficult to tell the difference between a truck and a passenger motor vehicle.<sup>152</sup>

The supreme court granted transfer in a significant case applying the Equal Privileges and Immunities Clause, *Ledbetter v. Hunter*.<sup>153</sup> In *Ledbetter*, the court of appeals’ opinion (vacated by the transfer grant) found unconstitutional a portion of Indiana’s medical malpractice statute regarding statutes of limitations for claims by minors. This same provision had been upheld by the supreme court in the seminal 1980 case *Johnson v. St. Vincent Hospital*,<sup>154</sup> but the court of appeals revisited the issue and applied a constitutional analysis that has been developed since 1980 to reach a different result.<sup>155</sup>

Indiana’s medical malpractice law sets a two-year, occurrence-based statute of limitations for minors’ claims.<sup>156</sup> In *Johnson*, the supreme court found that this provision met constitutional requirements even though it was different from the statutes of limitations for all other claims by minors.<sup>157</sup> *Johnson* held that the limitations period is “reasonably relate[d] to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs” in two ways.<sup>158</sup> First, the shorter limitations period would hold down malpractice premiums. Second, the faster period would allow cases to be tried faster, so that evidence would not be lost and memories would not fade.<sup>159</sup>

*Ledbetter* addressed these two rationales head-on under the two-part Equal

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148. *Kelter*, 808 N.E.2d at 156 (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

149. *Id.* at 157.

150. *Id.*

151. *Id.*

152. *Id.* at 148. See also *Owen v. State*, 796 N.E.2d 775 (Ind. Ct. App. 2003) (decision by BMV whether to license vehicle as truck or passenger motor vehicle determines vehicle’s status for seat belt law purposes).

153. 810 N.E.2d 1095 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 982 (Ind. 2004).

154. 404 N.E.2d 585 (Ind. 1980).

155. *Ledbetter*, 810 N.E.2d at 1098-99.

156. IND. CODE § 34-18-7-1 (2004).

157. See *id.* § 34-11-6-1 (statute of limitations for other claims by minors).

158. *Ledbetter*, 810 N.E.2d at 1100 (citing *Johnson*, 404 N.E.2d at 590).

159. *Id.* at 1100-01.



Privileges and Immunities standard announced fourteen years after *Johnson* was decided.<sup>160</sup> The current standard analyzes disparate legislative classifications to determine whether they are reasonably related to inherent characteristics that distinguish the classes, then evaluates whether uniform treatment is available to all those similarly situated.<sup>161</sup>

The plaintiffs had done extensive discovery of the insurance industry, and no evidence turned up showing that the limitations period on minors' malpractice claims had any effect on insurance rates or on the availability of medical services.<sup>162</sup> This lack of evidence negated *Johnson's* first basis for upholding the limitations period: there was no evidence of any reasonable relationship between the differential treatment and any inherent characteristic of the class of minor malpractice plaintiffs.<sup>163</sup> The court of appeals also rejected the second basis for the different limitations period, prompt presentation of claims, because there was no basis to differentiate malpractice claims by minors from all other tort claims by minors, which are governed by a longer limitations period. This rationale was invalid under the second prong of the section 23 test because the same treatment was not uniformly applicable to all persons (in this case, minor tort plaintiffs) similarly situated.<sup>164</sup>

In previous years, courts applying section 23 had some difficulty in determining exactly how to define the classes to be compared under the two-step analysis.<sup>165</sup> The cases decided in the most recent year did not present that problem.

### C. Open Courts

Two Indiana Court of Appeals decisions confirmed the right of prisoners under the Open Courts Clause of article I, section 12 to participate in certain civil legal proceedings while incarcerated. In *Murfitt v. Murfitt*,<sup>166</sup> the prisoner filed a motion to participate by alternative means in his divorce hearing, but the trial court denied the motion.<sup>167</sup> The trial court also denied his subsequent motions to be transported to court for the trial and to have counsel appointed for him as an indigent.<sup>168</sup> Relying on the language in section 12 that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law," the court of appeals reversed and

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160. See *supra* note 148 and accompanying text.

161. See *supra* note 148 and accompanying text.

162. 810 N.E.2d at 1101.

163. *Id.*

164. *Id.* at 1101-03.

165. See Laramore, *supra* note 1, at 961-62 (discussing *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *AlliedSignal Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003); *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000)).

166. 809 N.E.2d 332 (Ind. Ct. App. 2004).

167. *Id.* at 333.

168. *Id.*

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remanded, ordering the trial court to determine a method by which Murfitt could participate in the hearing.<sup>169</sup>

Similarly, in *Sabo v. Sabo*,<sup>170</sup> the prisoner's attempt to participate in his divorce hearing by telephone was complicated by withdrawal of his counsel, the timing of which left the prisoner both unrepresented and unable to participate personally.<sup>171</sup> Again relying on section 12, the court of appeals ruled that "some means must exist by which a plaintiff or defendant can prosecute or defend his or her civil claim while still incarcerated."<sup>172</sup> The court of appeals reversed and remanded, also ordering the trial court to provide a method for the prisoner to participate.<sup>173</sup>

#### *D. Right to Be Present at Trial*

In *Jordan v. Deery* in 2002,<sup>174</sup> the Indiana Supreme Court held that the jury trial right conveyed in article I, section 20 also included a party's right to be present at the party's trial "absent waiver or extreme circumstances."<sup>175</sup> *Niksich v. Cotton* assisted in defining "extreme circumstances" under article I, section 20.<sup>176</sup> *Niksich* was a prisoner who brought a small claims case when his television was broken.<sup>177</sup> The case mainly dealt with procedural requirements of the small claims rules.

*Niksich* also claimed that he had a right to be present at his small claims trial.<sup>178</sup> The court ruled that he had no such right. Rather, an incarcerated plaintiff "may seek to submit the case through documentary evidence, to conduct the trial by telephonic conference, to secure someone else to represent him at trial, or to postpone the trial until his release from incarceration."<sup>179</sup> Incarceration is therefore apparently an "extreme circumstance" under the *Jordan* standard.

#### *E. Incarceration for Debt*

Article I, section 22 establishes that "there shall be no imprisonment for debt, except in case of fraud."<sup>180</sup> In 1993, the Indiana Supreme Court placed a gloss on this provision relating to child support. Incarceration for failure to pay child support did not violate section 22, the court held, because "child support obligations arise out of a natural duty of the parent and not from a debt of the

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169. *Id.* at 334-35; IND. CONST. art. I, § 12.

170. 812 N.E.2d 238 (Ind. Ct. App. 2004).

171. *Id.* at 240-41.

172. *Id.* at 242.

173. *Id.* at 245.

174. 778 N.E.2d 1264 (Ind. 2002).

175. *Id.* at 1272.

176. 810 N.E.2d 1003 (Ind. 2004).

177. *Id.* at 1004.

178. *Id.* at 1008.

179. *Id.*

180. IND. CONST. art. I, § 22.

obligor.”<sup>181</sup>

Following fifty-three-year-old precedent,<sup>182</sup> the Indiana Court of Appeals ruled in *In re Paternity of L.A.* that section 22 bars incarceration for child support obligations after the youngest child is emancipated.<sup>183</sup> The court ruled that Indiana courts consistently had followed the 1952 supreme court ruling in *Corbridge*, limiting imprisonment for contempt for nonpayment of child support to situations in which the children were unemancipated.<sup>184</sup>

The court of appeals made this ruling in the face of legislative language apparently mandating a contrary result. In 2002, in reaction to another appellate decision limiting contempt to situations in which the children are unemancipated, the General Assembly enacted a statute making “contempt and all other remedies for the enforcement of a child support order available to assist in the enforcement of a child support order regardless of whether the child for whom the child support was ordered is emancipated.”<sup>185</sup> The court of appeals stated that it was bound by *Corbridge*, however, not to extend imprisonment for contempt to situations where the children for whom support was owing were emancipated.<sup>186</sup>

#### F. Double Jeopardy

In 2003 and 2004, the Indiana Court of Appeals applied recent state constitutional double jeopardy principles in a number of cases.

The underage defendant in *Lawson v. State*<sup>187</sup> had been convicted of illegal possession of alcohol and illegal consumption of alcohol, and the court of appeals raised the double jeopardy issue sua sponte. Lawson was arrested after a police officer saw him place a beer bottle on the floor of the van in which he was a passenger and because he had an odor of alcohol on his breath. When he was arrested, other empty beer bottles were within his reach.<sup>188</sup>

The court vacated Lawson’s conviction for possession (the lesser offense) because “[he] was convicted twice for the same behavior.”<sup>189</sup> Under *Richardson v. State*, two convictions violate state constitutional double jeopardy principles if “with respect to . . . the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another

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181. *Pettit v. Pettit*, 626 N.E.2d 444, 444 (Ind. 1993).

182. *Corbridge v. Corbridge*, 102 N.E.2d 764 (Ind. 1952).

183. 803 N.E.2d 1196 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 975 (Ind. 2004).

184. *Id.* at 1199.

185. Act of Mar. 14, 2002, § 6, 2002 Ind. Acts 39. This expression of legislative intent was not codified. The portion of the act that was codified states, “[n]otwithstanding any other law, all orders and awards contained in a child support decree . . . may be enforced by contempt,” with exceptions not applicable to this analysis. IND. CODE § 31-16-12-1 (2004).

186. *In re Paternity of L.A.*, 803 N.E.2d at 1201.

187. 803 N.E.2d 237 (Ind. Ct. App. 2004).

188. *Id.* at 239.

189. *Id.* at 243.

challenged offense."<sup>190</sup> In *Lawson*, the court of appeals also relied on the analysis in Justice Sullivan's concurring opinion in *Richardson*, which stated that Indiana's double jeopardy clause prohibits "conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished."<sup>191</sup> The court held that Lawson's convictions were covered by this language, so that the lesser conviction had to be vacated under double jeopardy principles.<sup>192</sup>

The court of appeals applied the same principles in *Vandergriff v. State*,<sup>193</sup> but with different results. Vandergriff was convicted of neglect of a dependent and battery, his infant son being the victim of both crimes. The acts serving as the basis for Vandergriff's convictions included ripping the baby from his mother's arms, throwing the baby into a carseat and speeding off, then later tossing the baby onto the floor.<sup>194</sup>

The State argued on appeal that Vandergriff's several acts supported more than one conviction. The court was not required to analyze that argument, however, because "even assuming the jury relied upon the same incident to establish the two offenses, additional evidentiary facts were required to prove each offense."<sup>195</sup> The neglect conviction required proof that the child was Vandergriff's dependent and that he was in Vandergriff's care, custody, and control.<sup>196</sup> The battery conviction required proof that the child was less than fourteen years old and Vandergriff was more than eighteen years old.<sup>197</sup> Because different evidence was required to prove these elements, the court ruled there was no constitutional double jeopardy violation.<sup>198</sup>

The *Vandergriff* court also looked at whether any statutory or common law double jeopardy rules were violated, applying an interesting gloss on relevant supreme court precedents. The court first reviewed the five categories of convictions barred by statutory or common law double jeopardy principles enumerated in Justice Sullivan's concurrence in *Richardson*.<sup>199</sup> Then, supported by Justice Boehm's dissent in *Guyton*, the court looked beyond the evidence adduced at trial to the statutes, charging instruments, and arguments of counsel to determine whether the facts establishing one conviction also established the

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190. 717 N.E.2d 32, 49 (Ind. 1999).

191. *Lawson*, 803 N.E.2d at 243 (quoting *Richardson*, 717 N.E.2d at 56 (Sullivan, J., concurring)).

192. It could be argued that Lawson's two convictions are not for "the very same act" because the actual conduct prohibited by the two statutes is different (i.e., consumption and possession), although the evidence used to convict is identical.

193. 812 N.E.2d 1084 (Ind. Ct. App. 2004).

194. *Id.* at 1085-86.

195. *Id.* at 1087.

196. *Id.*

197. *Id.*

198. *Id.* at 1088.

199. *Id.*

other.<sup>200</sup>

The court noted that Vandergriff's two convictions might be invalid under the second category in Justice Sullivan's analysis: "conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished."<sup>201</sup> This possible invalidity was supported by the fact that the prosecutor did not argue to the jury that each conviction was supported by a different act, but rather left it to the jury to determine which convictions should be supported by which facts.<sup>202</sup>

But because the prosecutor in closing argument relied on the grabbing incident as the primary support for the neglect conviction and on the tossing incident as the primary support for the battery conviction, the court concluded that although "we cannot say that there is no reasonable possibility that the jury used the same evidence to support the neglect and battery charges, . . . we can say that the facts supporting the two crimes are separate and distinct and, thus, no common law double jeopardy violation occurred."<sup>203</sup> The court therefore did not invalidate either conviction.

The court of appeals also applied other elements of Justice Sullivan's five part test for double jeopardy. In *Holden v. State*, the court ruled that a defendant could not properly be convicted of both robbery and conspiracy to commit robbery because the overt act of the *conspiracy*, as instructed by the judge, was the robbery itself.<sup>204</sup> This outcome violated the prohibition against two convictions based on the same evidence because the evidence establishing the overt act of the conspiracy was exactly the same evidence establishing the robbery.<sup>205</sup> In *Vennard v. State*, the court ruled that the defendant could not be convicted of both robbery, elevated to A felony because of serious bodily injury, and murder because the murder was the "serious bodily injury" required to prove that the robbery conviction should be enhanced to A-felony status.<sup>206</sup> The enhancement had to be vacated, relegating the robbery to B-felony status, under Justice Sullivan's injunction against "conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished."<sup>207</sup>

In *Jones v. State*, the court of appeals also looked into an allegation that double jeopardy principles were violated by a conviction after civil remedies had been imposed.<sup>208</sup> Jones was convicted of nonsupport of a dependent child after

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200. *Id.* (citing *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002)).

201. *Id.*

202. *Id.* at 1089-90.

203. *Id.* at 1090.

204. 815 N.E.2d 1049, 1056 (Ind. Ct. App. 2004), *trans. denied* (Ind. Jan. 6, 2005).

205. *Id.* at 1056.

206. 803 N.E.2d 678, 679 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 803 (Ind. 2004).

207. *Id.* at 682.

208. 812 N.E.2d 820 (Ind. Ct. App. 2004).

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being sanctioned for contempt for failure to support his child.<sup>209</sup> Under federal double jeopardy law, the relevant question is whether the civil sanction constitutes punishment.<sup>210</sup> Because the contempt in Jones's case was intended to coerce him to pay child support, it was remedial rather than punitive, so the criminal prosecution did not violate federal double jeopardy principles.<sup>211</sup>

Under the Indiana Constitution, the court applied a different analysis but reached the same result. The court concluded that state constitutional double jeopardy analysis applies only to two statutorily defined crimes.<sup>212</sup> The court derived this conclusion from *Richardson*, which said that the purpose of the "same elements" and "same evidence" double jeopardy tests "is to determine whether the essential elements of separate *statutory crimes charged* could be established hypothetically."<sup>213</sup> Because the *Richardson* analysis applies only to "statutory crimes," and civil contempt is not a statutory crime, state double jeopardy principles do not bar the prosecution.<sup>214</sup> In the end, this analysis is not much different than the federal analysis: the federal question is whether the contempt is punitive; the state question is whether the contempt is criminal. In most cases, the answers to these questions will be the same.

These cases show that the court of appeals is taking seriously the supreme court's case law on double jeopardy under the Indiana Constitution, although the underlying doctrine remains a bit muddled. The basic principle of *Richardson*, barring a conviction when either the same elements or same evidence used for conviction of one crime is used again to convict of a second crime, is now sufficiently established that the court of appeals even applied it in one case *sua sponte*.<sup>215</sup> The mechanics of the analysis remain less clear, however. Some panels of the court of appeals use straightforward "same elements" and "same evidence" analysis directly from *Richardson*.<sup>216</sup> Other panels use the five categories (including constitutional, statutory, and common law double jeopardy concepts) established by Justice Sullivan in his *Richardson* concurrence.<sup>217</sup> Other cases derive principles from Justice Boehm's dissent in *Guyton*, which heavily criticized *Richardson*.<sup>218</sup>

### G. Search and Seizure

The court of appeals applied state constitutional search and seizure principles in a number of cases. Article I, section 11 prohibits unreasonable searches, and

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209. *Id.* at 822.

210. *Id.*

211. *Id.* at 823.

212. *Id.* at 824.

213. *Id.* (quoting *Richardson v. State*, 717 N.E.2d 37, 50 (Ind. 1999) (emphasis added)).

214. *Id.* at 824-25.

215. *Lawson*, 803 N.E.2d at 243.

216. *E.g.*, *Holden*, 815 N.E.2d at 1057.

217. *E.g.*, *Vennard*, 803 N.E.2d at 682.

218. *E.g.*, *Vandergriff*, 812 N.E.2d at 1088.

cases have determined that the standard refers solely to the reasonableness of law enforcement conduct.<sup>219</sup>

*Osborne v. State*, adds specificity to the definition of reasonable law enforcement conduct.<sup>220</sup> In *Osborne*, police were contacted by an informant who said he would be bringing Osborne to French Lick, Indiana, and that Osborne would possess cocaine.<sup>221</sup> The informant said he would identify himself by driving over the posted speed limit, giving police an excuse to stop the car and search Osborne.<sup>222</sup> In exchange, the informant sought consideration for his girlfriend, who was facing unrelated cocaine charges.<sup>223</sup> Police knew that the informant was on home detention and had been consuming cocaine and alcohol on the day he was driving Osborne to French Lick.<sup>224</sup> The operation went as planned, and police arrested Osborne for possessing cocaine.

The court of appeals ruled that the evidence against Osborne must be suppressed, holding that police conduct in arresting him was unreasonable.<sup>225</sup> The court criticized police for allowing an individual on home detention, whom they knew to have ingested alcohol and cocaine, to drive at higher-than-posted speed in a populated area. The court called the informant's conduct "outrageously dangerous" and contrary to established policies against driving while impaired.<sup>226</sup> The court was particularly critical of police for allowing the informant to participate in the arrest while he was supposed to be on home detention as punishment for a separate crime.<sup>227</sup>

Other court of appeals cases applied article I, section 11 in the context of garbage searches.<sup>228</sup> Both of these cases mentioned *State v. Stamper*,<sup>229</sup> a 2003 case that appeared to establish a "bright line" test holding that any law enforcement search of garbage that required trespass was per se unreasonable under the Indiana Constitution.

In *Mast v. State*, the garbage was in a dumpster that sat far back from the

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219. *E.g.*, *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994) ("reasonableness of the official behavior must always be the focus of our state constitutional analysis").

220. 805 N.E.2d 435 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

221. *Id.* at 437.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 441.

226. *Id.* at 440.

227. *Id.* at 440-41.

228. The Indiana Supreme Court accepted transfer in one garbage search case, *Litchfield v. State*, 808 N.E.2d 713 (Ind. Ct. App. 2004), during the period covered by this Article. It issued its opinion in *Litchfield* after the period covered by this Article. *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). The supreme court's opinion, which will be discussed at greater length in next year's Article, clarified the test for determining reasonableness of law enforcement conduct under section 11 and held that the determination of reasonableness of trash searches is case by case.

229. 788 N.E.2d 862 (Ind. Ct. App. 2003).

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road.<sup>230</sup> A police officer dressed as a garbage collector accompanied employees of the private garbage collection company that ordinarily picked up the garbage.<sup>231</sup> After they emptied the dumpster (the officer remaining in the garbage truck), they took the garbage off site, where they searched it and found marijuana and items associated with methamphetamine.<sup>232</sup> After further investigation, Mast was charged as a methamphetamine dealer.<sup>233</sup>

The court approved the garbage search, holding that trespass is not the sine qua non of reasonableness.<sup>234</sup> Here, the waste hauling company acted as it always would, coming onto Mast's property to empty the dumpster. Mast only left trash in the dumpster that he intended to abandon. Because police did nothing that the authorized trash collector was not authorized to do, the search was not unreasonable and the evidence did not have to be suppressed.<sup>235</sup>

The court in *State v. Neanover*<sup>236</sup> analyzed a search of garbage left outside an apartment on a third-floor, interior landing.<sup>237</sup> The tenants used the landing for a variety of purposes, including storage, and they placed a table and chairs there for recreational use.<sup>238</sup> They sometimes placed their bagged garbage on the landing as an intermediate step before carrying it outside the building for disposal.<sup>239</sup> Police took the bagged garbage from the landing and used its contents, including evidence of marijuana use, as the basis for a search warrant.<sup>240</sup>

The court of appeals performed a Fourth Amendment analysis, determining that Neanover had a reasonable expectation of privacy in the landing.<sup>241</sup> She had placed a number of items on the landing that she did not intend to abandon, such as the table and chairs, but she did intend to abandon the garbage.<sup>242</sup> The court based its conclusion on the inaccessibility of the third floor landing, Neanover's use of the space as a combination patio and storage space, and the fact that she had not yet taken the garbage to its final resting place.<sup>243</sup>

The court also determined that the search was unreasonable under article I, section 11, looking at the totality of circumstances rather than the bright line trespass test of *Stamper*.<sup>244</sup> Circumstances the court weighed included the trespass by law enforcement officers as well as the fact that the garbage had not

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230. 809 N.E.2d 415 (Ind. Ct. App. 2004), *reh'g denied*, *trans. denied* (Ind. Mar. 24, 2005).

231. *Id.* at 417.

232. *Id.*

233. *Id.* at 418.

234. *Id.* at 420-21.

235. *Id.* at 420.

236. 812 N.E.2d 127 (Ind. Ct. App. 2004).

237. *Id.* at 128.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 130-31.

242. *Id.* at 129-30.

243. *Id.* at 131.

244. *Id.* at 131-32.



been placed in the location where it would be picked up by trash collectors.<sup>245</sup>

In *Clark v. State*, the defendant argued that his car was searched in violation of the Indiana seatbelt statute.<sup>246</sup> He was stopped by a law enforcement officer who had reasonable suspicion that Clark was not wearing a seatbelt.<sup>247</sup> The officer then asked Clark for permission to search the car.<sup>248</sup> Clark gave permission, and the officer found marijuana.<sup>249</sup>

The reasonableness analysis in *Clark* hinged on the seat belt statute, which states: "A vehicle may be stopped to determine compliance with this chapter. However, a vehicle, the contents of a vehicle, the driver of a vehicle, or a passenger in a vehicle may not be inspected, searched, or detained solely because of a violation of this chapter."<sup>250</sup> The Indiana Supreme Court has interpreted this statute to restrict what police may do when stopping a motorist for a seat belt violation.<sup>251</sup> The statute is intended to preclude police from using a seat belt stop as a pretext for other actions, including searches, for which they lack any other basis.<sup>252</sup>

Under the statutory language, police stopping a motorist for a seatbelt violation have fewer options than if they stop a motorist for other violations. Absent independent evidence of another violation, police may not conduct a search when they have stopped a motorist for a seat belt violation.<sup>253</sup> Because the officer could articulate no additional facts supporting his search, the search results had to be suppressed because law enforcement conduct had been unreasonable under the seat belt statute.<sup>254</sup>

### III. CONSTITUTIONAL AMENDMENTS

Indiana voters ratified three amendments to the Indiana Constitution on November 2, 2004.<sup>255</sup>

The voters amended article V, section 10 to address the situation when both the governorship and lieutenant governorship are vacant. Under the previous provision, the General Assembly was required to convene within forty-eight hours to select a new governor from the same political party as the former

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245. *Id.* at 132.

246. 804 N.E.2d 196 (Ind. Ct. App. 2004).

247. *Id.* at 198.

248. *Id.*

249. *Id.*

250. IND. CODE § 9-19-10-3 (2004).

251. *Baldwin v. Reagan*, 715 N.E.2d 332, 338 (Ind. 1999).

252. *Clark*, 804 N.E.2d at 200.

253. Independent evidence of another violation permits a search. *State v. Morris*, 732 N.E.2d 224 (Ind. Ct. App. 2000).

254. *Clark*, 804 N.E.2d at 201-02.

255. The questions, as they appeared on ballots, and vote totals may be found at <http://www.in.gov/apps/sos/election/general/general2004;jsessionid=aXf-A39uVN78?page=office&countyID=-1&officeID=42&districtID=-1&candidate=> (last updated Jan. 10, 2005).

governor. The new governor could then appoint a new lieutenant governor.<sup>256</sup>

The added language permits other individuals to discharge the governor's powers and duties during any time period that might elapse before a new governor could be elected.<sup>257</sup> It establishes the following order of succession of individuals to exercise the governor's powers and duties until the vacancy is filled: the speaker of the house; the president pro tempore of the senate; the treasurer of state; the auditor of state; the secretary of state; and the state superintendent of public instruction. The provision stipulates that the individual exercising the governor's powers and duties loses authority as soon as the General Assembly has chosen a new governor.

The second amendment enacted by the voters amends article VI, section 2 to permit the General Assembly to provide by law for uniform dates for beginning the terms of county officials including the clerk, auditor, recorder, treasurer, sheriff, coroner, and surveyor.<sup>258</sup> This provision addresses a lack of uniformity in terms that has evolved through vacancies in offices.

The third amendment the voters approved changes article X, section 1, which mandates the types of property that must be taxed and the types of property that may be exempted by the General Assembly from property taxation. The constitution previously permitted the General Assembly to exempt personal property from taxation with the exceptions of (1) inventory, (2) personal property used or consumed to produce income, and (3) personal property held as an investment.<sup>259</sup> The constitution mandated that these three enumerated classes of personal property had to be taxed.<sup>260</sup> The amendment allows the General Assembly to exempt from taxation inventory and personal property used or consumed to produce income.<sup>261</sup> Personal property held as an investment still

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256. The full text of the unamended provision and the amendment appear in Public Laws 188-2002 and 280-2003, the statutes by which two successive sessions of the General Assembly enacted identical amending language, as required by article XVI, section 1. H.J. Res. 2, 112th Gen. Assem., 2d Reg. Sess., 2002 Ind. Acts 188; H.J. Res. 8, 113th Gen. Assem., 1st Reg. Sess., 2003 Ind. Acts 280.

257. *Id.*

258. The full text of the unamended provision and the amendment appear in Public Laws 187-2002 and 279-2003, the statutes by which two successive sessions of the General Assembly enacted identical amending language, as required by article XVI, section 1. S.J. Res. 12, 112th Gen. Assem., 2d Reg. Sess., 2002 Ind. Acts 187; H.J. Res. 7, 113th Gen. Assem., 1st Reg. Sess., 2003 Ind. Acts 279.

259. The full text of the unamended provision and the amendment appear in Public Laws 189-2002 and 278-2003, the statutes by which two successive sessions of the General Assembly enacted identical amending language, as required by article XVI, section 1. H.J. Res. 9, 112th Gen. Assem., 2d Reg. Sess., 2002 Ind. Acts 189; S.J. Res. 5, 113th Gen. Assem., 1st Reg. Sess., 2003 Ind. Acts 278.

260. *Id.*

261. This provision in part retroactively authorized provisions of Act of June 28, 2002, 2002 Ind. Acts 192 (codified at IND. CODE §§ 6-1.1-10-29, 6-1.1-10-29.5; 6-1.1-12-41, 6-1.1-12-42 (2004)), which phased out the inventory tax and other taxes on business personal property.

must be taxed.<sup>262</sup>

The amendment also allows the General Assembly to exempt real property used as a principal place of residence by an owner, an owner of a beneficial interest, or a person buying the property on contract.<sup>263</sup>

These provisions may be a reaction to the *Town of St. John* litigation,<sup>264</sup> which established that all property must be assessed by use of objective information measuring property wealth. When reassessment took place using the *Town of St. John* standard, many homeowners experienced significant property tax increases.<sup>265</sup> The constitutional amendment would allow the General Assembly to use its exemption power to protect homeowners from some of the effects of market-value assessments.<sup>266</sup>

All of these amendments were effective upon approval by the voters.

#### IV. GUBERNATORIAL SUCCESSION<sup>267</sup>

A provision of the Indiana Constitution not previously used, article V, section 10, came into play in 2003 upon the unexpected death of Governor Frank O'Bannon. The smooth transition upon Governor O'Bannon's disability and death to the inauguration of Joseph E. Kernan as Indiana's forty-eighth governor since statehood illustrated the capacity of the Indiana Constitution and the good working relationship among the branches of government.

The transition also illustrated the need to interpret article V, section 10 to ensure that someone is always available to exercise gubernatorial powers. Because the interaction of two subsections in section 10 is less than crystal clear, the plain language does not explain precisely how the transition of power occurs in various circumstances.

Governor O'Bannon was the first Indiana governor to die in office in more

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262. See *supra* note 259 and accompanying text.

263. *Id.*

264. See, e.g., *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998).

265. See, e.g., Kevin Corcoran, *Voters OK Property Tax Law Changes*, INDIANAPOLIS STAR, Nov. 3, 2004, available at <http://www.indystar.com/articles/8/191562-9438-168.html>.

266. The amendment was enacted by the General Assembly before the Indiana Supreme Court indicated that many "tax policy" decisions such as credits and deductions may be permissible under the "uniform and equal" requirement in article X that undergirded the *Town of St. John* holding. See *Inland Container Corp. v. State Bd. of Tax Comm'rs*, 785 N.E.2d 227 (Ind. 2003) (property tax credit did not implicate "uniform and equal" language, which applies only to assessments, not actual tax bills).

267. The author was counsel to Governor Frank O'Bannon at the time of his disability and death and subsequently became counsel to Governor Joseph E. Kernan. The author thanks Kevin Charles Murray and Richard A. Nussbaum II, special counsels to Kernan when he was lieutenant governor and governor, for their comments on this portion of the article. The author expresses his thanks for the superb collegueship and friendship of Messrs. Murray and Nussbaum during their period of service in the governor's office, and to Governors O'Bannon and Kernan for providing him an extraordinary opportunity for public service.

than a century,<sup>268</sup> and the first since section 10 was amended to its current form in 1978. His death brought sadness to the Indiana Statehouse, where he had worked for decades, and it touched many Hoosiers with sadness as well because they felt a personal connection with him even if they had not met him.<sup>269</sup> As Governor Kernan said when he was sworn in, "I've lost my governor and my friend. So too has every Hoosier lost their governor and their friend."<sup>270</sup>

#### A. Disability and Succession

Governor O'Bannon had a stroke on September 8, 2003, when he was attending a trade conference in Chicago.<sup>271</sup> He was unconscious when found that morning, and he remained unconscious throughout his hospitalization until his death on September 13.<sup>272</sup> Then-Lieutenant Governor Kernan also was in Chicago and made sure that Governor O'Bannon was properly cared for at a top hospital before returning to Indianapolis.<sup>273</sup>

Upon his return to Indianapolis, Lieutenant Governor Kernan stated publicly that he had assumed the responsibility of acting governor as provided by the constitution. In assuming authority as acting governor, Kernan quoted subsection (a) of section 10, which states, "[i]n case the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall discharge the powers and duties of the office as Acting Governor."<sup>274</sup>

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268. The last Indiana governor to die in office was Alvin P. Hovey in 1891, well before the current version of article V, section 10 was in effect. Indiana Historical Bureau, *Indiana Governor Alvin Peterson Hovey*, at <http://www.statelib.lib.in.us/www/ihb/govportraits/hovey.html> (last visited Mar. 19, 2005). The last lieutenant governor to assume the governorship was Emmett Branch, who became governor in 1924 when Warren T. McCray resigned after being convicted of mail fraud. 2 JOHN D. BARNHART & DONALD F. CARMONY, *INDIANA FROM FRONTIER TO INDUSTRIAL COMMONWEALTH* 392-93 (1954).

269. See, e.g., Monica Davey, *With Respect, a State Pauses (Even Its Politicians)*, N.Y. TIMES, Sept. 21, 2003, at A27.

270. IND. GEN. ASSEMBLY, REPORT ON GUBERNATORIAL SUCCESSION AND MEMORIALS TO GOV. FRANK L. O'BANNON, at Senate 5, House 7 (2003) [hereinafter REPORT ON O'BANNON SUCCESSION] (remarks of Gov. Joseph E. Kernan).

271. Mary B. Schneider, *O'Bannon Gravely Ill After Massive Stroke*, INDIANAPOLIS STAR, Sept. 9, 2003, at A-1; J.K. Wall, *Governor Met with Japanese Business Leaders*, INDIANAPOLIS STAR, Sept. 9, 2003, at A10.

272. Diana Penner & Kristina Buchthal, *Doctors Say Damage Was Too Great*, INDIANAPOLIS STAR, Sept. 14, 2003, at A9.

273. Schneider, *supra* note 271, at A1; Michele M. Solida, *State Leaders Ready to Act if Necessary*, INDIANAPOLIS STAR, Sept. 9, 2003, at A1.

274. IND. CONST. art. V, § 10(a); Press Release, Indiana Office of the Governor, Statement About Governor O'Bannon's Condition; Kernan Is Acting Governor (Sept. 8, 2003) (available at Indiana State Archives). Section 10 was amended by the voters effective November 2, 2004. See *supra* notes 256-57 and accompanying text. The constitutional language in effect when Governor Kernan succeeded to the governorship in 2003 was affected by this amendment, but not in

But subsection (d) of section 10 also speaks to the transfer of power to the acting governor in the case of a governor's disability. It requires the president pro tempore of the state senate and speaker of the state house of representatives to "file with the supreme court a written statement suggesting that the Governor is unable to discharge the powers and duties of the office."<sup>275</sup> The supreme court then must meet within forty-eight hours to decide whether the governor is able to serve; if it decides the governor is not, the lieutenant governor assumes the governor's duties as acting governor.

Leaders of the legislative branch acted under subsection (d) two days after Governor O'Bannon was hospitalized. On September 10, the president pro tempore and the speaker initiated the formal process under subsection (d).<sup>276</sup> Shortly after the legislative leaders filed their petition, the supreme court issued an order finding Governor O'Bannon unable to discharge his duties because of his health condition and stating that "the Lieutenant Governor, Joseph E. Kernan, shall discharge the powers and duties of the office of Governor as Acting Governor in addition to serving as Lieutenant Governor."<sup>277</sup> The court's order also "ratified" actions Kernan had taken since Governor O'Bannon's disability was discovered at 9:30 a.m. on September 8, 2003.<sup>278</sup>

The branches of state government cooperated closely during this time. The speaker and president pro tempore were in frequent contact with the lieutenant governor's office and the governor's office.<sup>279</sup> The supreme court was well aware of events as they transpired.<sup>280</sup> Because of this coordination and communication, the supreme court already was convened in its conference room awaiting delivery of the letter from speaker and president pro tempore on September 10.<sup>281</sup>

The record shows sensitivity on the part of the legislative and judicial branches to the issues of succession. Before they delivered their letter to the supreme court, the president pro tempore and speaker sought not only a letter from Governor O'Bannon's treating physician stating that he could not discharge his duties, but also a letter indicating that the O'Bannon family supported designation of Kernan as acting governor.<sup>282</sup> This sensitivity in part reflected the close personal relationships among the principals involved, but also showed the principals' desire not to insert themselves unnecessarily into the operation of the

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substance. The relevant language discussed and analyzed in this portion of the Article was only made gender-neutral, not changed substantively. This Article quotes the current constitutional language.

275. IND. CONST. art. V, § 10(d).

276. REPORT ON O'BANNON SUCCESSION, *supra* note 270, at Senate 3, House 5.

277. *Id.* at Senate 4, House 6.

278. *Id.*

279. *Id.* at Senate 2, House 4 ("Our attorneys met numerous times with the attorneys from the Governor's and Lieutenant Governor's Offices.").

280. David J. Remondini, *Executive Power Transfer Affects Supreme Court*, IND. LAW., Oct. 8-21, 2003, at 5.

281. *Id.*

282. REPORT ON O'BANNON SUCCESSION, *supra* note 270, at Senate 3-4, House 5-6.

other branch out of respect for the distribution of powers set forth in article III of the Indiana Constitution.

### B. Interpretation of Section 10

The question left unanswered by the transition of power in 2003 is how subsection (a)—which appears to automatically vest the authority of acting governor in the lieutenant governor when the governor is disabled—is reconciled with subsection (d), under which the other two branches must act in concert to give the lieutenant governor authority as acting governor.<sup>283</sup> Between the time Governor O'Bannon became disabled on September 8 and the supreme court's order on September 10, Kernan performed as acting governor under subsection (a) even though there had been no formal action by the other branches under subsection (d). How to interpret section 10 should be determined in light of the text, the history of the time when the provision was adopted, the structure and function of the constitution, and relevant case law.<sup>284</sup> Lieutenant Governor Kernan also stated that he took on the responsibilities as acting governor under a "common sense" interpretation of the language,<sup>285</sup> a phrase the Indiana Supreme Court used two months later in a different context, stating that "common sense has driven our constitution from the earliest time."<sup>286</sup>

1. *Text.*—The plain language of subsection (a) reads as if the lieutenant governor becomes acting governor automatically—without intervention by the other branches—when the governor is unable to discharge the powers and duties of his office. The words of the provision, read in the most straightforward manner, invest the lieutenant Governor in the role of acting governor automatically.

The structure of the second sentence of subsection (a) parallels the structure of the first sentence of subsection (a): "In case the Governor-elect fails to assume office, or in case of the death or resignation of the Governor or the Governor's removal from office, the Lieutenant Governor shall become Governor and hold office for the unexpired term of the person whom Lieutenant Governor succeeds."<sup>287</sup> Both sentences describe situations in which the lieutenant governor

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283. The legislative leadership in office at the time plainly believed that the lieutenant governor could be made acting governor only under the provisions of subsection (d). REPORT ON O'BANNON SUCCESSION, *supra* note 270, at Senate 2, House 4. In their statement on succession, the legislative leaders indicated that "[t]here was no dispute" among the branches that only action by the legislative leadership and supreme court could transfer power. *Id.* The inaccuracy of that statement is shown by Lt. Governor Kernan's statement on September 8, 2003 that he "assume[d] the duties" of Acting Governor "under what he called 'a common sense provision' of the Indiana Constitution," quoting subsection (a) as making him Acting Governor upon the Governor's disability.

284. *See, e.g.,* Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003).

285. Press Release, *supra* note 274.

286. D & M Healthcare, Inc. v. Kernan, 800 N.E.2d 898, 901 (Ind. 2003).

287. IND. CONST. art. V, § 10(a).

assumes the powers of the governorship without any intervening action by other branches. In the first sentence, if the governor-elect fails to take the oath or the governor dies, resigns, or is removed, the lieutenant governor “shall become Governor.” Similarly, the second sentence states straightforwardly that if the governor “is unable to discharge the powers and duties of the office,” the lieutenant governor shall discharge those powers and duties as acting governor. Both sentences of subsection (a) describe a direct transfer of authority without intervention by other branches.

Subsection (d), on the other hand, states that the lieutenant governor becomes acting governor when the other two branches act to confirm the governor’s disability.<sup>288</sup> It requires, first, that the leaders of the two legislative branches unanimously ask the supreme court for a declaration of the governor’s disability, then, second, that the court confirm that the governor is unable to discharge the powers and duties of his office. It makes no reference to the automatic succession language of subsection (a).

The balance of section 10, not directly applicable in the 2003 succession, may also shed light on the meaning of the section. Subsection (b) provides the method for filling the lieutenant governorship in the event the lieutenant governor succeeds to the governorship.<sup>289</sup> It also allows the Indiana General Assembly, by statute, to designate a means for filling the lieutenant governorship temporarily if the lieutenant governor is disabled or cannot serve.<sup>290</sup> Subsection (c) provides a means for the governor himself to relinquish power temporarily in the event he recognizes his own disability or anticipates a period of time (such as anesthesia during surgery) when he will be unable to fulfill the duties of his office.<sup>291</sup> The governor takes this action by transmitting a written statement to legislative leaders declaring his disability; he may resume office upon transmitting a written statement stating that he is able to act as governor once again. Subsection (e) directs the General Assembly to convene, in the event that the governorship and lieutenant governorship are vacant simultaneously, to select a new governor, who would then select a new lieutenant governor under the provisions of subsection (b).<sup>292</sup>

2. *History.*—Indiana lacks legislative history, but the legislative committee that drafted the current language of section 10 prepared a brief report explaining the reasoning behind the amendment. The prior language of section 10 permitted the lieutenant governor to become acting governor upon the governor’s disability, but “[s]ince no method is provided to determine when the contingency [of disability] exists, it is unlikely that it would ever be effected.”<sup>293</sup> The portions of

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288. IND. CONST. art. V, § 10(d).

289. IND. CONST. art. V, § 10(b).

290. See IND. CODE § 4-4-2-2 (2004).

291. IND. CONST. art. V, § 10(c).

292. IND. CONST. art. V, § 10(e). The amendment ratified by the voters in 2004 lists additional individuals who are to exercise the powers and duties of the governor in the event that both the governorship and lieutenant governorship are vacant. See *supra* note 255 and accompanying text.

293. IND. LEGISLATIVE COUNCIL, REPORT OF THE COMM. ON GUBERNATORIAL SUCCESSION

section 10 relating to gubernatorial disability were added to address that problem.

The committee's report also explains its unanimous understanding of the operation of the amendment it proposed, which became the current version of section 10:

In case the Governor is unable to discharge the duties of his office, the Lieutenant Governor becomes acting Governor.

- (a) The Governor may declare in writing to the President Pro Tempore of the Senate and to the Speaker of the House that he is unable to discharge his duties; and he may reassume his duties by declaring in writing to the President Pro Tempore of the Senate and the Speaker of the House that he is able to discharge his duties.
- (b) The Supreme Court may, pursuant to a proceeding initiated by either the President Pro Tempore of the Senate or the Speaker of the House[,] determine that the Governor is unable to discharge his duties; and, later, pursuant to a proceeding initiated by the Governor determine that the Governor is able to discharge his duties.<sup>294</sup>

The 1978 amendment of section 10 also occurred shortly after the 1967 enactment of the Twenty-Fifth Amendment to the United States Constitution, which created a similar system for filling the presidency when the President is temporarily unable to act. The framers of Indiana's amendment were clearly aware of the federal change, as they appended material relating to the federal change to their committee report.<sup>295</sup> A primary motivation for the Twenty-Fifth Amendment was to provide for filling the vice-presidency after the vice-president acceded to the presidency, a contingency not then addressed in the Constitution.<sup>296</sup> The Twenty-Fifth Amendment also addressed the temporary disability of the President—which had occurred in the recent past when President Eisenhower was sedated for surgery. A President alert at all times and able to deal with pressing issues of national defense was considered a necessity during those Cold War years.<sup>297</sup>

But the federal amendment took a different approach than section 10, and its history is therefore of limited use. Under the federal provision, the Vice President or a majority of cabinet members can ask Congress to declare that the president is disabled, and the vice president takes on presidential responsibilities immediately upon filing the declaration.<sup>298</sup> The President can resume his duties

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3 (Oct. 1974).

294. *Id.* at 6.

295. *Id.* at 9-11.

296. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 6 (1968). Bayh, then senator from Indiana, authored the Twenty-Fifth Amendment and shepherded it through Congress.

297. *Id.* at 23-26. Woodrow Wilson had an even more severe disability during his second term in office, and his wife and aides exercised significant presidential authority at that time. *Id.* at 19-21.

298. U.S. CONST. amend. XXV, § 4, para. 1.



by filing a written statement that he is no longer disabled. If the Vice President or a majority of the cabinet state in writing that the disability has not ceased, the factual issue is decided by a congressional vote. Indiana's approach is different, in that no one in the Executive Branch is involved in the decision to recognize and adjudicate gubernatorial disability.<sup>299</sup>

3. *Structure and Function.*—As a functional matter, section 10 balances two competing ideas. First, it is important to have orderly and prompt succession in the event of gubernatorial disability. Second, it is vital to protect the democratic process against usurpation of gubernatorial authority by a lieutenant governor when the governor is in fact able to serve. section 10, like the Twenty-Fifth Amendment, puts arrangements in place to balance those competing ideas.

The question whether the lieutenant governor becomes acting governor automatically under subsection (a) in the event of the governor's disability could be particularly important if there is immediate need for gubernatorial action. One can imagine a number of scenarios in which quick action by an acting governor would be necessary in the event of a governor's disability. The most obvious, if least pleasant, is if the governor's disability were caused by a criminal or terrorist act or natural disaster that also disabled other portions of the government. If no quorum of the supreme court could be assembled, or if the legislative leaders could not communicate with one another for reasons that could arise from a disaster or terrorist attack, the provisions of subsection (d) could not be used to promptly install an acting governor.

The need for prompt succession is important not only in the event of a potential disaster or threat, but also to accomplish more quotidian activities of government. Someone needs to perform gubernatorial duties ranging from signing documents necessary for public finance transactions to approving agency rules, many of which involve deadlines for gubernatorial action.<sup>300</sup> Moreover, if a gubernatorial disability were to occur during a legislative session, a gap in authority could lead to effective forfeiture of the veto power because of non-extendable deadlines.<sup>301</sup>

On the other hand, structures must be in place to ensure that a lieutenant governor does not improperly usurp the role of acting governor. Subsection (d) sets a high barrier for someone wishing to take on or maintain the acting governor role. Significant figures from the other branches, including a majority of the justices of the supreme court, must concur in the transfer of power. This mechanism makes usurpation very difficult.

4. *Cases.*—No cases interpret this portion of the Indiana Constitution.

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299. Indiana is considered to have a "weak governor" government in that, for example, the gubernatorial veto can be overridden by a simple majority. IND. CONST. art. V, § 14. The assignment of determining gubernatorial disability to the legislative and judicial branches, without any involvement by the executive branch, is another example of this pattern.

300. See, e.g., IND. CODE § 4-22-2-34 (proposed rule becomes law without signature if governor fails to act by fifteenth day).

301. IND. CONST. art. V, § 14 (governor must veto bill within seven days of delivery or it becomes law without signature).

### C. Analysis

The key to interpreting section 10 is to give meaning to both subsection (a) and subsection (d). Principles of construction indicate that each subsection should be read to have meaning if at all possible.<sup>302</sup> Reading subsection (d) as the only method for installing the lieutenant governor as acting governor when the governor is disabled would render the second sentence of subsection (a) meaningless. But if the lieutenant governor becomes acting governor automatically upon the governor's disability, what is the purpose for subsection (d)?

Examining the various situations in which succession could take place in the event of gubernatorial disability permits both subsections to have meaning. The circumstances that could occur are the following:

1. The governor could become disabled in a situation in which the disability is clear and unquestionable, as when Governor O'Bannon became ill;
2. The governor could become disabled but be unable or unwilling to detect or admit his disability;
3. The governor's ability to discharge the duties of his or her office could be questionable;
4. The lieutenant governor could seek to become acting governor when the governor is not unable to exercise the duties and responsibilities of the governorship.

In the first instance, there is no problem with the lieutenant governor's automatic succession to the acting governorship. When the governor's disability is clear, there is no question that the governor cannot perform his or her duties, nor is there any question of usurpation of gubernatorial functions by the lieutenant governor. In this instance, the automatic succession language of subsection (a) can operate without violating the intent of the framers of section 10 and without offending the structural and functional considerations that animate section 10. While the lieutenant governor can become acting governor automatically and immediately under the language in subsection (a), it still may be appropriate, in due time, for the other branches to express their assent through the procedure in subsection (d).

In the second circumstance, there must be a procedure to formally declare the governor unable to perform the functions of his or her office. If the governor is unable to properly perform his or her duties, there must be a method to formally determine his or her disability. Subsection (d) provides that process. The leaders of the legislative branch must call the governor's disability to the attention of the

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302. *E.g.*, *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002) (meaning to be taken from whole provision, not one portion read in isolation); *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning Inc.*, 746 N.E.2d 941 (Ind. 2001) (no portion of a law should be rendered meaningless by construction) (both statutory construction cases).

supreme court, which adjudicates the disability and gives the lieutenant governor power as acting governor. This process provides for an orderly (although not necessarily prompt) succession, and it avoids any question of usurpation of gubernatorial authority by the lieutenant governor.

The third situation is similar to the second. When there is a question about the governor's ability to serve, there must be a procedure for determining his competency. Subsection (d) sets up that procedure, allowing the legislative leadership to present the matter to the supreme court, which would determine the factual issue of competency. This process allows orderly succession with no hint of usurpation. As in the second circumstance, the only problem with using subsection (d) when the governor's competency is questionable is the time it could take to initiate and conduct the process. The cognate federal provision addresses this possibility by giving the Vice President immediate power whenever the Vice President or a majority of cabinet members provides a written declaration of the President's disability.<sup>303</sup> If the President's capacity must be adjudicated, a timetable is provided for Congress to do so.<sup>304</sup>

Indiana has taken a different approach, creating a system under which precluding potential usurpation takes precedence over speedy transition of power when the governor's disability is doubtful. By leaving the governor in full control until his disability is determined under subsection (d), Indiana's system ensures that the governor will retain complete authority until the process for determining his disability runs its entire course. This provision represents a decision by the framers and ratifiers that legitimacy and process are more important than speed in the transfer of power in the event of a potential gubernatorial disability.

The fourth possibility, that the lieutenant governor could seek power even when the governor is not disabled, is not addressed directly by any provision of section 10. If a lieutenant governor were to announce that the governor is unable to fulfill his responsibilities so, as lieutenant governor, he was assuming authority as acting governor, several possibilities could ensue if the governor was not in fact disabled. The governor could use the provisions of subsection (c) by submitting a written statement to the president pro tempore and speaker stating that he is not disabled, permitting him to "resume the powers and duties of his office" automatically, without further action by any other branch. But this provision may be restricted to situations in which the governor himself has previously declared his disability in writing. He could use the similar provision of subsection (d) permitting him to file a written declaration of ability to serve and requiring the supreme court to rule within 48 hours whether his disability has ceased. But similarly, this provision may be limited to circumstances in which the supreme court has previously adjudicated the governor's inability to serve. The governor—alone or in conjunction with the legislative leadership—could choose another legal avenue, such as seeking an injunction, to restore his authority.

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303. U.S. CONST. amend. XXV, § 4.

304. *Id.*

Subsection (a) can be used for prompt transfer of authority in circumstances such as those that occurred in 2003, when Governor O'Bannon's disability was clear from the outset. Allowing transfer of authority to the lieutenant governor as acting governor in those circumstances gives vitality to subsection (a), which might otherwise be a dead letter. It allows the second sentence of subsection (a) ("In case the Governor is unable to discharge the powers and duties of the office, the Lieutenant Governor shall discharge the powers and duties of the office as Acting Governor.") to function in exactly the same manner as the first sentence of subsection (a) ("In case the Governor-elect fails to assume office, or in case of the death or resignation of the Governor or the Governor's removal from office, the Lieutenant Governor shall become Governor and hold office for the unexpired term of the person whom he succeeds."). In both cases, the lieutenant governor assumes gubernatorial duties automatically upon the occurrence of an obvious event—a governor's death, resignation, removal, or clear disability.

Subsection (a) has the obvious advantage of speed. It permits immediate transfer of power in circumstances where haste may be vital. Indiana's legislature and voters underlined the importance of succession in a post-9/11 world by enacting a constitutional amendment in 2004 clarifying gubernatorial succession and designating an order of succession if both the governor and lieutenant governor are unable to serve.<sup>305</sup> Section 10 also provides a counterweight to that speed through its procedures for settling disputes about gubernatorial disability in the event of overreaching by a lieutenant governor.

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305. See *supra* note 257 and accompanying text.