“To elaborate . . .”

A monthly column by Marcia J. Oddi

The Year in Review as seen from the Indiana Law Blog

The Indiana Law Blog compiles law-related stories from around the State. The day’s interesting or important Indiana appellate decisions are summarized, along with federal trial and 7th Circuit decisions, and occasional state trial court rulings. For my first end-of-the-year *Res Gestae* column, I’ve gone through the several hundred ILB entries for each month from January through November 2005 and pulled out some items of interest, resulting in a kind of selective overview of the year in Indiana law.

January 2005.

Jan. 10th – An entry titled “Authority of the Governor over Executive Branch appointees” has this quote from the Louisville Courier Journal:

Governor-elect Mitch Daniels, who takes office tomorrow, said last week he expects that Hoosiers serving on state boards and commissions will resign - without his having to ask. That's thousands of people, serving on high-profile boards like the Indiana Utility Regulatory Commission and obscure ones like the Indiana Corn Marketing Council. If members don't tender their resignations, Daniels says he'll ask for them. Not all of them will be accepted, Daniels said. And in some cases, he's seeking to eliminate the boards anyway.

Jan. 11th - *Save the Valley v. Indiana-Kentucky Electric (IKEA)* was decided by the Court of Appeals today; it recognizes associational standing in Indiana.

Jan. 12th - The long awaited decisions in *US v. Booker* (from our 7th Circuit) and *US v. Fanfan* have just been issued this morning by the Supreme Court.

Jan. 13th – Our ILB entry from January 6th was headlined *"Judge Barker issues decision in New Albany adult video store dispute"* -- the judge's ruling in *New Albany DVD v. City of New Albany* has been posted by the court and is now available.

Jan. 14th - *"Debate brewing in Indiana over human cloning"* is the headline to a lengthy front-page Indianapolis Star article today by Robert King, the Star's religion editor. Some quotes: “As a nurse, state Sen. Pat Miller knows the promise biotechnology offers to medicine. But she says certain areas of research raise too many moral questions. That's why she's pushing a bill to ban human cloning in Indiana.”

Jan. 20th - Court of Appeals rules that the Indiana Defense of Marriage Act is constitutional in *Ruth Morrison, et al. v. Sadler* (1/20/05).

Jan. 21st – An entry headed "More on Court of Appeals ruling yesterday on same-sex marriage" includes quotes from a Fort Wayne Journal Gazette editorial:

The ICLU has not decided [whether] to appeal to the state Supreme Court. It should, if only to question the appeals court's narrow reasoning in deciding that the ban on same-sex marriage does not violate the state constitution's equal-protection clause. (That clause prohibits the legislature from granting any class of citizens privileges denied to another class.)

Jan. 23rd – "I read a small blurb in the Indianapolis Star today about HB 1063, authored by Rep. David Wolkins of Winona Lake, which would prohibit the taking of private property by eminent domain for commercial purposes. I was interested because the United States Supreme Court will be hearing oral arguments on this issue in the current term. Although three related cases are scheduled, the closest case here is *Kelo v. New London*, scheduled for argument on Feb. 23, 2005. The Indiana Law Blog has had a number of entries on the "takings for private redevelopment" issue."

Jan. 27th - Two stories today on the possibility of a pay raise for Indiana judges this year.

Jan. 28th – Transfer list for week ending Jan. 28, 2005 includes *Clinic for Women, et al. v. Carl J. Brizzi,* (concerns IC 16-34-2-1.1, the statute governing voluntary and informed consent to abortion - here is the link to the now vacated Court of Appeals opinion from 9/17/04).

Jan. 29th - The Indianapolis Star has a story today on House Bill 1703, including this quote: "Democrats are in a rage over proposed legislation that would make Marion County judges appointed instead of elected. While moving to appointed judges has drawn support from the legal organizations and the Indiana Supreme Court, Democrats view House Bill 1703 as a power grab."

February 2005.

Feb. 1st - The Indianapolis Star editorializes against the Marion County judges bills: "Legislation that would reform Marion County Superior Court has too many flaws"

Feb. 1st – An Indianapolis Star story reports: "Supreme Court Chief Justice Randall T. Shepard urged lawmakers Monday to pass the raises, saying: 'There is nothing in this bill except catching up.'"

Feb. 10th - A controversy about whether the Governor was required to reside in the "seat of government" rather than in an outlying county erupted. An Indianapolis Star columnist, who had first raised the issue in print, wrote that after having been made aware of the restriction: "Daniels vowed to abide by the state constitution. Even if it means delaying a move to the dream home. Then he promised to get some bedding into the governor's residence this week."

Feb. 12th - Art. 6, sec. 5(b) of the Indiana Constitution reads: “(b) The Governor shall reside at the seat of government.” In this entry the ILB pointed out that the version of the Indiana Constitution posted on the Indiana Courts website was wrong in that it did not reflect the 1998 amendment to this section. [Note: It STILL wrong.]

Feb. 18th – The Indianapolis Star reports that *Morrison v. Sadler* (upholding the Defense of Marriage Act) will not be appealed to the Indiana Supreme Court; the plaintiffs agreed that “the risk of moving forward outweighed the benefits:”

The downside included the possibility of an unfavorable ruling, which would set a legal precedent that could hinder future challenges -- and an anti-gay backlash "If the plaintiffs had appealed and lost, the Supreme Court decision would have had influence beyond Indiana's borders. Just as the Indiana appellate court quoted from the legal opinions of sister states in its decision, so sister states could use an Indiana Supreme Court decision to deny same-sex families marriage-based right."

Feb. 24th – A brief item in the Indianapolis Star reports the Senate Judiciary Committee has approved SJR 1, which would give the Senate “the power to confirm or reject a governor's nominee for the supreme or appellate court ... and voters also no longer would have a say in whether supreme and appeals court judges are retained. Instead of appearing on a ballot at the end of their 10-year terms, the judges would need to be reconfirmed by the Senate.”

Feb. 27th - the Indianapolis Star has a great lead today in this story about an apparent resolution of the Governor's residence issues: “In what might be called ‘Extreme Home Makeover’ meets ‘This Old House,’ Gov. Mitch Daniels has recruited an army of volunteers to make the more than $2 million in repairs to the historic governor's residence in the Butler-Tarkington neighborhood.”

Feb. 28th - The Marion County judges bill passed out of committee on Feb. 7th; on Feb. 16th the report is that the is “snarled” on its way to what is normally a routine House vote to accept the committee’s report. A Feb. 28th entry begins:

It seems long ago, but it was only Feb. 16th, that we reported *"Marion County judges selection bill snarled."* HB 1703's committee report was not accepted by the full house, and instead was replaced with a "minority report." The future was dim.

Now, apparently, the future is over. *"Bill to appoint county judges dies: Lawmaker abandons measure in an attempt to gain votes for change to daylight-saving time,"* is the headline to a story today in the Indianapolis Star by Mary Beth Schneider.

March 2005

March 2nd - The “tongue stud case” – the March 2 Supreme Court decision on whether administering a breath test when the defendant had less than 20 minutes

before had a tongue stud inserted in her mouth made the results of the test to assess intoxication inadmissible. The Supreme Court said “no” in *Brenda Guy v. State*.

March 8th – Indianapolis Star readers were greeted with the story headlined *"Plan to link 400 courts hits a wall: Costly software glitch halts effort to computerize records statewide."*

March 10th – A report quotes from a Louisville Courier Journal story that two Washington County prosecutors had taken a defendant’s attorney’s notes when he stepped away from the defense table: “A complaint filed by the Indiana Supreme Court Disciplinary Commission accuses them of stealing notes written by a criminal defendant, then trying to cover it up.”

March 11th – An entry looked at the controversy surrounding the proposed inspector general bill, and whether creating an inspector general who would report to the Governor violated the separation of powers

March 18th – Judge Larry McKinney found for environmental activist John Blair: “A federal judge says the arrest of environmental activist John Blair at a 2002 appearance by Vice President Dick Cheney violated Blair's constitutional rights and entitles the activist to monetary damages.” according to an Evansville Courier & Press story.

March 24th - Quotes from a number of stories on Attorney General Carter’s move to obtain the medical records of 73 low-income patients from Planned Parenthood of Indiana.

March 25th - An entry on *Litchfield v. State* , where the Supreme Court held that “a search of trash recovered from the place where it is left for collection is permissible under the Indiana Constitution, but only if the investigating officials have an articulable basis justifying reasonable suspicion that the subjects of the search have engaged in violations of law that might reasonably lead to evidence in the trash.”

March 29th - A report on the Court of Appeals ruling in *Brittany Horn v. Kristi L. Hendrickson,* that Horn could not bring a wrongful death action for the death of an unborn child – a viable fetus is not a “child” for the purposes of Indiana’s wrongful death statute.

April 2005.

April 4th – An entry points to a story from the North Platte Nebraska Bulletin where the successful attorney had cited an Indiana Court of Appeals ruling that “an officer's failure to remove a tongue stud violated state law and made a breath test inadmissible as evidence.” I note that “Perhaps the Indiana decision should have been "Shepardized." because, as the Supreme Court held “the question whether a tongue stud inserted in her mouth more than twenty minutes before the

test renders the results of the test inadmissible. We conclude that it does not, and affirm."

April 11th - The Evansville Courier & Press reported that: The city of Evansville will challenge a federal court ruling that found city police violated a protester's constitutional rights when they arrested him in a "no-protest zone" outside a 2002 appearance by Vice President Dick Cheney.

April 18th - The Indianapolis Star reported: The clash between the state's duty to protect children from abuse and a patient's right to privacy moved to a Marion County courtroom Monday, drawing Indiana into a national debate on government access to medical records. Planned Parenthood of Indiana filed suit last month to block the Indiana attorney general from obtaining documents concerning patients younger than 14.

April 26th – "Daniels to sign judicial pay raise bill SB 363." From an Indianapolis Star story:

The cost of the raises would be born by users of the court system. A new $15 fee would be imposed on most people convicted of crimes and on any filing in civil or probate court under House Bill 1113, which already has advanced to the governor's office. A filing in small claims court will require a new $10 fee.

May, June and much of July – ILB on hiatus

July 31th - John Bair has settled with the City of Evansville. The Evansville Courier & Press reports:

The city of Evansville has apparently reached a settlement with a local political activist who sued the city after he was arrested outside a 2002 political fundraiser featuring Vice President Dick Cheney. The financial agreement comes on the heels of federal court rulings that found city police violated protester John Blair's right to free speech when they arrested him after he entered a "no-protest zone." The zone was set up by Secret Service agents during Cheney's visit to Evansville to raise money for Republican Rep. John Hostettler. The rulings said Blair was entitled to monetary damages for his wrongful arrest. Just how much money he'll get is unknown.

July 31th - An entry on the U.S. Supreme Court's ruling in *Kelo v. City of New London* (6/23/05), including quotes from a number of national and local papers.

July 31th - An entry on the "Right to walk along Michigan's Lake Michigan shoreline" looked at both the controversial Michigan Court of Appeals decision, *Glass v. Goeckel* (5/13/04) that decided "Michigan property owners who live along the Great Lakes shoreline have exclusive access up to the water's edge," and at the law in each of the other Great Lakes states, including Indiana.

August 2005.

Aug. 1st. - Today the Indiana Supreme Court has posted its decision in *SMDfund, Inc., et al v. Fort Wayne-Allen Co. Airport Authority, et al.* This was the trial court decision for which the Supreme Court granted a rare emergency transfer (bypassing the Court of Appeals) on Sept. 13, 2004. Today's 9-page ruling, by Justice Boehm, with the other four justices concurring, begins with the somewhat disappointing: "The plaintiffs challenge the constitutionality of the statute creating the Fort Wayne-Allen County Airport Authority. The Authority was created in 1985 pursuant to a statute the plaintiffs now contend violates the prohibition in the Indiana Constitution against special legislation. We hold that laches bars this claim."

Aug. 6th. - *"Courthouse Girls calendar hits the streets"* is a report about seven seniors' project to sell calendars to raise money to save the endangered Randolph County Courthouse.

Aug. 18th - The Court of Appeals yesterday ruled on the Wicca issue presented by a Marion County Superior Court ruling, *Jones v. Jones*.

Aug. 18th - The Supreme Court failed to grant transfer in the case of *Save the Valley v. Indiana-Kentucky Electric* , thereby now recognizing the doctrine of associational standing in Indiana.

Aug. 22nd and 25th - The *Nagy v. Evansville-Vanderburgh School Corp* case is awaiting a state Supreme Court decision. The case, involving school fees, was argued before the Supreme Court on Nov. 23rd, 2004.

Aug. 29th and 30th - Per the Indianapolis Star: "Gov. Mitch Daniels today commuted the sentence of convicted killer Arthur P. Baird II to life without the possibility of parole. Baird was just hours away from eating his last meal in the Indiana State Prison at Michigan City when his attorney, Sarah L. Nagy, received the word."

September 2005.

Sept. 15th - A Court of Appeals opinion issued today, *Utility Center, Inc. v. City of Fort Wayne,* looks at the question of the admissibility of the affidavit of a state senator as to his intent in authoring a piece of legislation.

Sept. 15th - Earlier this month federal Judge Barker upheld the state's no-call list in *Nat'l Coalition of Prayer, et.al. v. Steve Carter* (SD Ind., 9/2/05) , concluding: "For all the reasons explicated above, we declare that the Indiana Telephone Privacy Act is a constitutionally-valid, content-neutral, time, place, and manner restriction on speech."

Sept. 26th – Plan to link 400 courts still off-track. Courts terminate their agreement with Computer Associates. According to the Indianapolis Star: As part

of the termination -- said to be by mutual agreement -- Computer Associates has agreed to refund $7 million, $1 million more than it was paid for the job, said Mary DePrez, who oversees the project for the Indiana Supreme Court's Judicial Technology and Automation Committee.

Sept. 30th – Local color on confirmation of new chef justice. The Gary Post Tribune reports that:

Shortly after the U.S. Senate confirmed John G. Roberts Jr. as the nation's 17th chief justice of the United States, four women applauded on Paw Paw Creek Court in Valparaiso and toasted the man one of them calls her brother.

Kathy Godbey, a nurse at St. Anthony Medical Center in Crown Point and a 26-year resident of the Heritage Valley subdivision on the city's southwest side, is Roberts' older sister. * * *

Roberts, the La Lumiere School graduate and former Long Beach resident, was confirmed late Thursday morning by a vote of 78-22, replacing the late William Rehnquist as the next leader of the U.S. Supreme Court. * * *

Unlike other Roberts family members, Godbey stayed in Northwest Indiana long after the family relocated to Maryland.

October 2005.

Oct. 15th – The AP reports "A lesbian couple from Morgan County has gone to the Indiana Court of Appeals to win the adoption of a 1-year-old girl approved by a judge in one county but denied by a judge in another. Morgan Circuit Judge Matthew Hanson was conducting hearings to terminate parental rights of the girl's birth mother when he learned that Hamilton and Brennan were living together and were not married. He ordered the Office of Family and Children last to look for a married couple to adopt the baby.

Oct. 20th – Terre Haute court closing on hold. Chief Judge Larry McKinney announces that "The Terre Haute Division of the United States District Court for the Southern District of Indiana will remain open for business while it works closely with the General Services Administration ("GSA") and the Administrative Office of the U.S. Courts to examine the feasibility of continuing to hold court in Terre Haute."

Oct. 28th – The South Bend Tribune reports that "A trial in federal court today will determine the future, if any, for legislative prayers in the Indiana General Assembly. U.S. District Judge David F. Hamilton has promised a ruling before Nov. 22, when lawmakers convene for a one-day session called Organization Day." [Note – No ruling yet]

November 2005.

Nov. 2nd - The Indiana Supreme Court has issued two opinions today, both written by Justice Boehm, dealing with spousal testimony. The decisions, which make very interesting reading, are *John Glover v. State of Indiana* and *State of Indiana v. Dow Wilson*.

Nov. 2nd and 3rd - Indiana hearsay/confrontation clause case to be heard by U.S. Supreme Court. The opinion is *Hammon v. State* (6/16/05) According to an AP story: "The U.S. Supreme Court will decide whether an Indiana man's rights were violated when a judge allowed prosecutors to use statements made to police officers by his wife, even though she did not testify in court."

Nov. 19th - The ILB has posted several entries on the failure of Pennsylvania's voters to retain one of two Supreme Court justices who was up for 10-retention via a "yes/no" vote. Voters were angry, according to reports, because the legislature had voted a middle-of-the-night pay raise for themselves and other officials, including the judges, and because they felt that the Supreme Court had pretty much over the years adopted a "hands off" attitude to the actions of the legislature. Well, apparently seeing the writing on the wall, the Pennsylvania legislature has now repealed the pay raise. But that has only led to more controversy.

Nov. 21st – Indiana House to broadcast Ways & Means Committee hearings via the Internet; implications.

Nov. 21st - *Jane Doe, et al v. J. David Donahue*, issued today, is labeled "Published Order Vacating Prior Order Granting Transfer." It is a one-page document. A surprising development in that the Supreme Court had heard oral arguments Nov. 9th on the issue. The AP had reported that "A state prison policy violates Indiana law and the U.S. Constitution by prohibiting virtually all visitation between minors and child sex offenders, the Indiana Civil Liberties Union told the state Supreme Court yesterday."

Nov. 24th – "The Indiana Supreme Court yesterday upheld a law that requires in-person counseling 18 hours before an abortion, saying it does not impose a substantial burden on women who seek the procedure. Abortion opponents hailed the 4-1 ruling as "a common-sense victory" for women in Indiana" per the Louisville Courier Journal writing about the Supreme Courts ruling the day before in *Clinic for Women v. Carl Brizzi* (11/23/05) .

Nov. 28th – "The Indiana Supreme Court has ducked a couple of tough calls" is the headline to an editorial today in the Fort Wayne News-Sentinel. Here are some of its quotes re the Court's decision last week in *Dawn King v. S.B. (In re Parentage of A.B.)* (11/23/05):

In a 4-1 ruling, it skirted the question of whether the state's law or constitution recognizes same-sex parenting agreements and sent back to trial court a custody

battle between two women who had lived together, raising a child one of them conceived through artificial insemination. The non-biological parent sought custody, but the trial court said she had no legal standing. The Indiana Court of Appeals disagreed, saying the woman was a "legal parent." The Supreme Court upheld the appeals court, but not its legal-parent reasoning. It merely ruled that the trial court erred, because Indiana courts have the authority to consider the best interests of the child, which might involve placing the child with someone other than the natural parents.

Nov. 29th – The Indianapolis Star reports on in-state wine shipping: "Indiana's 31 wineries won a temporary victory in their fight to ship products directly to consumers' homes when Marion Superior Court Judge Thomas Carroll signed a preliminary injunction last week that allows in-state shipments through March. "

Nov. 30th - Federal Judge David Hamilton ruled today, in Hinrichs, et al. v. Bosma, that "plaintiffs are entitled to a permanent injunction against [Speaker Bosma] in his official capacity barring him from permitting sectarian prayer as part of the official proceedings of the Indiana House of Representatives."