

Indiana Law Blog Newsletter

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

Errors in SCOTUS opinions

Readers of the now-warehoused *Indiana Law Blog* may recall stories a few years back disclosing that the SCOTUS sometimes made changes, without notice, to opinions *after* they had been issued, and how the Court eventually addressed the issue. Here are two Adam Liptak columns from the NYT: May 24, 2004. [Final Word on U.S. Law Isn't: Supreme Court Keeps Editing](#); Oct. 5, 2015. [Supreme Court Plans to Highlight Revisions in Its Opinions](#).

Now comes a big [ProPublica story](#) dated Oct. 17th: "*It's a Fact: Supreme Court Errors Aren't Hard to Find | A ProPublica review adds fuel to a longstanding worry about the nation's highest court: The justices can botch the truth, sometimes in cases of great import.*" The story involves undetected and uncorrected errors. It is a must read.

I learned about this story from listening to [this week's edition of Amicus](#), the Slate podcast hosted by Dahlia Lithwich. The first half of the approximately 45 minutes podcast is about the 25th amendment, the second half (starting at about 24:30) is an interview with the ProPublica story's author, award-winning reporter Ryan Gabrielson.

From the lengthy story itself:

The decisions of the Supreme Court are rich with argument, history, some flashes of fine writing, and, of course, legal judgments of great import for all Americans.

They are also supposed to be entirely accurate.

But a ProPublica review of several dozen cases from recent years uncovered a number of false or wholly unsupported factual claims.

The review found an error in a landmark ruling, *Shelby County v. Holder*, which struck down part of the Voting Rights Act. Chief Justice John Roberts used erroneous data to make claims about comparable rates of voter registration among blacks and whites in six southern states. In another case, Justice Anthony Kennedy falsely claimed that DNA analysis can be used to identify individual suspects in criminal cases with perfect accuracy.

In all, ProPublica found seven errors in a modest sampling of Supreme Court opinions written from 2011 through 2015. In some cases, the errors were introduced by individual justices apparently doing their own research. In others, the errors resulted from false or deeply flawed submissions made to the court by people or organizations seeking to persuade the justices to rule one way or the other.

IU general counsel Jacqueline Simmons acts to make employee compensation information more accessible to public

A [Bloomington Herald-Times story](#) reported Oct. 20th is headed: "*IU releases details of AD Fred Glass' compensation; request was previously refused because of 'wording'*". Although access to all but a snippet of the story requires a H-T subscription, you may read the start of it in [the Indiana Economic Digest](#). Although much of the story relates to athletic director Fred Glass' compensation package, it begins with how the H-T was able finally to access the information:

Details of his [Glass'] additional compensation were discovered after concerns about how the university interprets the Indiana Access to Public Records Act. University lawyers had been directed not to release documents regarding employee compensation unless specific wording was used.

IU Vice President and General Counsel Jacqueline Simmons said that's going to change. "I have issued a new interpretation," she said Wednesday. * * *

When asked about Glass' total IU income back in July, university spokeswoman Nicole Wilkins said a public records request for his IU contract was necessary in order to find out how much money he made. She then said Glass has an employment agreement, not a contract. * * *

Contacted more than three months later, it was Simmons who provided three documents detailing Glass' compensation package. Simmons said that since she took over as general counsel in 2012, she has not typically seen public record requests submitted to the university because they are handled by other lawyers. They had in the past required specific wording, so if a request was made for a contract instead of an employment agreement, it would have been denied.

The key distinction between a contract and an appointment letter, Simmons said, is that a contract has a specified end date. Glass' letter specifies he has "a continuing appointment," serving at the pleasure of the president.

"His is as close to a contract as you can get without being a contract," Simmons said. "It's a very fine distinction." A distinction, she said, that will no longer be taken into account with regard to public records requests while she is IU's general counsel.

Simmons said she also will remove another directive that has kept IU employee compensation information from the public. The university had viewed appointment letters as being exempt from public record requests because they were part of personnel files. Simmons said that while certain aspects of a personnel file are exempt, she doesn't think the law prevents compensation details from being released. "I wouldn't read it that way," she said.

In past years, both Mr. Glass and Ms. Simmons were long-time, high visibility attorneys with Baker & Daniels. On Oct. 28, 2008 Indiana University named Mr. Glass as athletic director. On July 1, 2012, Ms. Simmons, then head of the Indianapolis office what is now Faegre Baker Daniels, became vice president and general counsel of Indiana University.

Moot court competition at Wabash College

Wabash College has published [a good story](#) about the finals of its annual moot court competition. Clicking through the photos, you'll find Court of Appeals Judges Maggie Robb and Rudy Pyle, plus Steve Creason '97, Chief Counsel, OAG. "This year's Moot Court problem involved a case to be heard by the Supreme Court in its 2017-18 term, which involves a baker refusing to bake a cake for a same-sex wedding. The problem given to the students was a variation of the original case."

A second update on Underwood v. Bunger

In its [Oct. 2](#) and [Oct. 9](#) editions, the ILB Newsletter reported on the issue presented by a [5-page LSA staff memo](#) distributed to the members of the Indiana Code Revision Commission on Sept. 25 that began:

In *Underwood v. Bunger*, 70 NE 3d 338 (Ind. 2017), the Indiana Supreme Court relied upon a statutory change made as part of the 2002 recodification of Title 32 as evidence of the legislature's intent to make a substantive change to that statute. While the change may have been substantive, the court's opinion is contrary to other Supreme Court precedent (from at least two previous cases), which holds that statutory changes made as part of a recodification should be construed to make no substantive change, even when the plain language of the statute would otherwise suggest a significant substantive change.

The 2002 recodification of Title 32, Property, was one of a continuing series of recodifications the General Assembly has enacted through the years. These massive bills are prepared by the LSA Code Revision staff, reviewed and endorsed by the Code Revision

Commission, and enacted by the legislature *as introduced*, on the assurance that they contain no substantive change. Ensuring this end, each recodification has included safeguard language similar to that included in the 2002 recodification:

IC 32-16-1-5: "[I]f the literal meaning of the recodification act of the 2002 regular session of the general assembly (including a literal application of an erroneous change to an internal reference) would result in a substantive change in the prior property law, the difference shall be construed as a typographical, spelling, or other clerical error."

In its recent *Underwood* opinion, however, the Court found that the legislature's removal of "manifestly" in the applicable section was evidence of the legislature's intention to make a substantive change. The opinion made no mention of the savings clause.

Was this the Supreme Court changing its interpretation of how such recodifications are to be considered henceforth, despite statutory language of IC 32-16-1-5 to the contrary?

As I reported about the Sept. 25th meeting in the Oct. 9th issue:

A legislative member of the Commission suggested the matter be taken to the Probate Section of the State Bar, to see whether they agreed with the substantive change the Court had made. However, Senator Young said that was not the issue, the issue was with the Court's interpretation of how a recodification was to be considered, not whether or not it was a good substantive change.

Julie McDonald, an Education Attorney with the Indiana Courts, and their designee to the Commission, said she would bring the matter to the attention of the Court.

The Commission met again last Wednesday, Oct. 25. The [minutes](#) have been posted. Video has yet been archived (when it is it will be [available here](#)). Here is the discussion of this issue from the minutes:

8. Followup Discussion: Discussion of Court Case Involving a Recodified Section of IC 32 (Property Law) (New [PD 3309](#)). Mr. Andrew Hedges, Attorney, Office of Bill Drafting and Research, Legislative Services Agency, presented PD 3309 providing that a contract shall be construed to create a tenancy in common if it manifestly appears from the tenor of the contract that the contract was intended to create a tenancy in common.

The Commission discussed whether the removal of "manifestly" during the recodification of a section of IC 32 was substantive, whether a response to the Court's interpretation was necessary, and what the correct response would be.

The Commission decided to not take up PD 3309, but to include a note in the final report regarding the Commission's discussion of the topic. The Commission agreed that the issue should be considered by a substantive

committee and left to the entire General Assembly to determine if the issue should be addressed through legislation.

Ms. McDonald, the Court's designee to the Commission, reported that the Court is still considering the matter. She noted that the Court appreciates the issue being brought to its attention. The *ILB Newsletter* also learned from a meeting attendee that some members said that they had heard nothing from attorneys around the state on the issue.

Update on overlooked 2016 legislative deer hunting prohibition not implemented until this fall

During the 2016 firearms deer hunting season, hunters were allowed to hunt using a rifle on public property (state and federal land) as well as private property, even though a 2016 law ([HEA 1231-2016](#)) limited the use of a rifle to private land.

As I reported in [last week's edition](#), it appears that no one was made aware of the new restriction during the 2016 season. This fall however, DNR published the change limiting hunters using a rifle to private land and got the word out.

A 2017 ([HEA 1415-2017](#)) amendment to the 2016 law has been widely blamed in news reports as the reason why the 2017 deer hunting season will be limited to private property. But this prohibition ("The use of a rifle is permitted only on privately owned land") has been in IC 14-22-2-8 since the section was added to the Indiana Code in 2016.

The misapprehension continues; here is part of an Oct. 17th letter from a member of the Indiana Senate to Governor Holcomb, urging the Governor to direct agencies "to follow the law as it existed prior to ... HEA 1415." *[image of letter follows]*

It has recently come to light that there were unintended consequences with House Enrolled Act 1415, which makes the use of all rifles, regardless of caliber, illegal for use on public land – and would greatly impact hunters during the 2017 hunting season.

In 2016, legislation was passed with the intent to expand the use of certain high caliber ammunition on private land (HEA 1231). However, amendments to this statute were passed during the last legislative session in HEA 1415, which were intended to expand the allowable rifles on state property, but which inadvertently resulted in a ban on all rifles on public land. This will greatly impact a large number of Hoosiers who otherwise safely and legally hunt throughout the season on public property.

I respectfully request that you consider issuing an Executive Order directing the appropriate agencies to follow the law as it existed prior to the consequential change created by HEA 1415.

Alternatively, calling a special session before the start of hunting season on November 18th may be appropriate so that the General Assembly may have the opportunity to fix this issue before it unduly impacts Hoosiers.

My thoughts. Even if the governor had the constitutional authority to pick and choose what laws to enforce,* the pre-HEA 1415 version of IC 14-22-2-8 also includes the language limiting hunters to private lands.

*See Ind. Const., Art. 1, s.26, Art. 4, s.16.

A big test of police body cameras in DC defies expectations

The Upshot, a [NY Times blog, reported](#) at length Oct. 20th on the "results of the largest, most rigorous [study of police body cameras](#) in the United States."

Oral arguments before the Indiana Supreme Court this month of October, 2017

Currently, only one more case is scheduled to be argued this month before the Supreme Court, and it takes place today, **Monday, Oct. 30th**. Notably, the argument will be held at the [University of Southern Indiana](#), a public university located just outside Evansville in Vanderburgh County.

- 10:30 AM - ***B.A. v. State of Indiana*** ([49S02-1709-JV-00567](#)) (Marion) A thirteen-year-old student was questioned in the assistant principal's office in the presence of school resource officers about a bomb threat written on a middle school wall, and the student made statements about the threat. After the State alleged him to be a delinquent child, the student moved to suppress his statements and argued he had been subjected to custodial interrogation without *Miranda* warnings and without waiving his rights. The Marion Superior Court denied the motion to suppress and found the student to be a delinquent child. The Court of Appeals affirmed, finding no error in admission of the statements. *B.A. v. State*, 73 N.E.3d 720 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted transfer and has assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Notice that the filings include an amicus brief, filed by the Center on Wrongful Convictions of Youth.

Webcasts of the Supreme Court's oral arguments are [available here](#). However, in this case only the live argument will be [videocast via this link](#).

Recommended this week

- [How to Save a Website to the Home Screen on Your iPad](#), Lifewire, June 11, 2017. "Did you know you can save a website to your [iPad's home screen](#) and use it just like any app? This is a great way to get quick access to your favorite websites, especially those you use throughout the day. This also means you can create a folder full of websites on your iPad, and you can even [drag the website's app icon to the dock at the bottom of the home screen](#)."
- [John Dickerson's Face the Nation Diary](#) - a great weekly podcast in which CBS's John Dickerson pithily summarizes the news of the week. I am a big fan. ([iTunes link](#))

[here](#)) Plus he has is a [Face the Nation Newsletter](#).

- [Blockchain for Business - An Introduction to Hyperledger Technologies](#), The Oct. 2nd ILB Newsletter had an article about blockchains, used in smart contracts, global supply-chains, etc. If you are a techie, or a semi-techie (or an attorney who wants to know more), here is a new, free, self-paced MOOC: "A primer to blockchain and distributed ledger technologies. Learn how to start building blockchain applications with Hyperledger frameworks."
- [Commit a crime? Your Fitbit, key fob or pacemaker could snitch on you](#). *Wash Post, Oct. 9, 2017*. "How Internet-connected, data-collecting smart devices such as fitness trackers, digital home assistants, thermostats, TVs and even pill bottles are beginning to transform criminal justice. The ubiquitous devices can serve as a legion of witnesses, capturing our every move, biometrics and what we have ingested. They sometimes listen in or watch us in the privacy of our homes. And police are increasingly looking to the devices for clues. The prospect has alarmed privacy advocates, who say too many consumers are unaware of the revealing information these devices are harvesting."



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