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president's message

By Charles W. German



Some Parting Thoughts

The final column. A moment eagerly anticipated by all who have had the privilege of serving as your KCMBA president (and by some readers, too). Thanks to all of the people who have been so supportive and understanding over this past year with your struggling, multi-tasking infomaniac representative—my beautiful wife Jan, my long-suffering law partners and law firm colleagues, our KCMBA executive committee, board of directors, standing committee chairs, special project volunteers, and our executive director Rae Jean McCall and her most excellent KCMBA staff. If I may borrow from Dr. Hunter S. Thompson, a late and favorite author and philosopher, “Buy the ticket, take the ride.” It’s been a fun, instructive and humbling ride this year, and I thank all of our members for the opportunity.

Let’s return here to familiar issues that are front and center for our bar association, all lawyers in our metropolitan area, and indeed all of our citizens. The process for selecting judges will again be on the agenda as the Missouri legislature reconvenes next month, and as the people in Johnson County consider a 2008 ballot initiative seeking to abolish merit selection of judges in favor of partisan elections. These local efforts to reinsert partisan politics into the judicial selection process are part of a larger political attack on judges and the courts as a co-equal branch of our government. It’s not Pakistan yet—nobody is shutting down the courts or arresting judges and lawyers who have taken to the streets in protest—but some of those sentiments are out there. As a prominent Missouri legislator and vocal critic of the courts recently characterized the challenge “Game on.”

But it’s really not a game. The debate over methods of judicial selection and the political attacks on the courts, reflect at bottom a debate over the value of the Rule of Law as an important force in our representative government. The debate is sparked by the tension that necessarily exists between the need for judges to have decisional independence if they are to be impartial and faithful to the law, and the need in our constitutional government for institutional accountability. In the federal courts, this tension has been resolved with adoption of a judicial selection process openly steeped in politics in which the President appoints and the Senate confirms. In our state courts in Missouri and Kansas, the citizens have resolved that tension through adoption of constitutional provisions for merit selection of appellate judges—a nominating commission, with the governor appointing one

of three submitted nominees, and then retention elections—and a mixed system of both merit selection and popular elections for trial court judges (depending on location).

The merit selection plans in Missouri and Kansas balance the principles that should guide the selection of judges—maximize judicial quality, protect independence, assure accountability, promote representativeness, achieve legitimacy with consistency to democratic government, and have an open and accessible process. But active and well-funded special interest groups seek to change the state merit selection plans—not to improve impartiality and the quality of the decisional process, but rather to advance a preferred political bias on high profile issues that come before the courts in our modern society.

The recent attacks on the Missouri Plan have been in the national spotlight since thirty-four states and the District of Columbia all followed Missouri’s lead and adopted some form of merit selection for judges. National groups like The Federalist Society, the Adam Smith Foundation, the Sam Adams Alliance, and the Show Me Institute are now raising money and advocating radical changes to the Missouri Plan or its outright abolition. Even the *Wall Street Journal* ran an editorial decrying supposed defects in the Missouri Plan. The anti-Plan forces have hired political consultants to help carry their message (the same outfit that brought Swift Boats into the 2004 presidential election). These mobilized opponents of merit selection, together with the anti-Plan legislators in Jefferson City, make it a virtual certainty that it is indeed “game on” when the

Missouri legislature reconvenes in January 2008.

The Johnson County ballot initiative to repeal merit selection and return to partisan elections is also being watched nationally by people on both sides of the issue. As best I can tell, no jurisdiction that has adopted a merit selection plan for judges has ever returned to electoral politics. Pushing the ballot initiative in Johnson County is a group called Judicial Review of Johnson County, whose literature mirrors that of the Federalists and similar groups with that philosophy regarding the appropriate role of the courts. (www.kansasjudicialreviewofjoco.org)

There appear to be four areas of criticism that opponents of the current merit selection plans in Missouri and Kansas advance: (1) the staggered terms for members of the nominating commissions do not give enough power and influence to the current governor and legislative leaders for the make-up of the commissions; (2) the number of lawyers on the nominating commissions also tends to undercut the current governor’s and legislative leaders’ ability to get their preferred people to the bench; (3) the retention elections are ineffective because they require only a majority vote and the voters have insufficient information; and (4) the nomination and selection process is not as open to the public as it might be (although the Kansas model is more open than the Missouri Plan). And, of course, some critics of merit selection for judges argue that the entire process is undemocratic and should be scrapped in favor of direct, popular elections.

KCMBA supports the non-partisan court plans in Missouri and Kansas and will actively oppose

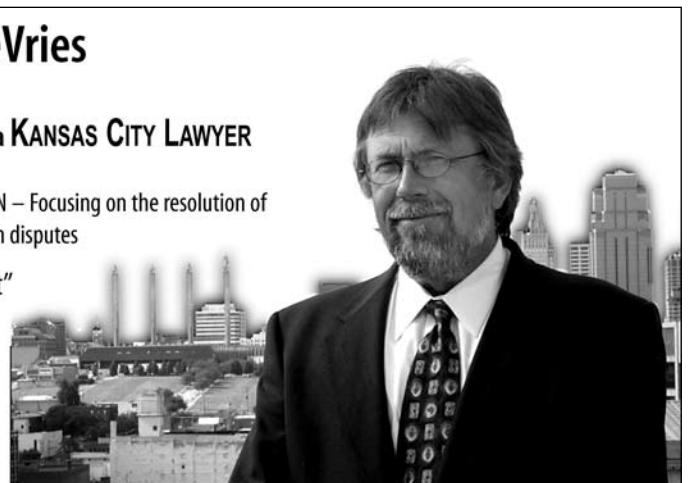
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any proposals to abolish the plans in favor of partisan elections. It is our view that judges should not be forced to become politicians and that fund-raising and political campaigns by judges can damage the impartiality of the judicial process. The citizens of Missouri and Kansas have struck a balance between the merit selection process and judicial elections that has worked well for decades, irrespective of the political party currently in power in the legislative and executive branches—and KCMBA supports the existing constitutional provisions of both states. That said, we should always be receptive to dialogue and debate which is intended to improve the fair and impartial administration of justice. So, let's take a look at the four criticisms of the merit selection plans.

The first two criticisms—staggered terms and lawyer/members on the nominating commissions—seem to me to advocate hiding the return of partisan politics to the process behind the non-partisan selection plan. Staggered terms for members of the nominating commissions help insure that the current governor's influence on judicial selection is tempered by the influence of his or her predecessor, and that the current governor needs to win a second term before he or she can have substantial influence on the make-up of the commissions. And having lawyers as members of the nominating commissions makes good sense given the nature of their job—maybe the critics just want different lawyers? And academic studies have shown that the lawyer/members do not dominate the process. See, e.g., *Caulfield, "How The Pickers Pick: Finding A Set Of Best Practices For Judicial Nominating Commissions," 34 Fordham Urban L. J. 163 (2007)*. These arguments that would give more appointment clout to the current occupant of the executive mansion, or to current, term-limited legislative leaders, appear to be dressed up versions of the cries against "activist judges" and are thus unpersuasive.

The second two criticisms of the non-partisan court plans regarding retention elections and transparency seem to me to raise issues that reasonable people can view differently, and issues that can be debated and resolved without abolishing or radically altering merit selection.

On transparency, for example, the proceedings of the Judicial Nominating Commission in Johnson County are open to the public, while the Missouri model calls for meetings in executive session—yet both systems work well to produce qualified, independent and impartial judges. The degree of transparency and the possible application of open meetings laws raise issues that even the most ardent proponents of merit selection should be willing to discuss.

On retention elections, both Missouri and Kansas are making substantive improvements to their systems for judicial performance evaluation, seeking to enhance the knowledge and awareness of the voters when they consider retention issues. In Missouri, the Report of the Judicial Evaluation Survey Committee was recently submitted for review to the Missouri Supreme Court. This committee was put in place earlier this year and as a successor to similar evaluative work done in 2004. In Kansas, an official judicial performance

evaluation program was launched earlier this year. These efforts to increase the amount, quality, and availability of voter information should be relevant in the debates over the effectiveness of retention elections in assuring accountability without compromising independence. And, like transparency, possible improvement in the retention election process raises issues that all of the interested parties can discuss.

We should also consider in the upcoming debates the study of Missouri courts and judges recently concluded by the ABA Standing Committee on Judicial Independence, which evaluated the existing court system for such things as qualifications, experience and diversity; allocation of jurisdiction, administrative unification and judicial control over rule-making; financial resources; and accountability and transparency—a total of thirty-four factors. This report indicates that the Missouri courts are doing a good job in the administration of justice and in meeting the needs and expectations of the citizens. That is relevant when we are talking about changes in the ways that some of the judges are selected. Perhaps a similar review is needed in Kansas.

In addition, we will likely be considering in these debates in Missouri the recently-completed Judicial Weighted Workload Report on the Missouri courts, and the future of the Citizens Commission on Compensation that was revitalized in the November 2006 elections. It may well evolve that proposed changes to the judicial selection process in Missouri become part of a larger initiative to ask the citizens to approve a range of reforms to the entire judicial article in the Missouri Constitution (article V).

As we move into the 2008 debates on these issues, it is also instructive to recall some recent history, courtesy of Judge Jay Daugherty of the Circuit Court of Jackson County, Missouri. *Daugherty, "The Missouri Non-Partisan Court Plan: A Dinosaur On The Edge Of Extinction Or A Survivor In A Changing Socio-Legal Environment?"*, 62 *Mo. L. Rev.* 315 (Spring 1997). Judge Daugherty's article from ten years ago focuses in part on attempts in the early 1990's by critics of the Missouri Plan, perceiving a public dissatisfaction with the plan and declining retention percentages in the 1990 elections, to enact significant changes—from outright abolition of merit selection, to term limits, to legislative participation in the selection process, to changes in the make-up of the nominating commissions. Sounds familiar. Ironically though, these proposals from the early 1990's were driven in large measure by a belief that the governor (then Governor John Ashcroft) wielded too much influence on the judicial selection process. *Id.* at 340. And, of course, these proposals from the early 1990's (like the ones last year) ultimately failed because the citizens support the non-partisan court plan.

It was in that era that lawyers and others concerned with saving merit selection formed the group known today as Citizens For Missouri Courts. This group and others—Missourians For Fair and Impartial Courts (www.protectjustice.org), Missouri Institute For Justice, Johnson Countians For Justice (www.justicenotforsale.org), Overland Park Chamber of Commerce, League of

Women Voters of Johnson County, KCMBA and other bar associations, and many other professional and grassroots organizations—will again speak out on the benefits of the non-partisan court plans and how they attempt to strike an admittedly imperfect balance among the factors appropriately considered in the selection of our judges.

One final thing—we may also receive some instruction from the United States Supreme Court on the constitutional issues raised by the politics of judicial selection. The Court has under advisement a challenge to New York's partisan selection method for trial court judges. *Lopez-Torres v. New York State Board of Elections, No. 06-766 (argued October 3, 2007)*. Although the New York constitution provides for election of trial court judges, by statute the system actually involves a convention process in which delegates selected by local party leaders actually vote (as directed by their political sponsors) for the judicial candidates. But only the candidates favored by the party leaders are permitted to address the conventions. The result is that judicial selection of New York trial court judges is controlled by political party bosses—not unlike Kansas City in the 1930's. The district court in New York and a unanimous Second Circuit panel held that this politics-driven system for selecting judges violates the First Amendment associational rights of both potential candidates and citizen voters, and also violates the citizen voters' Fourteenth Amendment due process rights (infringement on the right to vote triggering strict scrutiny). *Lopez-Torres v. New York State Board of Elections, 462 F.3d 161 (2d Cir. 2006)(certiorari granted)*. Many court-watchers predict that the Supreme Court will reverse and hold that burdens on candidates' and voters' ability to influence the ultimate decision-makers are minimal and do not raise constitutional concerns—in other words, it is not the statutory system itself that is problematic, but rather the manipulation of it by politicians who are not state actors.

Pundits also point to the Court's federalism concerns that finding the statutory system unconstitutional would force the state to choose between direct primary elections (the remedy ordered by the Second Circuit) and an appointment process for trial judges that the state has already deemed unacceptable. This case is definitely one to watch. Because whichever way the Court goes, it will underscore the importance of the citizens' role in determining the State's method for selecting judges.

So, as we move into 2008 and another chapter of debate and argument over the selection of Missouri and Kansas judges—there is much at stake and thorny issues to consider. But not much is new. These are, after all, the same issues that Missouri citizens debated and resolved by constitutional amendment in the 1940's, and that Johnson County citizens debated and resolved by their vote for merit selection in the 1970's. We cannot be complacent—lawyers must be involved in the debates and in defining the issues and values at stake. The citizens deserve and expect this from us.

Enough. Time to get on down the road. Thanks again for a great year!