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Bench-Bar & Boardroom
CONFERENCE WRAP-UP

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president's message

By Charles W. German



Wearisome But Dangerous Proposals

By the time this message arrives, the Missouri legislature (thankfully) will have adjourned. But not without more wearisome attempts to intimidate Missouri judges, to chip away at our constitutional separation of powers, and to weaken perceived obstacles to a political agenda. As of this writing, five legislative bad ideas are still alive in Jefferson City (four apparently on life support with little chance of recovery), and the KCMBA, The Missouri Bar, the Missouri Institute For Justice (“MIJ”) and its subsidiary Justice Institute for Missouri), and others who support an independent, impartial judiciary are working hard to persuade reasonable legislators that these radical proposals are indeed bad ideas.

At our 34th Annual Bench-Bar & Boardroom Conference in May, we heard and learned about these issues and the larger context from which these attacks on justice emanate. Chief Justice Michael Wolff from the Missouri Supreme Court, Judge Richard Greene from the Kansas Court of Appeals, and many others spoke knowledgeably and passionately about the values we seek to preserve and the challenges we as lawyers, and indeed all citizens, face in the current political environment. And we also heard from a well-known political consultant about how vulnerable our legal institutions and constitutional protections can be if we fail to stand up to the insurgent partisans who seek to alter basic governmental structures—checks and balances, and separation of powers—under the false guise of “restoring accountability.”

There are reasonable people in the state legislatures. These are, after all, the same people who allowed a judicial pay raise this year in Missouri, and approved appellate judge raises and new judge positions in Kansas. Though not without vocal and often rancorous opposition, and some setbacks and delay, these legislative actions tell us, as our political advisors from the Missouri and Kansas Bars and MIJ tell us, that our side on these issues has support. Why? Because reasonable politicians know that the citizens

will understand in the end what is going on here, and unreasonable politicians who fail to see this will be short-timers, even without term limits.

One bad idea in Jefferson City has been defeated in committee. HJR 12 would have moved impeachment trials from the Missouri Supreme Court to the Missouri Senate. Anyone care to hazard a guess at the first impeachment trial the sponsors wanted?

Here are the other bad ideas still under debate in Jefferson City in the final two weeks of the Missouri legislative session (the Kansas legislature has already adjourned—safe for the moment). HJR 15 would retain the constitutional non-partisan court plan (NPCP) (Missouri Const., Art. V, §§ 25(a)-(g)), but limit appointed judges to single eight-year terms and subject the appointments to Senate confirmation. HJR 31 would eliminate the NPCP, and make the judges now covered by the plan subject to appointment by the Governor and confirmation by the Senate. HJR 33 would also eliminate the NPCP, and make those judges subject to appointment by the Governor and confirmation by a panel of political appointees. And my favorite—HJR 34, which would retain the NPCP but take retention votes away from the citizens and have the voting done in the General Assembly.

Then there is HJR 1, which appears headed

to a Senate vote having already passed in the House, which would strip the Missouri courts of any jurisdiction to “instruct” on the appropriation of revenues or imposition of taxes. The sponsors are admittedly pushing this bill in an attempt to ward off any remedy that might be imposed as a result of pending court challenges to public school funding. And some argue that the proposal is also a precursor for immunizing from judicial review a political plan to provide public funding for private schools. It is somehow lost or ignored in the political push for this slap at the courts that the Hancock Amendment and Missouri Constitution, Article X, already preclude court-imposed tax increases, or that HJR 1 could effectively undermine the state’s credit ratings by denying bondholders any judicial remedy for default.

In 2006, cooler heads prevailed in Kansas and the legislature there wisely declined to enact SCR 1603 or HCR 5003, both of which were jurisdiction stripping bills like Missouri’s HJR 1, and which were similar political reactions to the Kansas Supreme Court’s decision in a public school funding case. Certain Kansas legislators can promote bad ideas, though, and the November 2008 general election will include a ballot proposal in Johnson County to eliminate the NPCP there, and have judges run political campaigns

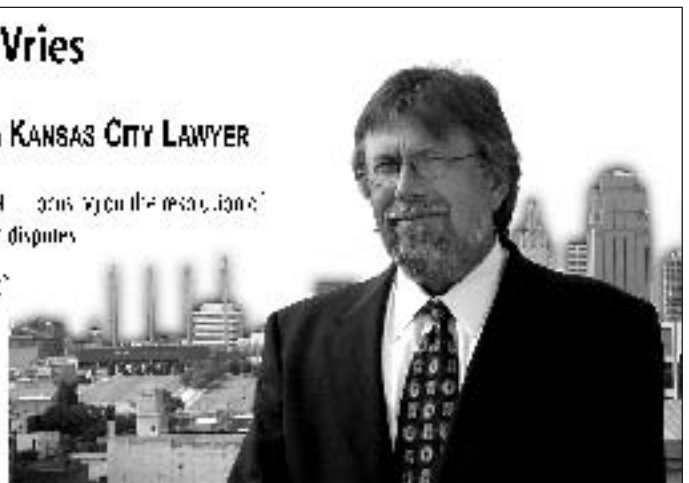
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for election to the bench. Johnson County Bar President Scott Gyllenborg has an excellent article on this ballot initiative in the April 2007 Journal of the Johnson County Bar Association. And also see Dorothy Samuels' thoughtful article on the dangers of partisan judicial elections, "Judges For Sale," New York Times, December 12, 2006.

All of these wearisome proposals are bad ideas. Each of them is bad on the merits, but these proposals are just symptoms, or evidence, of a larger, more dangerous threat. These proposals are truly bad because they represent the latest attacks on the institution and independence of the judiciary. These legislative proposals, many pushed by the executive branch, reflect a feigned distrust of the courts, but are really just power grabs intended to erode the constitutional separation of powers that protects the citizens from executive and legislative over-reaching. These various bills are like a cracked and uneven sidewalk leading nowhere, or to areas we do not want to travel.

Article II of the Missouri Constitution, which has remained unchanged since its adoption in 1875, embodies the fundamental separation of powers doctrine that HJR 1 would ask the citizens to alter. Neither the United States Constitution nor the Kansas Constitution expressly states the separation of powers doctrine, although it is, of course, widely recognized, *Public Citizen v. United States Department of Justice*, 491 U. S. 440 (1989); *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45 (1984), and an essential part of our structure of government.

The current legislative proposals that would ask the citizens to abrogate this long-standing principle of constitutional law and good government are not new, and they are not unique to Missouri and Kansas. Challenges to judicial independence, and by implication the peoples' right to fair and impartial courts, have occurred for more than 200 years. As MIJ president Dale Youngs reminded us at the Bench-Bar & Boardroom Conference, in the early 1800's, President Jefferson's political apparatus tried to impeach Supreme Court Justice Samuel Chase because of unhappiness with some of the Court's decisions. And in 1937, President Roosevelt announced his court-packing plan, based on disagreements with the Court's decisions. Twentieth century presidents—from Teddy Roosevelt to Gerald Ford to George W. Bush—have publicly criticized court decisions and "activist judges." There have been politically-motivated legislative and executive proposals to punish the judges over our history of all stripes—jurisdiction-stripping, requiring a unanimous

vote or super-majority to overturn laws, recall of judges, term limits, budget and salary retaliation, and Senate power to reverse court decisions. In almost all cases, these proposals have ultimately failed, and they have failed in large measure because reasonable lawmakers understand that the citizens want, expect and are entitled to an impartial and independent judicial branch. Examples abound of Congress stripping jurisdiction from federal courts—habeas corpus restrictions, sentencing guidelines, immigration procedure, wiretap authority (and much more)—but of course federal courts are courts of limited jurisdiction anyway under Article III of the Constitution. Efforts to make our state courts of general jurisdiction somehow inferior to the legislative and executive branches, on the other hand, are radical and dangerous departures from our legal tradition and history that ultimately hurts the citizens, not the judges or the legal community. And the citizens in the end will not stand for it.

At the outset of this message, I referred to the current legislative attacks on the courts as wearisome, and they are, but we must still react and respond. It seems that almost every bar leader in the country writes an article or two on this kind of political mischief. Last year, Pat McLarney wrote that it's "time to play hardball." Three years ago, Jay DeHardt wrote "a call to arms." So what I write here is not new, and it is wearisome. But these are important issues, and the KCMBBA and our bar colleagues in Missouri and Kansas will speak up for, and take action on, what is right and against what is wrong.

These current legislative attacks on judges and encroachments on the separation of powers, spurred on in Missouri by the executive branch, will fail, as similar past efforts have largely failed, because citizens will understand what is at stake. Citizens will understand how a cabal of anti-court, anti-rule of law partisan extremists, joined by otherwise thoughtful legislators who in this instance refuse to stand up to executive branch goading, want to remove (or at least lessen) the constitutional constraints on their political agenda. Citizens will understand that these partisans want to be able to intimidate any judge who interferes with their agenda by enforcing the law and constitutional rights. Chief Justice John Roberts warned in a 2006 speech about attacks against individual judges for their decisions as "a means of intimidation," as well as "institutional retribution, actions against the judiciary as a whole that might inhibit judges from performing their vital function."

Part of our job as lawyers—all of us—is to help the citizens see through the sophomoric

"unelected activist judges" rhetoric, and not only defeat these kinds of bad bills but also defeat their sponsors in the next election cycle. We have the ability to be an important influence on the issues before the voters (as Senator Jack Danforth reminded us at last year's KCMBBA Annual Meeting), and also on the candidates who will represent us in the legislative and executive branches. The courts and judges are helping as they can by improving transparency, efficiency, performance and public awareness. The Missouri and Kansas Bar Associations are working on public education initiatives to make sure that the citizens understand the role of an independent and impartial judiciary that is accountable to the law and the constitution rather than to a political faction or agenda. But we as individual lawyers can speak out and take action on the specific issues, and against the politicians whose bad behavior warrants public scrutiny. This job of helping to shape the political agenda, and to articulate and act on what—and who—is right and wrong requires time, money and tenacity. Our legal community is up to that challenge. We are in the game.

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