

State of the Judiciary

Chief Justice Michael A. Wolff, Missouri Supreme Court

Message to the Missouri Legislature

January 10, 2007, in Jefferson City, Missouri

President Kinder, Speaker Pro Tem Gibbons, Speaker Jetton, Secretary of State Carnahan, Treasurer Steelman, Auditor Montee, Attorney General Nixon, esteemed members of the General Assembly, my fellow judges of the Supreme Court, and honored guests:

I would like to start by paying tribute to two distinguished colleagues from the other branches of government. First, Mike Keathley is a friend to many of us, an outstanding businessman called to public service first as your Senate administrator and then, by Governor Blunt, to be commissioner of administration. We pray for his speedy recovery.

I also would like to pay tribute to Representative Jason Brown. As you know, while stationed in Iraq, he suffered a gunshot wound to his chest. He now is back on duty in Iraq. I extend him my gratitude, on behalf of the Missouri judiciary, for the selflessness and personal courage that he and all of our nation's soldiers have demonstrated in service to our country.

As the people's representatives, you in this chamber, along with the executive branch leaders, set Missouri's policies within the boundaries established by our state and federal constitutions. It is an awesome power that you possess and one worthy of our respect.

Each of our three co-equal branches – legislative, executive and judicial – has been assigned specific roles. It is the system of checks and balances among these three branches of government that is America's unique contribution to the idea of a democratic republic. The Missouri Constitution, echoing the Magna Carta of nearly 800 years ago, guarantees that the courts shall be open to every person and that a remedy be afforded for every legal injury. Unless we choose to abandon what we traditionally have come to understand as a republican form of government, we never must abandon this fundamental principle. We should remember what Benjamin Franklin replied when asked, at the close of the American Constitutional Convention, what form of government the constitution would create; he said: "A republic, if you can keep it."

We in this state have a constant interplay among our branches of government and with our citizens in what is aptly called a laboratory of democracy. As legislators, you have the power to revise the principles of the common law; you have the power to revise statutes when they prove to be inadequate or when courts apply them in a manner with which you disagree. The executive has the power to veto what you pass, and you have the power to enact a statute notwithstanding a governor's veto. And, importantly, the people of Missouri retain the power to revise both constitutional and statutory provisions when they deem it appropriate.

In this laboratory of democracy, these legislative chambers are a marketplace of ideas – ideas that ultimately become the public policy of this state. I have gained over many years a profound appreciation for the legislative process of translating the ideas of the political marketplace – as expressed through elections – into policy expressed as law.

So much of what we in the courts do on a day-to-day basis is driven by the words you give us – to decide cases involving, for example, the status and welfare of vulnerable children, the obligations of marriage, the protection of property rights, the protection of the elderly, and the enforcement of the criminal laws. In hundreds of thousands of cases each year, our courts look to your legislated words to enforce the laws that you enact.

In the 30 years that I have been observing Missouri's legislative process, sometimes at close range, I have been impressed that every one who serves in this body comes with an idealistic and personal vision of how to better the public policy of this state. The framers of our constitutional system purposely created a difficult process through which good legislation is the product of competing visions and compromises among interest groups and interested citizens. In this process, you often are confronted with a question as old as representative government itself: was I sent here to carry out the specific wishes of the voters who elected me or to exercise my best judgment on their behalf regardless of what they might think at the moment? In any event, under either theory, you are accountable to the voters for what you do.

The judicial role, on the other hand, is different. Not better, not worse, but definitely different. Regardless of whether voters agree with our decisions, the courts are accountable to uphold and enforce the laws based on the facts of each case as the litigants present them and within the confines of the state and federal constitutions.

In the first three decades of our state's existence, starting in 1821, Missouri judges did not face the voters: like federal judges, they were appointed by the chief executive, subject to senate confirmation. In 1848, Missouri's voters changed our constitution so that judges were elected on partisan ballots. A few years later the Supreme Court of Missouri decided the first Dred Scott case – in which our court declined, not coincidentally, to follow its own extensive precedents and instead held that a slave who traveled to free territory was still a slave.

The words of the dissenting judge, Hamilton Gamble, are worth remembering. Judge Gamble, himself a slaveholder, said the court should follow prior case law and recognize Scott's freedom. Addressing the "temporary public excitement" over the issue of slavery that undoubtedly would cloud the people's judgment, Gamble said: "Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decision, but in those principles which are immutable." A few years later, after losing his Missouri state case, Dred Scott's appeal of his federal court case resulted in the United States Supreme Court's infamous 1857 decision that denied Mr. Scott's personhood, and his right to sue, in what was truly a low point in American jurisprudence.

Today, most of Missouri's judges – those who serve in the trial courts in 110 counties – are elected directly by the people. Judges in St. Louis, in four urban counties and on the appellate courts serve under the Missouri Nonpartisan Court Plan, adopted by the voters through initiative petition in 1940. Although the governor initially selects these judges from a panel of applicants nominated by a nonpartisan commission of citizens, attorneys and a judge, they are subject to retention election after serving one year in office and periodically thereafter before serving any additional term in office. All Missouri state judges remain accountable to the people through elections.

Unlike legislators, however, judges never should be elected to carry out specific campaign promises. Campaign promises are appropriate for those running for legislative or executive office; in fact, they are essential in helping voters fully evaluate these candidates. But judicial elections are different. After all, if you have a lawsuit, would you really want the judge in your case to promise a position contrary to yours before hearing you present your evidence and legal arguments? No, you would not ... not any more than the local football coach would want to arrive at a game and discover that the referees have already promised to help the other team.

The only promises judicial candidates should make are to follow their constitutional obligations to be accountable to the law, administer justice fairly and impartially, and remain free from political influence and intimidation. When you appear in court as a litigant, you have a right to expect that the judge will decide your case on the facts and on the law regardless of his or her personal beliefs – regardless of political, financial or other special influences or interests.

To achieve and maintain this vision, I want to improve our system of accountability. To do so we must evaluate ourselves honestly and often. As Alexander Hamilton astutely observed 200 years ago, the judiciary has neither the power of the purse nor the power of the sword. Nor should it. We have only judgment. The people's confidence that their disputes will be resolved on the basis of the law is a bedrock principle of our constitutional democracy as well as fundamental to our economic system.

Our obligation to be fair and impartial also extends to our responsibility to administer the affairs of the judiciary wisely. We should be open to evaluations, from the inside and from the outside, to ensure that our process for using the states' resources – which you provide – is thoughtful and wise and based on facts.

To help us evaluate ourselves, enhance our accountability, and determine the best use of our judicial resources, Missouri's court system has taken three solid steps.

### **Judging the Judiciary**

First, to help us understand where we are and where we should be going, I accepted an offer from the American Bar Association's Standing Committee on Judicial Independence to conduct a thorough examination last year of our Missouri court system – at no cost to us. This is the first – and only – such study that has been done of an American court

system. They used criteria the ABA developed for advising emerging democracies around the world about what constitutes an adequate and effective judiciary. They studied the structure of Missouri's courts and conducted in-depth interviews with civic leaders, political leaders, journalists, members of the bar and others about their perceptions of the strengths and needs of the Missouri judiciary. Some of you may have participated in that survey – I have no idea who did, as all the responses were anonymous – so if you did, I thank you for your involvement, your candor and your insights.

Fortunately, most of what the assessment had to say about Missouri's courts was quite positive. We were rated favorably on our professionalism, the quality and tenure of our judges, and our basic unified structure. Our ongoing plan for the use of information technology also was well received. I would add, by the way, that we are using this technology not only to make our courts more efficient but also to let the public see who we are and what we do. This past fall, we launched a new Web site that will give the public ready access to this information. I invite you to visit our courts both in person and online at [www.courts.mo.gov](http://www.courts.mo.gov).

### **Evaluating Judges' Performance**

Our second step is to enhance our courts' accountability to the public through elections. How do voters get information about judicial performance? In most of Missouri's counties, the populations are small enough that the public can get to know their judges and candidates without costly campaigns. However, for trial courts in the larger counties, whether included in the nonpartisan court plan or not, as well as for the Supreme Court and the Court of Appeals, I believe we should enhance the opportunities for the public to get to know these judges, on whom they vote, and to have an evaluation system that provides timely critiques for the benefit of both the public and our judges.

Currently, The Missouri Bar conducts judicial evaluation surveys for every judge on the ballot for retention in nonpartisan plan jurisdictions. The results are available to the media, to the public in printed form in various locations, and on the Bar's Web site. The Bar does all it can to publicize the results given the resources it has, and it should be given great credit for continuing to undertake this valuable service. Most of our citizenry, however, remains uninformed in such elections, mostly because they don't know where to look for information, and this may result in a lack of confidence about our system. I might add, however, that it does have the effect of keeping judges humble. I know I wake up each morning and think of the 582,249 people who voted against me six years ago. Not that anyone's counting. I don't even know 582,249 people, but I'd like to prove to them that the 1.27 million or so Missourians who voted to retain me got it right.

We should try to remedy the lack of information about judges. I am asking The Missouri Bar to convene a fair cross-section of citizens – nonlawyers as well as lawyers – to review our judicial evaluation system, to look at systems in place in other states, and to propose a model that gives useful information about judges that can be communicated effectively to the electorate.

I emphasize two aspects of judicial evaluations. First, a judicial evaluation system should include not just the voices of attorneys, but also the voices of jurors, litigants, witnesses, court staff and others who have direct experience with the judges. Second, while the results of a judicial evaluation system should be made available at election, the true intent of any evaluation system is to assist in improving both individual and institutional performance; in other words, evaluation should be ongoing. These evaluations should be timed both to allow judges to have an opportunity to improve as a result of the review and to give voters information before elections where the judges' futures are decided. I believe that the vast majority of judges will be rated highly and that even the most highly rated judges will learn something useful about how they do their jobs.

My hope is that the group of citizens convened by The Missouri Bar will propose a judicial evaluation system that is driven by nonlawyers as well as by the members of the Bar; that is independent and nonpartisan; and that produces credible results made widely available to the voting public.

### **Using Our Resources Wisely**

Our third step is to evaluate ourselves in the use and distribution of our resources. The weaknesses the ABA committee identified in its assessment report all relate to lack of resources. One of these relates to the impact of judicial salaries in Missouri. On this topic, I will simply say this: I believe the schedule established by the Citizens' Commission on Compensation under the constitution is sensible and appropriately restrained. The citizens' schedule is essential to our continued ability to attract highly qualified and well-motivated men and women to judicial service. Seven years without one penny of increase is too long.

As for the other needs identified by the ABA report, we look forward to addressing them with you in the budgetary process. We do not seek more judges now. Instead, we need to examine critically and competently how our current resources are deployed. Four years ago, Senator Matt Bartle chaired an Interim Committee on Judicial Resources, which made several recommendations, some dealing with judicial procedure and others dealing with judicial personnel. Many of the recommendations have been implemented.

But because there is no consistent understanding of judicial resource needs, attempts to fashion a consistent process for creating judgeships in this state have languished. Without a coherent method for making decisions allocating judicial personnel, people conclude what they want from the raw data currently available, which includes only population figures and numbers of cases.

But numbers of people and numbers of cases are only part of the answer. To get a true picture of our needs across the state, we have undertaken a substantial study – the first of its kind in Missouri – to review the weighted workload of Missouri's trial judges. I say "workload," not "caseload," because if you just count cases, you will not necessarily get a useful answer. A 15-minute hearing involving a traffic ticket and a two-week murder trial each counts as one "case," but each obviously has a much different impact on judicial

time, both in preparation and in the courtroom. Likewise, time that judges spend on administrative duties is essential to the operation of the courts; in rural areas, especially, where one circuit may include as many as five counties, judges spend time moving from county to county to hear cases – we must account for this travel time.

America's expert in conducting judicial weighted workload studies is the National Center for State Courts, which we have engaged to direct Missouri's study. A cross-section of Missouri's trial judges is serving as a steering committee to guide the study, and the National Center is using methodology that has been used in many other states with similar population distributions between urban and rural areas.

This study, which they are conducting this spring, is essential for our future to provide useful information to us, to the public, and to you, the legislature, so that together we might make more informed decisions about judicial personnel needs. The legislative and executive branches are the appropriators of money, but we have an obligation to advise you how best to spend the public's dollars for courts. This will assure adequate judicial service in every county of the state.

Do we need more judges? My own guess is that, overall, we have enough judges statewide. But until the data are available this summer, any guess regarding our judicial personnel is still just a guess. We are now filling needs in some areas by transferring judges and by using senior judges. We should wait for the results of this study before making any long-term changes in allocation or numbers of judges.

### **Cooperative Efforts**

Although there remains much to improve that the three steps I have described will help bring to light, there is much that we have done in recent years to increase our efficiency and, indeed, to cooperate in improving state government as a whole. Through legislation you passed in 2004, we established methods to collect overdue court debt through the use of income tax offsets, time payment fees and private debt collection agencies. The end result of these efforts has been twofold: a greater respect for the laws you pass, by virtue of the higher percentages of court costs and fines paid, and, since the programs began, an increase of more than \$3 million to the state and to local governments and school districts. Almost none of that money comes to the judiciary, just in case you were wondering.

There are other examples. We continue to cooperate with the department of corrections and other agencies in seeking alternatives to prison, including our drug courts, to enhance public safety and to avoid wasting scarce correctional dollars. Additionally, we have remained in contact with you about several opportunities that may allow all three branches of government to become even more efficient. These include the potential for greater savings of time and money in our juvenile justice system as well as for a structural reduction in the public defender's caseload. Working as partners, we can solve these kinds of problems. We are committed to cooperating with you in a continued spirit of openness and respect, so that we all may better serve the citizens to whom we all are

ultimately accountable.

In the past 18 months, during which I have been privileged to serve as chief justice, I have worked hard to help our citizens better understand their system of government. Judges and members of the bar around the state similarly have embraced the challenge of engaging in civics education.

In the eight and a half years I have served on the Supreme Court – and especially in these last 18 months – I have gotten to know many of the fine men and women who serve in the judicial branch as judges, as clerks and as support staff in your communities throughout the state. I am very proud of their dedication and of the work they do, week in and week out, to uphold the rule of law and to maintain a stable, civil society in our state through the fair and impartial administration of justice.

On their behalf, I assure you that we in the judiciary will continue to be responsive to the public's needs, and we will continue to evaluate ourselves – subject to the scrutiny of others – in the spirit of honesty and accountability that all Missourians should expect of us. In turn, it is my hope that you will continue to work with us toward the goal of giving Missouri the greatest judicial system possible. Without your continued support, we cannot meet this goal. But with your support, I am certain that we will.

Thank you very much.