

From the desk of James T Byrne

To: Senator Michael Gibbons

State Capitol Building Room 326 Jefferson City, Missouri 65101 July 26, 2007

Re: Circuit Court Judge Patricia Joyce's usurpation of legislative power by ruling that RSMo 566.147, a sex offender law intended to protect Missouri's children, as unconstitutional.

Dear Senator Gibbons,

I appreciate you, and your staff, taking the time to address my questions and concerns. However, your letter did not answer all of the questions presented and created additional concerns.

You cite multiple authorities in your letter. However, you *never* quote those authorities. You change the words, that would have been provided if the cited authorities were quoted, and those of the questions presented to you, by me, in an effort to support your position when, in fact, if the citations were quoted they would not support your position.

For the most part, I intend to address your responses in the order that they are presented in your letter dated July 13th 2007. However, the second-to-last paragraph of your letter mischaracterizes my contention limiting the power of judicial review as one that would appear to eliminate the rights of an aggrieved party to protect themselves from an unconstitutional legislative directive. Your statement, in that paragraph, presents the reader with the appearance of a judicial dead-end, when, in fact, my contention only limits the power of judicial review to the court having that power. Most circuit court judges, at least those that follow the law, rule in accordance with a statute, even when a challenge as to the constitutionality of that statute has been presented. The system still works! The aggrieved party was never prevented from appealing the judgment of the circuit court directly to the Supreme Court. The Missouri Supreme Court can rule the statute to be invalid on grounds that it is repugnant to the Missouri or U.S. Constitutions. Relief was therefore provided to the aggrieved party in accordance with the constitution. The checks and balances of government remain.

In your letter, **you stated that**, "*When a statute, or a portion thereof, is declared unconstitutional by a circuit court, the law becomes invalid or void, and no longer has any legal force or effect upon the circuit court's final decision. The law will still show up within the Missouri Revised Statutes, however, a footnote will be printed to indicate that the law has been declared unconstitutional and that it is not valid. Unless the circuit court's decision is overturned on appeal, the law will remain without force or effect forever. It will remain within the code of state statutes unless it is repealed, or rescinded by legislative act.*"

It is notable that you provide no citation of authority for the above statements. I believe that no documented authority exists for the above statements. They appear to be mere fabrication, a collection of untrue statements having the effect of deceiving the reader. They are not quoted from case law, statute, or constitution. I must call them what they appear to be....lies!

You stated that "*a footnote is printed in the Missouri Revised Statutes to indicate that the law has been declared unconstitutional and that it is not valid.*"

Question 1: (a) This *printing of a footnote* is done in accordance with what directive? (b) Where in the Missouri Constitution or Missouri Revised Statutes is it stated, that upon the ruling of unconstitutionality by a circuit court judge, a footnote shall be printed in the Missouri Revised Statutes?

Missouri Revised Statutes, Chapter 3, specifically 3.066, is the directive, and authority, that provides for removal of a statute, or a portion thereof, when the Missouri supreme court, or a federal court of competent jurisdiction makes a final ruling on the constitutionality of a challenged statute.

Note that the term circuit court or circuit court judge does not exist.

You also stated that, “*the law will remain without force or effect forever.*”

Question 2: Where in the Missouri Constitution or Missouri Revised Statutes is it stated that the ruling of a circuit court judge is controlling over any other court, or that the ruling of a circuit court judge can invalidate a statute or a portion thereof?

The rulings of a circuit court judge are only controlling upon the parties in the instant case.

Article V, Section 2 of the Missouri Constitution states that, “*The supreme court shall be the highest court in the state. Its jurisdiction shall be coextensive with the state. Its decisions shall be controlling in all other courts.*”

Nothing in the Missouri Constitution states that the decisions of any court, other than the Missouri Supreme Court, shall be controlling in all other courts.

Further, allowing a circuit court judge to invalidate a statute would deprive another circuit court judge from ruling in accordance with such statute. This would be a clear violation of Article V, Section 4 of the Missouri Constitution.

Article V, Section 4. 1. “*The supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power.*”

To my knowledge, the supreme court has never delegated superintending power to the circuit court. If it has, please provide such documentation.

To support this I cite the opinion of Jeremiah (Jay) Nixon v. Cole County Circuit Judges –SC84301:

“a circuit judge cannot exercise power over the circuit judges in another circuit”

“These principles are applicable here. Article V, section 4(1) of the Constitution of Missouri provides that the Supreme Court has general superintending control over all courts, and each district of the court of appeals has superintending control over the circuit and other courts within its district, subject to the general supervisory authority of the Supreme Court. Article V provides that no other court is permitted to exercise supervisory or superintending authority over circuit courts unless that power is specifically delegated to it by the Supreme Court. The Supreme Court has not delegated supervisory power over circuit courts to any lower court.

*The Circuit Court of Cole County is a lower court within the western district of the Missouri Court of Appeals. The Circuit Court of Cole County and the judges thereof are therefore subject only to the superintending jurisdiction of this Court and the Missouri Court of Appeals, Western District. **Mo. Const. art. V, sec. 4(1)**. The Circuit Court of Osage County, where the attorney general filed suit, is not this Court, nor is it the Court of Appeals, Western District, nor, indeed, is it even located in the western district of the Court of Appeals. **(FN5)** Under the constitution, then, the Circuit Court of Osage County cannot exercise jurisdiction over the Circuit Court of Cole County or the judges thereof.”*

Question 3: (a) Do any other cases exist, in which a violator of RSMo 566.147, has been required to change his/her residence, pay a fine, been incarcerated, or has had their probation status revoked? (b) Was a challenge as to the constitutionality of 566.147 presented in those cases? (c) Why aren't the rulings of the other circuit court judges controlling?

Let me present this in another way. If twenty circuit court judges have been presented with a challenge as to the constitutionality of a statute, and all twenty judges had ruled that such statute was constitutional, are those twenty judges incompetent? Is Judge Patricia Joyce this state's repository of wisdom? Why does the ruling by one circuit court judge render the statute invalid and remove all force and effect, when the ruling of numerous other circuit court judges does not secure the statute's validity?

You stated that, *"the U.S. Constitution is the supreme law of the land, per Article VI of the Constitution."* -I concur.

Article VI, clause 3 of the U.S. Constitution states that, *"The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution."*

Question 4: You and your fellow legislators were required to take an oath to support the U.S. Constitution, and the Constitution of the State of Missouri. (a) In perfecting a bill, don't the legislators of this state address the constitutionality of such bill? The Governor of this State takes a similar oath. (b) Doesn't the Governor consider the constitutionality of such bill prior to signing the bill? (c) Are the numerous members of the General Assembly, and the Governor of Missouri, so incompetent, that they create law of which a single circuit judge has more wisdom as to its constitutionality than they do?

You stated that, *"it is inherent that any law that is in conflict with the constitution shall be voidable through a proper constitutional challenge against such law brought by a party whose rights have been or will be affected."* You cited Bode v. Barrett, 344 U.S. 583, 588 (1953); and Article III, sections 1 and 2, of the U.S. Constitution as support for this statement.

Bode v. Barrett, provides that a constitutional challenge may be made only by a party whose rights have been or will be affected by the provision that they are challenging. - I concur. Take note that Bode v. Barrett was a case decided in the U.S. Supreme Court, a court of competent jurisdiction per the Judiciary Act of 1789.

Article III, Section 1 of the U.S. Constitution states that, *"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."*

Article III, Section 2 of the U.S. Constitution states that, *"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."*

The references that you have provided do nothing to support your contention that a Missouri circuit court judge has the authority to invalidate a Missouri Statute. Article III, Sections 1 and 2 of the U.S. Constitution are inapplicable as the Missouri Circuit Court is not the one supreme court referred to in the U.S. Constitution, nor an inferior court that was established by the U.S. Congress to which Article III, section 1 refers.

You state that, “our state constitution is the basis for our state government, and therefore any state law that is inconsistent therewith is also voidable by a party whose rights are affected. However, since the U.S. Constitution is the supreme law, any state law or state constitutional provision that is inconsistent with the federal constitution is also voidable by such a party.”

You loosely use the word “party” -a party is a litigant, and therefore can make no law void. Only a court of competent jurisdiction can invalidate a Missouri Statute.

You cite Ryder v. St. Charles County, 552 S.W.2d 705, 707 (Mo. 1977) for this statement. Take note that Ryder was decided in the Missouri Supreme Court, which was the proper venue for ruling on the validity of a statute. Further, it is explicitly stated in Ryder that “In its findings and conclusions, the trial court stated that there is at least arguable logic in the position taken by the defendants in asserting unconstitutionality of 64.560 but that it would be presumptive for a trial court to rule the section unconstitutional. That, he concluded, should be determined at the appellate level.” Ryder does not support your claims. I applaud Judge L. Frank Cottey for using appropriate judicial restraint, thereby allowing the Missouri Supreme Court to determine the validity of the statute.

You state that, “a law that has been declared unconstitutional can have no effect by virtue of the fact that it has been declared such,” citing Miller v. O’Malley, 117 S.W.2d 319 (Mo. 1938), as being a case related to this statement. – I concur and note that Miller v. O’Malley was decided in its proper jurisdiction, The Missouri Supreme Court.

I concur that if a court of competent jurisdiction rules a statute to be invalid, that such statute would have no effect. It is important to note that the ruling must be made by a court whose decision is controlling over all other courts, i.e. the Missouri Supreme Court or a federal court of competent jurisdiction.

You state that “a circuit court judge can strike down a law if it is deemed unconstitutional.”

Question 5: Where in the Missouri Constitution or Missouri Revised Statutes is this stated that a circuit court judge may invalidate a statute?

Millie Aulbur, Director of LawRelated Education, for The Missouri Bar presents the following in her teaching guide on Judicial Review;

The Establishment of Judicial Review

The United States Constitution says nothing about the one job the Supreme Court of the United States is most known for today. That is the power to review federal and state laws to determine whether or not they are constitutional. On the other hand, the Missouri Constitution specifically grants the power of judicial review to Missouri Courts:

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity...of a statute or provision of the constitution of this state... (Article V, Section 3.)

Question 6: Are the teachings of the Missouri Bar as related to judicial review incorrect?

It is clear and I can provide you with numerous supporting documentation, if desired, that the U.S. Constitution does not provide for the power of judicial review. That power was initiated by the Judiciary Act of 1789. You claim that the Missouri circuit courts have the authority to invalidate a statute pursuant to Article V, Section 14 of the Missouri Constitution. **Article V, Section 14 of the Missouri Constitution states;** “The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court.” **Article III, Section 2 of the U.S. Constitution states that;** “In all cases affecting ambassadors,

other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction..."

Question 7: If you concede that the U.S. Constitution did not provide the Supreme Court with the power of judicial review, and that power was subsequently provided by the Judiciary Act of 1789, how come the statement of "original jurisdiction" in the Missouri Constitution would give the Missouri Circuit Courts authority that was not provided the U.S. Supreme Court by those identical words in the U.S. Constitution?

It is apparent that the Missouri Circuit Courts have assumed the authority of judicial review, but no Act of Congress has ever provided them with such authority. The Judiciary Acts of 1789, 1801, and 1802, along with The Jurisdiction and Removal Act of 1875 may be helpful in explaining jurisdiction of the courts.

The Districts of the Missouri Court of Appeals and the lower courts are to interpret statutes in accordance with their legislative intent. The Missouri Supreme Court is the only Missouri court with the power of "Judicial Review."

When the General Assembly enacts legislation, it often becomes the task of the courts to interpret the meaning of the statutory language and determine the intent to be ascribed to the language used. *Vice v. Thurston*, 793 S.W.2d 900, 905 (Mo.App. 1990). Construction of a statute is a question of law, not judicial discretion. *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 355 (Mo.banc 1995). We approach the task of statutory interpretation mindful that it is the function of the courts to construe and apply the law, and not to make it. *Dees v. Mississippi River Fuel Corp.*, 192 S.W.2d 635, 640[2] (Mo.App. 1946). In construing statutes, our primary responsibility is to ascertain legislative intent from the language used, to give effect to that intent if possible, and to consider the words used in their ordinary meaning. *Angoff v. M & M Management Corp.*, 897 S.W.2d 649, 652-653 (Mo.App. 1995); *State v. Cox*, 836 S.W.2d 43, 46 (Mo.App. 1992). The General Assembly is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction. See *State v. Evers*, 777 S.W.2d 344 (Mo.App. 1989).

You stated that "*when a judge determines whether a law is unconstitutional, the judge is not making law; he or she is interpreting the law, which is one of the basic functions of the judicial department.*"

When a judge rules that a statute is unconstitutional, and invalidates such statute, the judge is performing *judicial review* of that statute, not judicial interpretation. A Missouri circuit court judge has the authority to interpret a statute in line with legislative intent. The power of *judicial review* of a Missouri Statute is vested in the Missouri Supreme Court.

Repealing a statute is, in effect, to permit something that was controlled, to now be uncontrolled, or in the alternative, something that was statutorily permitted, to no longer be permitted. This is creating law and has the same effect as invalidating a statute, which would also be creating law. This is a power constitutionally given to the legislature, and to the citizens of Missouri by means of initiative process. The Supreme Court of Missouri is also given this power by means of Article V, Section 3 of the Missouri Constitution. This power vested in the Supreme Court is a power belonging to the legislative branch that has been directly permitted or directed by the Missouri Constitution, as it is required to be, by the Separation of Powers Doctrine of Article II, Section 1 of the Missouri Constitution.

You stated that "*if a person were aggrieved by a statute that was enacted and felt that it was unconstitutional, if the courts had no authority to review the law and make a declaration of its validity then the aggrieved person would have no remedy whatsoever, and a very basic aspect of the checks and balances within our governmental system would be lost.*"

Courts of competent jurisdiction do have the power of judicial review. Missouri Circuit Courts do not have the power of judicial review of a statute or treaty of this state.

Invalidation of a statute must be performed by a court whose decisions are controlling over all other courts. Specifically a court who has acquired limited law-making power specifically granted to the Missouri Supreme Court.

The *Doctrine of Stare Decisis* provides for continuity in our judicial system by allowing all courts to review the opinions of the appellate courts and to allow the lower courts to render judgments in accordance with those brought before superintending courts. The opinions of the circuit court are not published as they are not intended to be controlling over any other courts.

You have provided a footnote referencing Marbury v. Madison, 5 US. 137 (1803), however, you failed to cite such anywhere in your letter. Marbury v. Madison is relevant in support of my contention as it relates to the Judiciary Act of 1789. The Judiciary Act of 1789, in Section 25, permits the Supreme Court to address the validity of a statute of the United States or any state that is repugnant to the constitution. The authority given to the Supreme Court was not provided for any lower court. It was not until The Jurisdiction and Removal Act of 1875 that it was finally settled, and the federal circuit courts would have the authority to *review* a statute of the states that was repugnant to the U.S. Constitution, hence the words, "*federal court of competent jurisdiction*," contained in Article V, Section 3 of the Missouri Constitution.

Question 8: (a) What is the history of RS.Mo 452.423.1 from Sept 41998th to May 302000? (b) Where are the footnotes that invalidated this statute during this period? (c) How could the Eastern District Court of Appeals rule in support of 452.423.1 on **09/14/1999** in, Petifurd v. Petifurd -56413, when according to your statements 452.423.1 was invalid, and had no force or effect during this period?

In conclusion, I can see how a circuit court judge could assume authority not expressly permitted by the constitution or statute. Should a circuit court judge continue to usurp the power of the legislature, the judge must be removed from office pursuant to Article VII, Sections 1 and 2 of the Missouri Constitution.

However, I find it extremely distressing that the Senate Leader Pro Tem, who has been a member of the Missouri Bar for almost twenty-three years, would present a concerned constituent with fraudulent statements, that cannot be supported by any documented authority, in an effort to support a clearly out of control judiciary.

I am requesting specific answers, with supporting specific documentation. Your immediate response would be appreciated and is, I believe, warranted.

Respectfully Submitted,

Signature on original – sent via U.S. Mail
James T Byrne

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"It is not the function of the government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error." Justice Robert H. Jackson

"To remain silent when your neighbor is unjustly persecuted is cowardice; to speak out boldly against injustice, when you are one against many, is the highest patriotism." -**Abraham Lincoln – 1855**

"The spirit of resistance to government is so valuable on certain occasions, that I wish it always to be kept alive." -Thomas Jefferson