IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

LARRY T. SOLOMON, CHIEF JUDGE, 30TH JUDICIAL DISTRICT of the STATE OF KANSAS,	)	
Plaintiff,	)	Division 6
v.	)	Case No. 2015-CV-156
THE STATE OF KANSAS,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant State of Kansas, by and through counsel, submits this memorandum in support of its motion to dismiss pursuant to K.S.A. 60-212(b)(1) and (b)(6). For the reasons set forth herein, the State requests that this action be dismissed and that it receive such other and further relief as the Court deems just and proper.

NATURE OF THE CASE

In his Petition, Plaintiff Larry T. Solomon, Chief Judge of the 30th Judicial District, seeks a declaratory judgment that 2014 Senate Substitute for House Bill 2338 ("HB 2338") unconstitutionally infringes on the Kansas Supreme Court's general administrative authority under Article III, § 1, of the Kansas Constitution. In particular, Chief Judge Solomon challenges Section 11 of HB 2338, which amended K.S.A. 20-328 to provide that, starting January 1, 2016, the chief judge in each district court will be selected by the judges of that district, and not be appointed by the Kansas Supreme Court, which is the current practice.

Chief Judge Solomon also argues that because of the nonseverability clause contained in Section 43 of HB 2338, a declaration that Section 11 is unconstitutional will invalidate the entire bill, including its funding provisions for the Judicial Branch. The State does not contest this assertion.

STATEMENT OF FACTS

The relevant facts in this matter are not in dispute. In 2014, the Kansas Legislature passed Senate Substitute for House Bill 2338, and the Governor signed it into law. L. 2014, ch. 82. Section 11 of the bill amended K.S.A. 20-329 to provide that the district court judges in each district will select their chief judge. Currently, Kansas Supreme Court Rule 107 states that chief district court judges will be selected and appointed by the Kansas Supreme Court. K.S.A. 20-329 continues to provide that chief district court judges are subject to the supervision of the Kansas Supreme Court and are required to follow Supreme Court rules in exercising their clerical and administrative responsibilities.

Plaintiff Larry T. Solomon is the Chief Judge of the 30th Judicial District, and he will continue to hold that position until at least January 1, 2016. After that date, he may continue as chief judge if selected by the district court judges in his district, including himself.

ARGUMENT

This matter should be dismissed for two reasons. First, the Court lacks jurisdiction because the Petition fails to present a justiciable case or controversy. Second, even if this matter were justiciable, the Petition fails to state a claim because HB 2338, § 11, does not unconstitutionally infringe on the Kansas Supreme Court's general administrative authority.

I. The Petition Does Not Present a Justiciable Case or Controversy.

Kansas courts only have jurisdiction to decide cases or controversies. *See Gannon v. State*, 298 Kan. 1107, 1119 (2014). Absent an actual case or controversy, separation of powers principles prohibit Kansas courts from issuing advisory opinions. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 898 (2008). In order for a matter to constitute a case or controversy, (1) the parties must have standing, (2) the issues must not be moot, (3) the issues must be ripe, and (4) the issues must not present a political question. *Gannon*, 298 Kan. at 1119. Two of these requirements—standing and ripeness—are not met here, depriving this Court of subject matter jurisdiction.

A. Chief Judge Solomon Lacks Standing Because He Has Not Alleged a Concrete, Particularized, and Actual or Imminent Injury.

To have standing, "a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct." *Gannon*, 298 Kan. at 1123. A cognizable injury, also called an "injury in fact," is an injury that is "concrete, particularized, and actual or imminent." *Id.*; *see also Sierra Club v. Moser*, 298 Kan. 22, 33 (2013) ("To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct."). An injury is "particularized" if it affects the plaintiff "in a personal and individual way" rather than being a generalized or widely dispersed grievance. *Gannon*, 298 Kan. at 1123.

In his Petition, Chief Judge Solomon suggests that he has standing to bring this action because he has a "direct interest in the integrity and viability of the Kansas unified court system as well as the Kansas Supreme Court's vital role in administering the various courts comprising that system, including the district court of the 30th Judicial District." Petition ¶ 3.

To the extent Chief Judge Solomon relies on an alleged injury to the Judicial Branch, however, his alleged injury is not cognizable because it is institutional in nature and therefore a generalized grievance, not personal and particularized. In this respect, this matter is similar to the U.S. Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). *Raines* involved a challenge to the line item veto by members of Congress who claimed that the line item veto undermined the separation of powers and diminished their power as legislators. The line item veto was unconstitutional, as the Supreme Court later held in *Clinton v. City of New York*, 524 U.S. 417 (1998). But in *Raines*, the Supreme Court held that the plaintiff members of Congress lacked standing to challenge its constitutionality because they only suffered "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821. This injury was "wholly abstract and widely dispersed" and not particularized as required to establish standing. *Id.* at 829.

The same analysis applies here. At most, the Petition alleges an institutional injury to the Judicial Branch as a whole (although even this injury is questionable because HB 2338, § 11, does not significantly interfere with the Supreme Court's general administrative authority). This alleged injury, even assuming it exists, would be generally and widely shared by all judges (indeed, by all litigants and even by the general public), just as the injury in *Raines* was shared by all members of Congress. Like the plaintiff members of Congress in *Raines*, Chief Judge Solomon has not been injured in any personal and individual way. Despite the change in law resulting from HB 2338, he has been, and remains, the Chief Judge of the 30th Judicial District; his circumstance is unchanged. He lacks standing.

Admittedly, Chief Judge Solomon *might* be injured in a personal way *if* HB 2338 at some time in the future were to cause him to lose his position as chief judge. But at this point in time, such an injury is speculative at best, not "actual and imminent" as required for standing. To be actual and imminent, a threatened injury must be "*certainly impending*"—"allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotations marks omitted). Chief Judge Solomon's potential future loss of his position as chief judge does not meet this standard. In fact, it is entirely possible, perhaps probable, that he and his colleagues will vote that he continue as chief judge, particularly given the considerable experience he has gained in that position already. Indeed, rather than causing injury, it is plausible the change embodied in HB 2338 may *benefit* Chief Judge Solomon by eliminating any risk that the Supreme Court could decline to reappoint him at the end of a term.

B. The Matter Is Not Ripe Because There Is No Concrete or Actual Harm at This Time, and There May Never Be Such Harm to Plaintiff.

This matter is not ripe for much the same reason. "To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract." *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 170 (2009). A claim is not ripe if it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *See Texas v. United States*, 523 U.S. 296, 300 (1998). Because Chief Judge Solomon's potential loss of his position as chief judge is only hypothetical and may never occur, this matter should be dismissed at this time for lack of jurisdiction. The issue is not ripe.

II. HB 2338, § 11, Does Not Unconstitutionally Infringe on the Kansas Supreme Court's General Administrative Authority.

Even if this matter presented an actual case or controversy, it should be dismissed for failure to state a claim on the merits. In his Petition, Chief Judge Solomon contends that Section

11 of HB 2338 is unconstitutional because it conflicts with Kansas Supreme Court Rule 107(a). This argument appears to rely on the Kansas Supreme Court's opinion in *State v. Mitchell*, 234 Kan. 185 (1983).

A. *State v. Mitchell*, 234 Kan. 185 (1983), Does Not Require the Invalidation of HB 2338, § 11.

In *State v. Mitchell*, the district court had refused to follow the jury selection procedures specified in K.S.A. 22-3411a, claiming that the statute violated the separation of powers. The Kansas Supreme Court rejected this argument, distinguishing between the traditional concept of judicial power, *i.e.*, the power to hear and decide cases and controversies, and the Supreme Court's "general administrative authority" to "promulgate and enforce reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice." *Id.* at 194-95. The former is vested exclusively in the courts and "cannot be delegated to a nonjudicial body or person." *Id.* at 195. But the "rulemaking authority over administration and procedure" is not exclusive and may be exercised by the Legislature, at least when the courts acquiesce. *Id.* The Supreme Court went on to observe, in a statement not relevant to the case, that when a court rule and a statute conflict, the court rule "must prevail." *Id.* This last statement appears to be the basis of Chief Judge Solomon's Petition.

The problem is, this statement was both dictum and inaccurate as a matter of law. *See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844 (2006) (describing dicta as statements of law unnecessary to the decision of the case). Because *Mitchell* did not involve a conflict between a statute and a court rule, a categorical assertion of what would happen in such a situation was unnecessary to the decision. As dictum, this statement "is not binding, even on the court itself, because the court should consider the issue in light of the briefs and arguments of

counsel when the question is squarely presented for decision." *State v. Cummings*, 297 Kan. 716, 725-26 (2013).

Moreover, the *Mitchell* dictum, taken literally and to its extreme conclusion (as Plaintiff does), cannot be an accurate statement of the law. Given the actual holding in *Mitchell* that the Legislature had authority to enact a statute governing jury selection, it is clear that authority to regulate court administration and procedure is not vested exclusively in the Kansas Supreme Court; at least some of this authority is within the scope of the "legislative power" vested in the Legislature by Article II, § 1, of the Kansas Constitution.

In fact, the Legislature regulates court administration and procedure all the time. The Code of Civil Procedure, K.S.A. 60-201 *et seq.*, the Code of Criminal Procedure, K.S.A. 22-2101 *et seq.*, and the Rules of Evidence, K.S.A. 60-401 *et seq.*, are prime examples. The Legislature also has established residency requirements for district court judges, K.S.A. 20-331, specified the number and location of district magistrate judges in each district, K.S.A. 20-338, and determined that each county must have at least one judge, K.S.A. 20-301b. The Legislature even has addressed such matters as requiring that Supreme Court opinions include a syllabus, K.S.A. 20-111 and 20-203, setting minimum standards for the reproduction and preservation of court records, K.S.A. 20-159, and requiring courts to accept credit cards for the payment of fees, K.S.A. 20-1a13. These are just a few of the many ways in which the Legislature has regulated judicial administration and procedure.

Another example is the Judicial Department Reform Act of 1965, which predates the 1972 constitutional amendment giving the Supreme Court general administrative authority. This Act required the Supreme Court to set up judicial departments, created the position of judicial administrator, and specified the powers and duties of the departmental justices and the judicial

administrator. L. 1965, ch. 215 (codified at K.S.A. 20-318 *et seq.*). Following the 1972 constitutional amendment, the Legislature did not repeal the Act, on the ground that it exceeded legislative authority in light of the constitutional amendment, and thereby leave these matters exclusively to the Supreme Court. To the contrary, in legislation evidently designed to *implement* the constitutional amendment, the Legislature revised the Act along with numerous other statutes governing the judiciary. *See* L. 1976, ch. 146. This roughly contemporaneous evidence demonstrates that the 1972 grant of general administrative authority to the Kansas Supreme Court did not *extinguish* the Legislature's legislative power in the area of court administration and procedure any more than the 1966 constitutional amendment granting the State Board of Education "general supervision" of public schools extinguished the Legislature's power to govern public education. *See NEA-Fort Scott v. USD 234*, 225 Kan. 607, 612 (1979) (holding that Article VI, § 2, of the Kansas Constitution does not "exhaust[] legislative powers on all subjects related to the field of public education").

This is not to say that the Legislature has unlimited power over court administration and procedure. As discussed below, a statute will unconstitutionally violate the separation of powers if it significantly interferes with the Kansas Supreme Court's general administrative authority. But to conclude that the legislative power over court administration and procedure is limited to those matters "agreed upon" by the Supreme Court, as Plaintiff reads the *Mitchell* dictum to suggest, would raise serious separation of powers problems of its own.

In essence, Plaintiff's reading of *Mitchell* would give the Kansas Supreme Court a veto over an entire category of legislation, *i.e.*, laws implicating judicial administration and procedure, a proposition found nowhere in the text or structure of the Constitution or in the practices or holdings of the Kansas Supreme Court. Even more troubling, Plaintiff's reading of

the *Mitchell* dictum would actually bestow upon the Kansas Supreme Court the power to nullify previously constitutional laws—and then to revive them. For example, the jury selection statute upheld in *Mitchell* remains on the books today. *See* K.S.A. 22-3411a. According to Plaintiff's reading of the *Mitchell* dictum, if the Kansas Supreme Court were to adopt a conflicting jury selection rule, the statute would suddenly become unconstitutional. Then, if the Kansas Supreme Court later changed its mind and revoked that rule, the statute would be constitutional once again.

In effect, the constitutionality of any statute governing court administration or procedure could change from time to time, depending on the preferences of the Kansas Supreme Court at any given moment. That can't be the law. A statute either infringes on the Kansas Supreme Court's general administrative authority or it doesn't; the fact that the Kansas Supreme Court may disagree with the statute on policy grounds is irrelevant.

B. HB 2338, § 11, Does Not Violate Separation of Powers Principles.

Of course, no one doubts that the courts have authority to conduct judicial review and invalidate laws that violate the Constitution. But in determining whether a statute passed by the Legislature is constitutional, the courts must employ a *legal* standard—something more than whether the Supreme Court agrees with the statute or would instead prefer some other rule.

That legal standard is supplied by the Kansas Supreme Court's separation of powers jurisprudence. In determining whether a statute passed by the Legislature violates the separation of powers, courts begin with a presumption that the statute is constitutional. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84 (2008). Any doubts must be resolved in favor of the statute's validity, and the statute must *clearly* violate the Constitution to be stricken down. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 289 (1976).

A statute passed by the Legislature violates the separation of powers when it usurps the powers of another branch of government. *Morrison*, 285 Kan. at 884. An "usurpation" exists "when there is a *significant interference* by one branch of government with the operations of another branch." *Id.* (emphasis added). To determine whether a statute significantly interferes with powers given to another branch, courts consider "(a) the essential nature of the power being exercised; (b) the degree of control by one [branch] over another; (c) the objective sought to be attained . . . ; and (d) the practical result in blending of powers as shown by actual experience over a period of time." *Id.* (brackets and ellipsis in original).

Consideration of these factors here demonstrates that HB 2338, § 11, does not usurp the Kansas Supreme Court's general administrative authority.

1. The Essential Power at Issue Here Is the Legislative Power to Create and Regulate State Offices and Officers.

As to the first factor, HB 2338, § 11, is an exercise of the "legislative power" vested in the Legislature by Article II of the Kansas Constitution. The grant of administrative authority to the Supreme Court does not strip the Legislature of its authority to regulate the court system. This is particularly true when it comes to the selection of judicial officers. As the Kansas Supreme Court explained in *Leek v. Theis*, 217 Kan. 784 (1975), the "creation of various offices and departments of government not otherwise provided for in the Kansas Constitution is a legislative function. It is also a legislative function to determine the qualifications of the officers and by whom they shall be appointed and in what manner they shall be appointed." *Id.* at 808. For example, the Legislature created the Court of Appeals and has authority to determine how Court of Appeals judges are selected. *See* K.S.A. 20-3001; L. 2013, ch. 1, § 1 (codified at K.S.A. 20-3020) (providing for gubernatorial appointment and Senate confirmation).

In fact, the Kansas Constitution *explicitly* grants the Legislature authority to determine how public officers are selected. Article II, § 18, of the Constitution states: "The legislature may provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution." And judges are "officers" for purposes of the Constitution, as evidenced by the text of Article IV, § 3, which provides that "all elected public officials in the state, except judicial *officers*" are subject to recall. (Emphasis added).

The position of chief district court judge (originally called an "administrative judge") was created by the Legislature, *see* L. 1968, ch. 385, § 34 (codified at K.S.A. 20-329), and no provision of the Constitution specifies how chief judges are to be selected. Thus, this determination is left to the Legislature under Article II, § 18.

While the Legislature exercises "legislative power," Article III of the Constitution gives the Supreme Court "general administrative authority over all courts in this state." The key word here is "administrative"—the Supreme Court is responsible for administering the court system, much as an executive branch agency head is responsible for administering an agency. But a grant of administrative authority does not mean that the Legislature, in the exercise of its legislative power, cannot pass laws governing that administration.

The relationship between the Executive Branch and the Legislature helps illustrate this point. The Governor has general administrative authority over most Executive Branch agencies—the language in the Constitution is "supreme executive power." Kan. Const. art. I, § 3. And so the Governor may regulate the Executive Branch by issuing executive orders or directing executive officials to perform certain acts. But this administration must be carried out within the bounds of law, including those statutes passed by the Legislature that do not violate the separation of powers. The Legislature has regulated Executive Branch administration in

numerous ways. To give an example particularly analogous here, the Legislature has specified that the chairpersons of various administrative boards and commissions are to be chosen by their peers, not by the Governor. *See, e.g.*, K.S.A. 65-6102 (Emergency Medical Services Board); K.S.A. 74-601 (Kansas Corporation Commission); K.S.A. 74-4202 (Kansas Real Estate Commission). Yet there has been no suggestion that this violates the separation of powers.

To be sure, the Legislature cannot actually administer the courts, any more than it can attempt to administer executive agencies. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 298 (1976) (holding that a law giving the State Finance Council, a predominately legislative body, control over day-to-day operations of the Department of Administration was an unconstitutional usurpation of executive power by the Legislature). But it is important to distinguish between *administrative* authority and *legislative* power to govern administration. While the former is beyond the authority of the Legislature (except with respect to Legislative Branch personnel), the latter is within the Legislature's purview so long as the Legislature does not significantly interfere with the operations of another branch. Put another way, Article II of the Constitution grants the Legislature power to create the laws which then are to be administered by the Governor (for subject matter within the scope of Article I) or the Supreme Court (for subject matter within the scope of Article III).

2. HB 2338, § 11, Does Not Grant the Legislature Any Role in Selecting Chief Judges.

The second factor in the separation of powers analysis is the degree of control one branch exercises over another. This factor, too, supports the constitutionality of the statute. HB 2338, § 11, does not represent a case of legislative aggrandizement at the expense of the Judicial Branch; it gives the Legislature no role in the actual selection of the chief judges. The bill simply modified who within the Judicial Branch selects chief judges. And in doing so, the bill preserved

the Kansas Supreme Court's general administrative control over chief judges. Chief judges remain "subject to supervision" by the Supreme Court, and their exercise of clerical and administrative functions must comply with Supreme Court rules. *See* K.S.A. 20-328. The Supreme Court also retains the authority to discipline, suspend, or remove chief judges for cause under Article III, § 15, of the Kansas Constitution.

3. HB 2338, § 11, Furthers Proper and Reasonable Objectives.

The third factor in the separation of powers analysis—the nature of the objective sought—is perhaps the least important. After all, a bill that significantly interferes with the Kansas Supreme Court's administrative authority surely cannot be salvaged by a worthy motive, or vice versa. Not only that, but identifying an "objective sought" will often be next to impossible when dealing with a multimember legislative body that may have numerous and at times conflicting objectives.

That said, there is absolutely no evidence in the legislative history to indicate that the Legislature passed HB 2338, § 11, in a pernicious attempt to undermine the Kansas Supreme Court's general administrative authority. Instead, the legislative history of 2014 SB 365 (which originally contained the provision that became HB 2338, § 11) suggests that the Legislature adopted peer selection of chief judges in part because of the practice in other states. A memorandum prepared by the Chair of the Senate Judiciary Committee explained that peer selection is the most common method of district court chief judge selection, being used in 40 percent of the states with chief district court judges, including the surrounding states of Missouri, Oklahoma, and Nebraska. *See* Memo by Senator Jeff King to the Senate Judiciary Committee on SB 365 (Feb. 17, 2014) (Exhibit 1). Further, several Kansas district court judges testified in support of SB 365. *See* Written Testimony of the Honorable Eric R. Yost, District Judge, 18th

Judicial District, before the Kansas Senate Judiciary Committee in support of SB 364 and 365 (Feb. 17, 2014) (Exhibit 2); Written Testimony of Three 18th Judicial District Judges in support of SB 365 (Feb. 17, 2014) (Exhibit 3). These judges argued that chief judges should be selected by their peers, who know them best and work with them most closely. They also noted that peer selection is how the Legislature, city and county commissions, and school boards choose their leadership. The State recognizes that not all Kansas judges favored the change, but HB 2338, § 11, reflects a proper and considered policy decision about the best method of selecting chief judges, not an attempt to weaken the Judicial Branch by permitting the Legislature to assume judicial power.

4. HB 2338, § 11, Does Not Have Adverse Consequences for the Administration of Justice or the Operation of the Courts in Practice.

The fourth and final factor is the practical result as shown by actual experience. Although peer selection of chief judges was not official policy until the passage of HB 2338, testimony before the Senate Judiciary Committee explained that judges in both Johnson and Sedgwick counties (the two most populous counties in the State) already have a *de facto* peer selection process. *See* Written Testimony of the Honorable Eric R. Yost, District Judge, 18th Judicial District, before the Kansas Senate Judiciary Committee in support of SB 364 and 365 (Feb. 17, 2014) (Exhibit 2). In these two districts, the district court judges informally select a chief judge, and only their chosen candidate applies to the Supreme Court for the position. *Id.* There is no indication that this practice has somehow created inefficiency, frustrated the administration of justice, or otherwise disrupted the Judicial Branch.

The practical experience in surrounding states also demonstrates that peer selection of chief judges will not significantly interfere with the Kansas Supreme Court's general administrative authority. Nebraska, Missouri, and Oklahoma all have constitutional provisions

similar to Kansas giving general administrative or supervisory authority to their supreme courts. *See* Neb. Const. art. V., § 1 ("In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice."); Mo. Const. art. V, § 4 (The supreme court shall have general superintending control over all courts and tribunals. . . . Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power."); Okla. Const. art. VII, § 6 ("[G]eneral administrative authority over all courts in this State . . . is hereby vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules.").

Yet in each of these states, chief judges (sometimes called "presiding judges") are chosen by their peers. *See* Neb. Rev. Stat. § 24-1101(2) (Nebraska Court of Appeals chief judge chosen by peers, with Supreme Court approval); Neb. Ct. R. § 6-1502 (peer selection of presiding judge within each district court division); Neb. Rev. Stat. § 24-506 (peer selection of presiding judges within Nebraska county courts); Mo. Const. art. V, § 8 (peer selection of chief judge in each court of appeals district); Mo. Ann. Stat. § 478.240 (peer selection of presiding judge in each circuit (trial) court); Okla. Stat. Ann. tit. 20, § 35 (peer selection of presiding judge in the Oklahoma Court of Criminal Appeals—the highest court for criminal appeals in Oklahoma); Okla. Stat. Ann. tit. 20, § 30.2 (peer selection of presiding judge for each division of the Oklahoma Court of Civil Appeals); Okla. Const. art. VII, § 10 (peer selection of presiding judge in each judicial district). Given that most of our neighbor States deem peer selection of chief judges to be consistent with constitutional grants of general administrative authority to their state

supreme courts, it is difficult to comprehend how or why the conclusion would be dramatically different in Kansas, which has a virtually identical constitutional provision.

The federal system is also instructive. The U.S. Supreme Court long has recognized Congress' power to regulate the federal judiciary. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts."). And Congress, not the Supreme Court, has specified how chief judges of federal district courts and federal courts of appeal are chosen. *See* 28 U.S.C. § 45 (courts of appeals); 28 U.S.C. § 136 (district courts). Although federal chief judges are not chosen by their peers, they also are not appointed by the Supreme Court, and instead are chosen in a manner that Congress has directed. Thus, longstanding practice in the federal courts further undermines any claim that chief judges must be selected by the highest court in a judicial system in order to preserve the separation of powers and judicial independence.

Ultimately, a careful analysis demonstrates that HB 2338, § 11, preserves the Kansas Supreme Court's general administrative authority, is a legitimate exercise of the legislative power under Article II of the Kansas Constitution, and does not violate the separation of powers.

CONCLUSION

The State of Kansas respectfully requests that the Court dismiss this matter for lack of jurisdiction because there is no justiciable case or controversy. Chief Judge Solomon has not suffered an injury in fact sufficient to establish standing nor is the matter ripe for review.

In the event the Court reaches the merits, the Petition should be dismissed for failure to state a claim because HB 2338, § 11, does not violate Article III, § 1, of the Kansas Constitution. The Legislature has the constitutional authority to determine how chief judges are selected, peer selection is a reasonable policy choice consistent with widespread practice among the states, and peer selection does not significantly interfere with the Kansas Supreme Court's general administrative authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of March, 2015, a true and correct copy of the above Memorandum in Support of Motion to Dismiss was mailed, postage prepaid, to:

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Dwight Carswell

Dwight R. Carswell

Exhibit 1

Memo by Senator Jeff King to the
Senate Judiciary Committee on SB 365
(Feb. 17, 2014)

February 17, 2014

To: Senate Judiciary Committee

From: Committee Chairman King

Re: Hearing on Senate Bill No. 365

To Senate Judiciary Committee members:

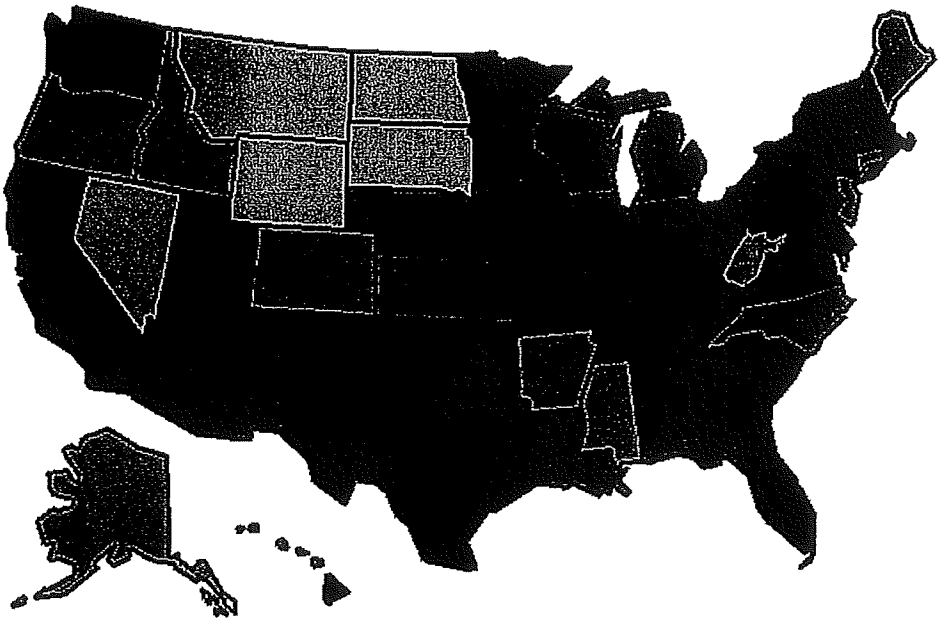
Senate Bill No. 365 would amend K.S.A. 20-329 and 20-3011 and repeal the existing sections. Currently, the chief judge for both the court of appeals and the chief judges in every judicial district are selected by the Kansas State Supreme Court. Kansas is one of only four states in which the supreme court selects the chief appellate court judge. SB 365 would move Kansas to the much more common practice of peer voting. Court of appeals judges would elect amongst themselves one chief judge, as is the most common practice in the country; 41% of states with chief appellate judges use the peer vote. Kansas would join regional neighbors Missouri, Oklahoma, Nebraska, and Iowa in utilizing a peer vote mechanism.

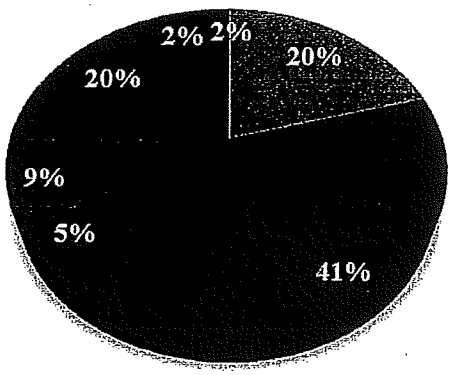
SB 365 would also replace the current system of district court chief judge selection with a peer vote. Currently, Kansas is one of seven states that allow the supreme court to choose chief judges in the district courts. A peer vote, in which the district court judges in every judicial district would elect a district court judge as chief judge, is the most commonly used selection mechanism and is used by 40% of states with chief district court judges. Kansas would join regional neighbors Missouri, Oklahoma, and Nebraska in utilizing a peer vote mechanism.

Please find attached data illustrating the current mechanisms employed by courts across the country in selecting chief judges at the appellate court and district court levels.

Senate Judiciary Committee
Date: 2-17-14
Attachment: 1

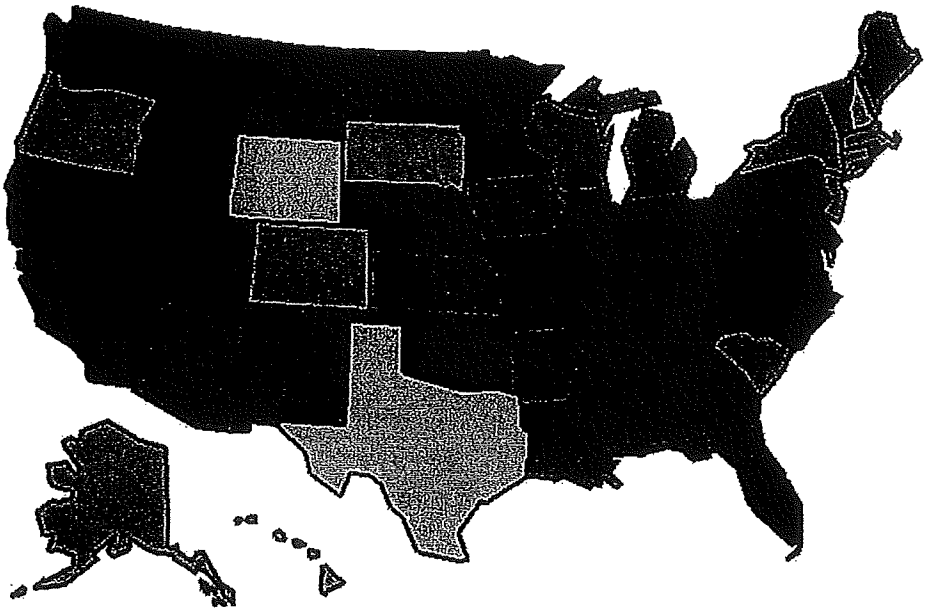
Court of Appeals – Chief Judge Selection Method

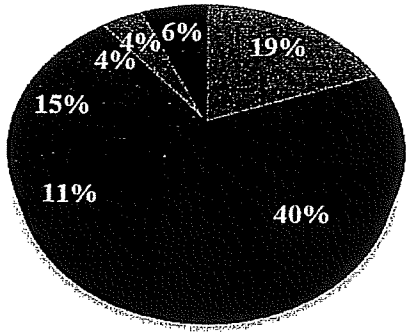




- Chief Justice appoints
- Peer vote
- Seniority
- Supreme Court appoints
- Governor appoints
- Legislative election
- Popular election

District Court – Chief Judge Selection Method





- Chief Justice appoints
- Peer vote
- Seniority
- Supreme Court appoints
- Governor appoints
- Chief court administrator
- Varies by circuit

Chief Judge Selection Methods

State	Supreme Court	Duration	Court of Appeals	Duration	District Court	Duration
AK	Peer vote	3 yrs	Chief Justice appoints	2 yrs	Chief Justice appoints	1 yr
AL	Popular election	6 yrs	Criminal: peer vote, Civil: seniority	Indefinite	Peer vote	3 yrs
AR	Popular election	8 yrs	Chief Justice appoints	4 yrs	Supreme Court appoints	No set term
AZ	Peer vote	5 yrs	Peer vote	1 yr	Supreme Court appoints	Remainder of 4 yr term
CA	Gubernatorial appointment, confirmation by commission on judicial appointments	12 yrs	Gubernatorial appointment, confirmation by commission on judicial appointments	12 years	Peer vote	1 or 2 yrs
CO	Peer vote	Indefinite	Chief Justice appoints	Indefinite	Chief Justice appoints	Indefinite
CT	Gubernatorial nomination from judicial selection commission	8 yrs	Chief Justice appoints		Chief court administrator appoints	At pleasure of chief court administrator
DE	Gubernatorial appointment from judicial nominating commission with Senate consent	12 yrs	Gubernatorial appointment from judicial nominating commission with Senate consent	12 yrs	Gubernatorial appointment from judicial nominating commission with Senate consent	12 yrs
FL	Peer vote	2 yrs	Peer vote	2 yrs	Peer vote	2 yrs
GA	Peer vote	4 yrs	Peer vote	2 yrs	Varies by circuit	Varies by circuit
HI	Gubernatorial appointment from nominating commission with Senate confirmation	10 yrs	Gubernatorial appointment from nominating commission with Senate confirmation	10 yrs	Chief Justice appoints	Chief Justice determines
IA	Peer vote	8 yrs	Peer vote	2 yrs	Supreme Court appoints	2 yrs
ID	Peer vote	4 yrs	Chief Justice appoints	2 yrs	Peer vote	3 yrs
IL	Peer vote	3 yrs	Peer vote	1 yr	Peer vote	Indefinite
IN	Judicial nominating commission selects	5 yrs	Peer vote	3 yrs	Varies by circuit	Varies by circuit
KS	Seniority	Indefinite	Supreme Court appoints	Indefinite	Supreme Court appoints	2 yrs
KY	Peer vote	4 yrs	Peer vote	4 yrs	Peer vote	2 yrs
LA	Seniority	Duration of service	Seniority	Duration of service	Peer vote	Varies by court
MA	Gubernatorial appointment with governor's council approval	To age 70	Gubernatorial appointment from nominating commission with governor's council approval	To age 70	Chief Justice appoints	5 years

MD	Gubernatorial appointment	Indefinite	Gubernatorial appointment	Indefinite	Seniority	N/A
ME	Gubernatorial appointment	7 years			Chief Justice appoints	At pleasure of Chief Justice
MI	Peer vote	2 yrs	Supreme Court appointment	2 yrs	Supreme Court appoints	2 yrs
MN	Nonpartisan election	6 yrs	Gubernatorial appointment	3 yrs	Peer vote	2 yrs
MO	Rotation with peer vote	2 yrs	Rotation with peer vote	2 yrs	Peer vote	2 yrs
MS	Seniority	Duration of service	Chief Justice appoints	4 yrs	Seniority	Duration of service
MT	Nonpartisan election	8 yrs			Seniority/rotation	Duration of service/1 year
NC	Nonpartisan election	8 yrs	Chief Justice appoints	Indefinite	Seniority	Indefinite
ND	Selected by judges of SC and district courts	5 yrs			Peer vote	3 yrs
NE	Gubernatorial appointment from nominating commission	DoS	Peer vote with Supreme Court approval	2 yrs	Peer vote	1 yr
NH	Gubernatorial nomination from selection commission recommendation; appointment by executive council	5 yrs or to age 70	Gubernatorial nomination from selection commission recommendation; appointment by executive council	To age 70		
NJ	Gubernatorial Appointment with Senate confirmation	Duration of Service	Chief Justice appoints	Indefinite	Chief Justice appoints	Indefinite
NM	Peer vote	2 yrs	Peer vote	2 yrs	Varies by district	Varies by district
NV	Rotates by seniority	2 yrs			Peer vote	2 yrs
NY	Gubernatorial appointment from nominating commission with Senate consent	14 yrs	Gubernatorial appointment from nominating commission	Serves through end of Supreme Court term	Chief administrative judge appoints	
OH	Popular election	6 yrs	Peer vote	1 yr	Peer vote	1 yr
OK	Peer vote	2 yrs	Peer vote	2 yrs for Criminal Appeals, 1 yr for Civil Appeals	Peer vote	1 yr
OR	Peer vote	6 yrs	Chief Justice appoints	2 yrs	Chief Justice appoints	2 yrs
PA	Seniority	Duration of term	Peer vote	5 yrs	Seniority or peer vote	5 yrs

RI	Gubernatorial appointment from nominating commission with House and Senate confirmation	Life	Gubernatorial appointment from nominating commission with Senate confirmation	Life	Gubernatorial nomination with Senate Judiciary Committee confirmation	Life
SC	Legislative election	10 yrs	Legislative election	6 yrs	Chief Justice appoints	6 months
SD	Peer vote	4 yrs			Chief Justice appoints	At pleasure of Chief Justice
TN	Peer vote	4 yrs	Peer vote	1 yr	Peer vote	1 yr
TX	Popular election	6 yrs	Popular election	6 yrs		
UT	Peer vote	4 yrs	Peer vote	2 yrs	Peer vote	2 yrs
VA	Peer vote	4 yrs	Peer vote	4 yrs	Peer vote	2 yrs
VT	Gubernatorial appointment from nominating commission with Senate confirmation	6 yrs	Supreme Court appoints	4 yrs	Supreme Court appoints	4 yrs
WA	Peer vote	4 yrs	Peer vote	1 yr	Peer vote	At least 1 yr
WI	Seniority	Indefinite	Supreme Court appoints	3 yrs	Supreme Court appoints	2 yrs
WV	Peer vote	1 yr			Peer vote	Varies by circuit
WY	Peer vote	4 yrs				

Exhibit 2

Written Testimony of the
Honorable Eric R. Yost,
District Judge, 18th Judicial District,
before the Kansas Senate Judiciary
Committee in support of SB 364 and 365
(Feb. 17, 2014)

Eric R. Yost
JUDGE

(316) 660-5612
eyost@dc18.org

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
525 N. MAIN
WICHITA, KANSAS
67203

Written Testimony of Judge Eric R. Yost
Senate Judiciary Committee
Senate Bill 364 / Senate Bill 365
Monday, February 17, 2014

Vice President King and members of the committee:

Happy Presidents' Day, and thank you for permitting me to submit written testimony related to the two pieces of legislation referenced above. I strongly support both Senate Bill 364 (related to allocating a budget for each judicial district) and Senate Bill 365 (election of chief judges by the judges of a judicial district).

Senate Bill 365

First, in regard to SB 365, it has always been my belief that the judges of a given judicial district should elect their own chief judge. The chief judge of any judicial district should be the person who commands the respect and support of the majority of those being "chiefed," just as legislative bodies organize themselves, or even school boards or county/city commissions. It simply makes sense. And truth be told, we already have such a *de facto* selection process is both Johnson and Sedgwick County. In both counties, there is a chief judge election at the local level, with the understanding that only the

winner will apply to the supreme court for the position. SB 365 merely removes the pernicious possibility that a sore loser, who does not have the support of a majority of the judges, may decide to apply to become chief judge in spite of a lack of support.

My own preference in accomplishing the goal of an elected chief judge would have been to have the supreme court amend its own internal rules to reflect that local judges' preferences will control, but the supreme court has never seen fit to so amend their rules.

Lastly, I would note an important provision in this bill: the election by the Court of Appeals of their own chief judge. It seems oddly out of place to have one appellate body (the supreme court) imposing a chief judge on another appellate court; I believe the members of the Kansas Court of Appeals are perfectly capable of selecting their own chief. Indeed, the Court of Appeals, if left to their own devices, could choose to make it a matter of pure seniority, as the supreme court does, without regard to merit.

Senate Bill 364

As for SB 364, my recommendation is to do with budgeting what I recommended above that we do with chief judge selection: keep as much control at the local level as possible. And it seems only logical that each judicial district be responsible for what occurs within that district, and to be held to account for its fiscal management. The chief judge of a district should be charged with the responsibility of putting together a budget request, and would then be expected to live within whatever appropriation is made. Making the chief judges of any given judicial district accountable for their own performance is the surest way to achieve good fiscal management in our judiciary.

I would also like to address the notion that SB 364, as well as SB 365, are an assault on the administrative powers of the supreme court. From what I can tell in reading both pieces of legislation, they are no such thing. Making chief judges accountable to their local judges, and having them also be responsible for their own fiscal management, is simply a good management tool. These bills are nothing more than an effort to bring important decision making, and the subsequent accountability for same, to the local level. The Kansas Supreme Court should welcome these suggested changes.

Good luck in your deliberations.

Judge Eric R. Yost
18th Judicial District

Exhibit 3

Written Testimony of Three 18th Judicial District Judges in support of SB 365 (Feb. 17, 2014)

TESTIMONY IN SUPPORT OF SB 365
BEFORE THE SENATE JUDICIARY COMMITTEE

February 17, 2014

Hon. Chairman Sen. King:

Thank you for the opportunity to submit written testimony in favor of SB 365. The district court trial bench in Kansas is, for the most part, a fairly close group. Trial judges work with each other on a daily basis, which we believe places us in the best position to select the chief judge.

We are in support of SB 365, which simply allows the trial judges to determine for themselves who they want to be the chief judge for each judicial district. We are, after all, the judges who are directly impacted by this decision. Moreover, we believe that when the chief judge is elected by the trial judges within the respective judicial district, the chief judge will be directly accountable to the trial judges for the decisions he or she makes, which will foster greater communication between the chief judge and the trial judges he or she supervises.

Nothing in our written testimony should be construed as a complaint against our current chief judge. Rather, when evaluating the method by which a chief judge is selected, we believe that SB 365 is preferable to the current statute, and we urge the Senate Judiciary Committee to pass this bill out of committee favorably.

Respectfully submitted:

Hon. Jeffrey E. Goering, District Judge
18th Judicial District

Hon. Robb Rumsey, District Judge
18th Judicial District

Hon. Christopher M. Magana
18th Judicial District