BRENNAN CENTER FOR JUSTICE
at New York University School of Law

Kansas Values INSTITUTE

Kansans for FAIR COURTS

October 6, 2014

Honorable Sam Brownback
Governor of Kansas

Chief Justice Lawton Nuss
The Kansas Supreme Court

President of the Senate Susan Wagle
Vice President of the Senate Jeff King
Senate Majority Leader Terry Bruce
Senate Minority Leader Anthony Hensley
Senate Asst. Minority Leader Marci Francisco
Kansas Senate

Speaker Ray Merrick
Speaker Pro Tem Peggy Mast
House Majority Leader Jene Vickrey
House Minority Leader Paul Davis
House Asst. Minority Leader Tom Burroughs
Kansas House of Representatives

We write to express our concerns regarding Kansas House Bill 2338, signed into law by Governor Brownback on April 17, 2014 and in effect since July 1, 2014. We believe the new legislation, which strips Kansas's Supreme Court of the power over local court budgets and the selection of local chief judges, threatens to impinge upon the Kansas Supreme Court's constitutional authority to administer a unified court system and thus endangers the proper balance between the legislative and judicial branches under the separation-of-powers doctrine.

1. *The Supreme Court's Constitutional Authority to Administer a Unified Court System*

As amended in 1972, Article III, Section 1 of the Kansas Constitution vests the judicial power of the state in "one supreme court, district courts, and such other courts as are provided by law." To administer that unified system, Article III, Section 1 also grants the Supreme Court "general administrative authority over all courts in this state." As the Kansas Supreme Court stated in *State v. Mitchell*: "It is apparent from the unambiguous words of the constitution that the judicial power of Kansas is vested exclusively in the unified court system."[1] It was not always so.

Before 1972, the administration of the Kansas judicial system was badly fragmented. At the time, Article III, Section 1 did not explicitly grant that authority to the Supreme Court. Nevertheless, some legal experts maintained that the authority was inherent under the separation-of-powers doctrine, as is the case in many sister states.[2]

[1] 234 Kan. 185, 194, 672 P.2d 1 (1983).
[2] *See e.g.*, Spencer A. Gard, *Procedure by Court Rules*, 5 Kan. L. Rev. 42, 45 (1957) (the legislature "exceeds its constitutional power when it attempts to impose on the judiciary any rules for the dispatch of judiciary duties.").

Any uncertainty was eliminated by the 1972 amendment to Article III, Section 1, which grew out of a report issued in February 1969 by the Citizens' Committee on Constitutional Revision, established by the Kansas State Legislature.[3] That report recommended amending Article III, Section 1 to include an explicit grant of authority to the Supreme Court to administer the State's entire judicial system in order to, in the report's words, "create a unified court with overall administrative authority in the supreme court branch thereof ..."[4] Three years later the Kansas citizenry backed that proposal by voting to adopt the current version of Article III, Section 1.

As observed by the Judicial Study Advisory Committee (JSAC), the group tasked with making recommendations to implement the unified court system explicitly mandated by the amendment of Article III, Section 1, the people of Kansas have "wisely vested ultimate administrative authority over Kansas courts in the supreme court" consistent with "sound principles of judicial administration elaborated by ... the American Bar Association."[5] Contrary to the *vox populi*, HB 2338 now threatens to decentralize the Kansas court system, diminish the Supreme Court's constitutional authority to administer it, and return it to its fractionalized state before Article III, Section 1 was amended.

2. *Mitchell v. State: Separation-of-Power Limits on Legislative Incursions into the Area of Judicial Administrative*

The threshold issue addressed in *Mitchell* was "whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration and procedure."[6] Answering that question emphatically in the affirmative, the Kansas Supreme Court pointed to the "unambiguous" text of Article III, Section 1:

> We conclude the Supreme Court has constitutional authority under the general grant of power of administration over the court systems to promulgate and enforce reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice.[7]

However, in contrast to the judiciary's nondelegable function of decision-making, *Mitchell* noted two circumstances in which the legislature could enact laws that encroach upon the Supreme Court's constitutional authority to administer Kansas's court system "without violating the separation of powers doctrine,": (1) where the Supreme Court chooses to "cooperate" with the legislature "through the use of agreed upon legislation"; or (2) where the Supreme Court chooses to "acquiesce in legislative action in this area of the judicial function." Although in both instances "[t]he constitutional power over court administration and procedure remains vested in the judicial branch," legislative action is permissible because the Supreme Court has chosen deliberately to refrain from exercising its constitutional authority through the promulgation of

[3] *See* Wesley H. Sowers, et al., *Report of the Citizens' Committee on Constitutional Revision* (Feb. 1969).
[4] *Id.* at 43.
[5] Edward F. Arn, et al., *Recommendations for Improving the Kansas Judicial System*, 13 Washburn L. J. 271, 363-64 (1974).
[6] 234 Kan. at 193.
[7] 234 Kan. at 194.

conflicting rules. However, "when court rules and statue conflict ... the court's constitutional mandate *must prevail*." [8]

3. *HB 2338 Poses a Direct Conflict with the Supreme Court's Exercise of Its Constitutional Authority to Administer Kansas's Court System*

HB 2338 is decidedly not an example of the Supreme Court and the legislature cooperating on an agreed upon statute that deals with the administration of the State's judicial system. On the contrary, as Chief Justice Nuss has stated publicly, the Supreme Court is "strongly oppose[d]" to this legislation.[9] In fact, HB 2338 directly conflicts with at least two rules promulgated by the Supreme Court pursuant to its administrative authority under Article III, Section 1.

In furtherance of the 1972 amendment of Article III, Section 1, the JSAC recommended that the Chief Justice of the Supreme Court have general supervision over "all matters within the purview of the supreme court's policy-making power including…the assignment of judges at all levels."[10] JSAC further recommended that "the court of appeals docket be closely monitored and that the supreme court appoint a chief judge of that court to monitor its affairs."[11] Implementing those proposals, the Supreme Court promulgated Rule 1.02 ("The Supreme Court will appoint a chief judge of the Court of appeals) and Rule 1.07 ("The Supreme Court will appoint a chief judge in each judicial district.").

HB 2338 seeks to wrest control of these appointments from the Supreme Court and reallocate it the lower courts. Thus, the new legislation amends K.S.A. 20-329 to provide that the district court judges in each judicial district shall elect their own chief judge. Similarly, K.S.A. 20-3011 has been amended to provide for the election of the chief judge of the Court of Appeals by the judges of that Court. Under *Mitchell*, these statutory provisions violate the separation of powers doctrine because they irreconcilably conflict with rules adopted by the Supreme Court in the exercise of its constitutional authority under Article III, Section 1. In these circumstances, the Supreme Court's "constitutional mandate must prevail."

There is, however, a window of opportunity for the legislature to avert a constitutional confrontation. That is because the legislation provides that the chief judges of the district courts and the Court of Appeals who have been designated by the Supreme Court as of July 1, 2014, the effective date of HR 2338, "shall be allowed to serve as chief judge through January 1, 2016." Thus, the legislature has sufficient time to eliminate the offending provisions and restore the separation of power mandated by the Kansas Constitution.

HR 2338 seeks to make other substantial inroads into the administration of the Kansas judicial system reserved for the Supreme Court under Article III, Section 1, the most prominent being a provision which authorizes the chief judge of each district court to "control and supervis[e]" the annual budget allocation for the district as well as exercise "the authority and power to hire,

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[8] 234 Kan. at 195.
[9] Lawton R. Nuss, Editorial, *Kansas Legislature Threatens Judges' Independence*, Kansas City Star, Mar. 18, 2014, available at http://www.kansascity.com/2014/03/17/4896714/lawton-r-nuss-kansas-legislature.html.
[10] JSAC Report at 364.
[11] *Id.* at 366-367.

promote, suspend, demote and dismiss all personnel as necessary to carry out the functions and duties of such judicial district." This new provision is not self-executing, however; each fiscal year, the chief judge of each district court must opt to undertake these responsibilities.

Unlike the impending constitutional clash over the selection of lower court chief judges, this new statutory provision does not conflict with any existing Supreme Court rules. Prior to the passage of HB 2338, the Kansas legislature recognized the Supreme Court's primacy in all budgetary matters effecting the State's judicial system consistent with Article III, Section 1 and the 1974 JSAC recommendation that the Supreme Court have supervisory authority over the entire judicial budget: "Giving one body, the supreme court, budgetary power over all the courts will permit the rational planning and control of court expenditures heretofore unavailable, because many agencies separately were passing on court budgets."[12] In light of HB 2338's diminution of its budgetary authority, it remains to be seen whether the Supreme Court will reassert its primacy through the rule-making process or acquiesce.

In sum, by attempting to eliminate the Supreme Court's authority to select the chief judges of the Kansas judiciary in direct conflict with the Court's exercise of that authority, HR 2338 has created an impending constitutional confrontation. Given *Mitchell*'s holding that the Supreme Court rules "must prevail" in these circumstances, it would appear that the legislature has a constitutional duty to retreat under the separation of powers doctrine. That duty will become even more acute should the Supreme Court choose to exercise its rule-making authority in the other areas of judicial administration in which HR 2338 seeks to diminish the Court's constitutional authority under Article III, Section 1.

Should the legislature refuse to repeal these provisions, HR 2338 appears vulnerable to a legal challenge and threatens unnecessary acrimony between the branches.

Sincerely,

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[12] JSAC Report at 373.
[13] This letter does not purport to convey the position of N.Y.U. School of Law.