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No. 114,573

IN THE SUPREME COURT OF THE STATE OF KANSAS

LARRY T. SOLOMON, CHIEF JUDGE,
30TH JUDICIAL DISTRICT OF THE STATE OF KANSAS
Appellee,

v.

STATE OF KANSAS,
Appellant.

KANSAS STATE COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS BRIEF OF AMICUS CURIAE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THE HONORABLE LARRY D. HENDRICKS, JUDGE
DISTRICT COURT CASE NO. 2015-CV-156

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TABLE OF CONTENTS

I. STATEMENT OF INTEREST

The Kansas State Committee of the American College of Trial Lawyers ("Kansas Committee") represents a total of 62 Kansas Fellows, all of whom are licensed to practice law in Kansas and have substantial experience in litigating contested matters before the courts of this state. The membership includes specialists in both civil and criminal matters, and includes attorneys who represent both plaintiffs and defendants. A list of the Kansas membership is attached as Appendix A.

One of the core values of the Kansas Committee is a commitment to preserving and protecting the independence of the judiciary as a third branch of government. This appeal presents issues of importance involving this subject and for this reason the Kansas Committee respectfully offers the following observations.

II. STRIPPING THE KANSAS SUPREME COURT OF THE POWER TO APPOINT CHIEF DISTRICT COURT JUDGES REPRESENTS A SIGNIFICANT LEGISLATIVE INTERFERENCE WITH THE JUDICIAL BRANCH OF GOVERNMENT

While the parties have raised other issues, the Kansas Committee will limit its discussions to the following: Whether Section 11 of Senate Substitute for House Bill 2338 (hereafter HB 2338), 2014 Kan. Sess. Laws 544, which strips the Supreme Court of the authority to appoint chief district court judges, violates the separation-of-powers doctrine?

Judicial independence is, of course, merely one part of the broader separation-of-powers doctrine. Nothing in the text of either the United States or Kansas constitutions expressly creates that doctrine. Yet, the separation of powers "is recognized as 'an inherent and integral element of the republican form of government.'" *State ex rel. Morrison v.*

Sebelius, 285 Kan. 875, 882, 179 P.3d 366 (2008) (quoting *Van Sickle v. Shanahan,* 212 Kan. 426, 447, 511 P.2d 223 (1973)). At one time, the Kansas Supreme Court attempted to strictly apply the requirement of separation. This, however, proved impractical and the Court now recognizes that "separation of powers of government has never existed in pure form except in political theory." *Id.* at 883 (quoting *Leek v. Theis*, 217 Kan. 784, 805, 539 P.2d 304 (1975)). Thus, while the general descriptions of the power held by each branch of government might suggest complete separateness, "[i]n reality, there is an overlap and blending of functions, resulting in complimentary activity by the different branches that makes absolute separation of powers impossible." *Miller v. Johnson*, 295 Kan. 636, 671, 289 P.3d 1098 (2012) (quoting *State ex rel. Morrison v. Sebelius*, 285 Kan. at 883). This being true, "an unconstitutional 'usurpation of powers exist [only] when one branch of government significantly interferes with the operations of another branch.'" *State v. Buser*, 2015 WL 4646663, **5 (Kan.) (quoting *Miller v. Johnson*, 295 Kan. at 671).

In determining whether a significant interference has occurred, the Court considers: "(1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of bleeding powers as shown by actual experience over a period of time." *Miller v. Johnson,* 295 Kan. at 671. See also *State ex rel. Morrison v. Sebelius*, 285 Kan. at 884.

A review of this case law points to the existence of two primary principles of adjudication in separation of powers cases. First, the key test to constitutionality is whether an usurpation of power significantly interferers with the operations of another branch. A mere cosmetic or theoretical offense to the ideal of separation does not state a constitutional

claim. The interference must be real and meaningful. Second, in making this judgment, the Court applies a practical, real world standard. The inquiry becomes how the legislatively authorized intrusion of one branch into another branch will functionally impact the offended branch's operations. It is only when the impact is significant that the statute will fall.

Applying this practical, "real world" standard to the present case, we must begin by defining the dimensions of judicial responsibility and power in the administration of the court system. Article 3, §1 answers this unambiguously by granting the Supreme Court "general administrative authority over all courts in this State" under a unified judicial system. This constitutional assignment of "administrative authority" represents nothing less than a direction to the Supreme Court to exercise control of the administrative functions of the entire Kansas judiciary, including all district courts, so as to assure the fair, effective and efficient operation of a unified court system. This is no small undertaking. Kansas has 31 separate judicial districts, of various sizes, spread across a large and diverse state. Common sense, standing by itself, counsels that the ability to select the chief judges, as the principal administrative leaders of the individual districts, will be of significant assistance to the Court in carrying out these responsibilities. When the Supreme Court selects the administrative judge, there is no ambiguity regarding the line of authority. Everyone involved knows who is giving the orders on administrative matters, and whose duty it is to carry out those orders. Under the peer selection method envisioned by House Bill 2338, this chain of command is disrupted. Is the chief judge to give full deference to instructions on administrative matters from the Supreme Court, or is he or she also to abide by the perhaps conflicting desires and viewpoints of the judicial peers to whom that chief judge owes his or her office? As a related

point, peer election of chief judges also creates an obvious danger of engendering conflict and faction within the individual judicial districts, further complicating the Supreme Court's administrative duties.

Under HB 2338, the Supreme Court is denied any involvement in the selection of the principal administrative officers carrying out the Court's directions at the district court level. In all but the extraordinarily rare circumstance in which professional discipline is called for, the Court is also denied all input into whether sitting chief judges shall remain in that position. Thus, the Court is given the duty to administer the courts, but denied the means of effectively enforcing its directions. It is doubtful that any competent chief executive of a large organization, be it a private corporation, a major sports franchise or the governor of a sovereign state, would ever accede willingly to such a limitation on his or her power and capacity to do the job at hand.

An analogous situation involves the powers of the presidency. Under Article 2, §2 of the United States Constitution, the President is expressly granted the power to make appointments to major offices, subject to the advice and consent of the Senate. There is no similar provision granting the President the power to remove those officials from office. Despite this fact, the United States Supreme Court has consistently ruled that the power to remove high ranking subordinate officials is inherent in the President's general administrative powers. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-93 (2010). This is because "Article II confers on the President 'the general administrative control of those executing the laws.' It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's

famous phrase. . . . [T]he President therefore must have some power of removing those for whom he cannot continue to be responsible." *Id.* (citations omitted)(emphasis in original).

The Court concluded:

> The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibility; the buck would stop somewhere else. Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'

Id. at 513-14 (citing The Federalist No. 70, at 478).

Similarly, here the Kansas Constitution grants the Supreme Court general administrative powers over the courts of Kansas. Under this mandate, the buck stops with the Court. In carrying out this constitutional obligation, the Court must work with and rely upon the chief judges, as the Court's primary representatives in carrying out these responsibilities at the district court level. The power to appoint and, if necessary, replace these chief judges (from their administrative not adjudicatory roles) is a necessary and implied feature of this grant of power.

III. AN INDISPUTABLE ELEMENT OF COERCION SURROUNDS THE STATUTE IN QUESTION

There is another, even more important, reason why Section 11 of HB 2338 cannot withstand constitutional scrutiny. And this requires discussion of a subject that can only be meaningfully considered if there is a willingness to state an uncomfortable, but objectively indisputable, truth -- and to state it clearly and without equivocation. Taking into account

all of the objective facts and circumstances relevant to the question, there is simply no question that HB 2338 is irreparably tied to an unconstitutional effort by the state legislature to intimidate and/or retaliate against this Court.

It is no secret that the statutory language in question, expressly diminishing the administrative power of the Supreme Court, was enacted at a time of intense conflict between the political branches and the Court. This conflict was largely centered around long simmering litigation involving school finances, but touched other subjects as well. Indeed, throughout this process neither the legislature nor the governor has been hesitant to express their displeasure with the Court. Of equal importance, HB 2338 does not stand in isolation as an effort by the legislature to strike back at the Court. As one commentator has noted:

> The argument that the legislature wanted to threaten the judiciary to gain leverage in litigation gains credibility from a variety of other Kansas legislative proposals that have circulated within the statehouse. The same legislators who challenged the state's supreme court authority to appoint chief judges also debated plans for changing the process of selecting judges, limiting their tenure in office and limiting the state supreme court's jurisdiction. Their alternative "court packing" plans would have made Franklin Roosevelt blush.

William J. Rich, *In Kansas, a Battle of the Branches*, Jurist (September 29, 2015), http://jurist.org/forum/2015/09/william-rich-kansas-government.php.

Still, while an intent to coerce the Supreme Court is at least implied by these circumstances, none of these facts alone probably rise to the level of the so-called "smoking gun." That changed, however, on June 4, 2015 when, while this lawsuit was pending, Governor Brownback signed into law House Bill 2005, Chapter 81 of the 2015 Session Laws of Kansas ("HB 2005"). 2015 Kan. Sess. Laws 1044. As the Court is well aware, HB 2005,

which appropriates the funding for the Kansas judicial branch for fiscal years 2016 and 2017, included an unmistakable threat directed at the Kansas judiciary. In Section 29 of the Bill, the legislature specifically mandated that if HB 2338 was stayed or declared to be invalid or unconstitutional, the entire judicial funding bill would become null and void. 2015 Kan. Sess. Laws 1085. In short, the political branches of government were telling this Court to either decide the present case in the way they wanted -- thereby relinquishing part of the Court's constitutional authority -- or the entire judiciary would be defunded. There is no hyperbole extreme enough to encompass the audacity of this action. The legislature is expressly telling the Court: Do as we say in deciding this case, or you and every other court in this state will functionally cease to exist.

The State argues that HB 2005 is irrelevant here, since it was not enacted until a year after HB 2338 (Brief of Appellant at 24-25). The State is mistaken. It has long been the law of Kansas that in construing statutes "and **determining legislative intent**, several provisions of an act or acts, *in pari materia*, must be construed together...." *State v. Breedlove*, 285 Kan. 1006, Syl. ¶ 6, 179 P.3d 1115 (2008) (emphasis added). See also *Kansas Commission on Civil Rights v. Howard*, 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975); *City of Kansas City v. Board of County Commissioners*, 213 Kan. 777, 780, 518 P.2d 403 (1974). "Statutes relating to the same subject, **although enacted at different times**, are in pari materia and should be construed together." *Claflin v. Walsh*, 212 Kan. 1, Syl. ¶ 6, 509 P.2d 1130 (1973) (emphasis added).

While this appeal does not involve an issue of statutory construction, as such, the same general issues of legislative intent do apply. This being true, while the constitutionality

of HB 2005 is not before the Court, it is proper and necessary for the Court to consider that enactment together with HB 2338, as statutes *in pari materia*, in determining the constitutionality of HB 2338.

Not long ago, litigants in the former Soviet Union would regularly confront "telephone justice," under which leaders of the Communist party would call judges and instruct them how to rule in key cases. Alexander Solzhenitsyn described the situation as follows: "In his mind's eye the judge can always see the shiny black visage of truth -- the telephone in his chambers. This oracle will never fail you, as long as you do what it says." *Wersal v. Sexton*, 674 F.3d 1010, 1013 (8th Cir. 2012) (quoting *The Gulag Archipelago*, Vol. III 521 (1974), as quoted in Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 Geo. J. Int'n L. 353, 385 (2006)). As would be expected, decades of this telephone justice permanently eroded public confidence in the Russian judiciary. *Wersal v. Sexton*, 674 F.3d at 1034.

The Kansas Committee respectfully suggests that this disgraced Soviet tradition should stand as a warning in the current controversy. While the attempted means of judicial intimidation here is very different, an express legislative enactment threatening to defund the entire Kansas judiciary if the "wrong" decision is returned, as opposed to a private phone call, the end result of judicial capitulation would likely be the same. Any perceived accommodation to such a threat would irreparably damage the Kansas judiciary's reputation for providing fair and equal justice. As this Court itself recently noted: "Overall, '[w]hen one of the other branches interferes with the processes though which the judiciary reaches its judgments, the legitimacy of those judgments suffers.'" *State v. Buser*, 2015 WL 4646663

at *7 (quoting *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. Rev. 761, 798 (Oct. 1997)).

Without a strong reputation for independence from the political branches, the judiciary, and with it the pursuit of justice, would inevitably wither and die. As Alexander Hamilton famously stated: "The independence of the judges, once destroyed, the constitution is gone; it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate." *Wersal v. Sexton*, 674 F.3d at 1033. The extraordinary importance, not just of judicial independence itself, but of the appearance that it is present, is further highlighted in another famous comment of Alexander Hamilton, this time in Federalist No. 78. There he observed that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may be truly be said to have neither force nor will, but merely judgment." *Evans v. Gore*, 253 U.S. 245, 249 (1920), overruled by *U.S. v. Hatter,* 532 U.S. 557 (2001). Since, under our constitutional system, the Court lacks the power to directly enforce its will, it must rely exclusively upon respect for its judgments. That respect cannot survive interference from the other branches of government.

With that established, we return to the ultimate test under the separation-of-powers doctrine of whether there has been a significant interference by one branch of government with the operations of another branch. Could there be a greater act of intrusion against the judiciary than a legislative demand that the Supreme Court capitulate to the political branch's preferences in a pending lawsuit, or face catastrophic consequences? The Court has been left with only two options -- either agree to these political demands, thereby surrendering its

reputation for independence, or face a complete loss of the judicial budget. HB 2338 is not separate and apart from this unlawful demand; it is inextricably tied to it. It has been shown to be the fruit of an improper attempt to subject judicial judgment to the whim of the other branches, and as such must be stricken.

IV. JUDICIAL INDEPENDENCE IS CRITICAL TO THE DEFENSE OF CONSTITUTIONAL LIBERTY, PARTICULARLY FOR POLITICAL MINORITIES AND THE POWERLESS

Near the beginning of this brief, the Kansas Committee noted that judicial independence is merely one part of the broader doctrine of separation of powers. While this is certainly true, it understates the judiciary's case. Surely, among all of the branches of government, it is most dependent upon its independent status. This is a truth that has been repeatedly noted by great minds throughout the history of the nation.

As Alexander Hamilton stated in Federalist, No. 78, "complete independence of the courts of justice is peculiarly essential in a limited Constitution." *Evans v. Gore,* 253 U.S. at 250. This is because limitations on governmental power "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing." *Id.* Over a century ago, this Court endorsed the same sentiment in quoting the political philosopher, Montesquieu: "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers . . . ." *State v. Johnson*, 61 Kan. 803, 812, 60 P. 1068 (1900). This is because "[w]ere the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." *Id.*

John Marshall, the famous Chief Justice, similarly noted that it is the role of a judge "to pass between the government and the man who that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties he should observe the upmost fairness." *Evans v. Gore*, 253 U.S. at 250-51 (quoting Debates Va. Conv. 1829-1831, pp. 616, 619). Emphasizing the importance of judicial independence, Marshal then posed the following question: "Is it not to the last degree important that [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?" *Id.* In conclusion, he noted: "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary." *Id.* Retired United States Supreme Court Justice, Sandra Day O'Connor, a great defender of judicial independence, noted that the framers of the Constitution had "placed at the core of the judiciary's design the concept of judicial independence as a means to guarantee the Rule of Law." O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, Den. U. L. Rev., Vol. 86.1 at 1 (2008). Only such independence "gives life to the promise that the Rule of Law safeguards the minority from the tyranny of the majority." Id.

While many similar quotations of historical note could be offered, the above should suffice. What is particularly noteworthy in these comments is the consistent drumbeat as to the importance of judicial independence in protecting the rights of the minority against abuse by the majority. Protecting minority constitutional rights is, after all, one of the essential

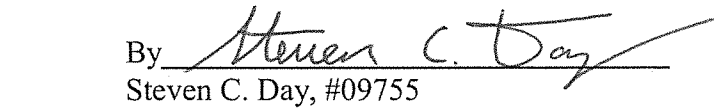
responsibilities of the judiciary under our constitutional system. It is self-evident that no court can effectively carry out this promise if it is subject to the control or coercion by the other branches of government.

This then is what is at stake in a dispute of this nature, which might otherwise seem little more than an obscure "turf battle" between different branches of government: Will the judiciary continue to act as the guardian of the Constitution and the protector of minority rights, or is it, instead, to be transformed into little more than an enforcement arm for whatever political faction happens to be in power?

V. CONCLUSION

Speaking in the role of *amicus curiae*, the Kansas State Committee of the American College of Trial Lawyers respectfully submits that the decision of the district court, declaring HB 2338 unconstitutional under the separation-of-powers doctrine, should be affirmed.

Respectfully submitted,

By 
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CERTIFICATE OF SERVICE

I do hereby certify on this 4th day of December, 2015, I electronically filed the foregoing ***Kansas State Committee of the American College of Trial Lawyers Brief of Amicus Curiae*** with the Clerk of the Court by using the E-flex electronic filing system which will send a notice of electronic filing to registered participants, and copies were electronically mailed to the following:

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