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MEMORANDUM

To: Chairman King and members of the Senate Judiciary Committee

From: Jason Thompson, Senior Assistant Revisor of Statutes

Date: January 28, 2016

Subject: *Solomon v. State* and separation of powers; 2014 HB 2338 and 2015 HB 2005

I. *Solomon v. State* and separation of powers

The Kansas Supreme Court held in *Solomon v. State*, No. 114,573, 2015 WL 9311523 (Kan. Dec. 23, 2015), that section 11 of 2014 HB 2338, allowing the district judges in each judicial district to elect a chief judge of such district court, was an unconstitutional violation of the separation of powers doctrine. Article 3, § 1 of the Kansas Constitution provides that: "The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law, and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state." The *Solomon* decision states that the "general administrative authority" includes "the power to make rules for process, practice, and procedure at all levels of the unified court system." (Slip opinion at 16-17).

The decision explains that "[t]he doctrine of independent governmental branches is firmly entrenched in United States and Kansas constitutional law" and that the Court "has the authority and duty to preserve the constitutional division of powers against disruptive intrusion by one branch of government into the sphere of a coordinate branch of government." (Id. at 18-19). The decision also explains that "[i]n order for the interference by one department with the operations of another department to be unconstitutional, the intrusion must be significant." (Id. at 20). The decision then provides four factors to guide consideration of "whether one branch of government has significantly interfered with the operations of another to the point of violating the doctrine of separation of powers": (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 blending powers as shown by actual experience over a period of time. (Id.).

The Court found "that the position of chief judge is an essential component of the Supreme Court's constitutionally derived general administrative authority" and concluded "that the legislative interference represents a direct and explicit removal of appointing authority from the Supreme Court and dilutes the Supreme Court's authority over the administration of district courts." (Id. at 22). This led the Court to find that "the means of assigning positions responsible to the Supreme Court and charged with effectuating Supreme Court policy must be in the hands of the Supreme Court, not the legislature." (Id. at 27). The Court concluded by holding that section 11 of 2014 HB 2338 was unconstitutional.

Justice Stegall concurred in the result of the decision, but wrote a separate concurring opinion criticizing the majority opinion for promoting a "harmony of powers" rather than a separation of powers. (Slip opinion at 29). The concurring opinion is critical of the "significant interference" test and the four factors used to evaluate whether a violation has occurred. Further, Justice Stegall states that he would not hold section 11 of 2014 HB 2338 unconstitutional based on such test. (Id. at 35 and 41). He would, however, hold the section unconstitutional based on a different test. "Stating the rule as clearly and succinctly as possible, I would hold that when 'the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.' *Association of American Railroads*, 135 S. Ct. at 1241 (Thomas, J., concurring)." (Id. at 41).

Justice Stegall concludes that "the exercise of legislative power to control or dictate in any manner the exercise of judicial administration cannot survive constitutional scrutiny." (Id. at 42). This analysis would invalidate not only K.S.A. 2014 Supp. 20-329, concerning chief judges, "but also the creation of the position of chief judge, L. 1999, ch. 57, sec. 17, the assignment of administrative duties to the chief judge, L. 1976, ch. 146, sec. 28; L. 1999, ch. 57, sec. 17, and the conferral of benefits on the chief judge, K.S.A. 2014 Supp. 75-3120g." (Id. at 42-43).

II. 2014 HB 2338 and 2015 HB 2005

In 2014, the Legislature passed **HB 2338**, which:

1. Appropriated for FY15, $2,000,000 for Judiciary operations.
2. Amended the distribution of docket fees as follows (K.S.A. 2015 Supp. 20-362):
   - $5 or $10 (depending on the type of case) goes to the county general fund
   - Library fees go to the county law library fund
   - $1 or $2 (depending on the type of case) goes to the prosecuting attorneys' training fund

- $15 to the law enforcement training center fund
- Of the balance, 0.99% to the judicial council fund
- Of the remainder, during FY15 through FY17, the first $3.1 million goes to e-filing. FY18 and beyond, the first $1,000,000 goes to e-filing.
- The remainder after all deductions goes to the judicial branch docket fee fund.

[Previously, the docket fees were distributed (after the deduction of the county general fund, county law library fund, prosecuting attorneys' training fund and law enforcement training center fund) by a specified percentage amount to the following funds: (1) 4.37% to the access to justice fund; (2) 2.42% to the juvenile detention facilities fund; (3) 1.87% to the judicial branch education fund; (4) .50% to the crime victims assistance fund; (5) 2.38% to the protection from abuse fund; (6) 3.78% to the judiciary technology fund; (7) .30% to the dispute resolution fund; (8) 1.10% to the Kansas juvenile delinquency prevention trust fund; (9) .19% to the permanent families account in the family and children investment fund; (10) 1.31% to the trauma fund; (11) .99% to the judicial council fund; (12) .60% to the child exchange and visitation centers fund; (13) 16.03% to the judicial branch nonjudicial salary adjustment fund; (14) 15.85% to the judicial branch nonjudicial salary incentive initiative fund; and (15) the balance to the state general fund.]

3. Granted authority to chief judge of each judicial district to be responsible for the budget of such district.

4. Created a $145 filing fee for appeals.

5. Created the electronic filing and management fund.

6. Allowed the district court judges to elect the chief judge of the district court.

7. Granted the court more time on filling vacancies in district court judge positions.

8. Allowed the court of appeals judges to elect the chief judge of the court of appeals.

9. Increased conviction expungement fees, arrest record expungement fees, juvenile expungement fees, probate fees, garnishment fees, and civil action fees.

10. Created a summary judgment fee.

11. Reduced small claims fees.

12. Contained a nonseverability clause stating if one provision of the bill is found invalid or unconstitutional, it shall be presumed the legislature would not have enacted the remainder of the bill.

In 2015, the legislature passed **HB 2005**, which:

1. Appropriated the moneys for FY16 and FY17 for Judiciary operations.

2. Created a dispositive motion fee, replacing the summary judgment fee.

3. Allowed the court to continue to collect an additional charge on docket fees, expungement fees, bond fees, lien fees, judgment fees, and other court fees for 2 years, through June 30, 2017.

4. Extended for two years the $3.1 mil deposit to the electronic filing and management fund.

5. Increased conviction expungement fee to be equal to other expungement fees.

6. Contained a nonseverability clause stating the provisions of 2015 HB 2005 are not severable from 2014 HB 2338. If any provision of either act is found invalid or unconstitutional, it shall be presumed the legislature would not have enacted the remainder of the bill.

[Note: **2016 SB 320** and **2016 HB 2449**, both pending, would repeal the nonseverability clause, codified at K.S.A. 2015 Supp. 20-1a18, and declare that the remainder of the provisions of 2015 HB 2005 shall remain in force.]