

Testimony presented to the Joint Committee on the Judiciary
Monday, April 9, 2007

Sen. McDonald, Rep. Lawlor, Sen. Kissel, Rep. O'Neill, and members of the Judiciary Committee.

My name is Dale Radcliffe. I am a judge of the Superior Court and I am here to testify in favor of Senate Joint Resolution 32. "A Resolution Proposing an Amendment to the State Constitution concerning the Practices and Procedures of the Courts."

Amending the Connecticut Constitution to designate rule making as a legislative function is necessary and long overdue. This proposed amendment would restore the historic relationship between the legislative and judicial branches of state government – a relationship that was dramatically transformed when in 1974 the Connecticut Supreme Court decided *State vs. Clemente* (166 Conn. 501).

Since that 3-2 decision, the Judicial Department has been permitted, perhaps due to abdication in some cases, to usurp the historic prerogatives of the General Assembly.

A fundamental principle of our democracy is that lawmaking is inherently a legislative function. As such, it is the unique province of the General Assembly, not the courts. This may seem elementary, but it bears repeating. Legislators are charged with writing the laws, judges are charged with interpreting and applying those laws.

As far back as the Fundamental Orders, Connecticut has recognized that the power of the courts to promulgate rules, both substantive and procedural, was derived from acts of the General Assembly.

Between 1821 and 1855 legislation granted to the Supreme Court of Errors the power to make rules.

In 1855 a statute transferred that rule making power to the judges of the Superior Court.

The role of the legislature was recognized, acknowledged, and respected by legislators and jurists for more than 150 years prior to the Clemente decision. Writing in the 1950 case of *In Re Appeal of Dattilo*, (136 Conn. 488, 492, 1950), Chief Justice Maltbie, by many accounts the most venerated and respected chief justice in Connecticut history, acknowledged that the rule-making powers of the courts were derived from statutes passed by the legislature, as well as the common law.

In a subsequent essay, Chief Justice Maltbie recognized the role of the legislature in rule making when he wrote: “In this state ... the courts have recognized the right of the General Assembly to control causes of action which can be maintained and the procedure to be followed in them, although the basis of many recognized actions is to be found solely in the common law.” (See *State vs. Clemente*, *supra*, at 533-34, Cotter, J. dissenting.)

Far from producing a radical departure from the traditional relationship between equal branches of government, adoption of a constitutional amendment by the voters would restore to each branch the role it has historically discharged. It would announce and reaffirm that Connecticut’s legislative branch possesses powers and responsibilities not unlike those exercised by the U.S. Congress concerning the federal judiciary.

The exercise of those powers by Congress has not rendered the federal judiciary subservient to the legislature when performing adjudicative functions or deciding cases and controversies brought to federal tribunals. Connecticut judges use and apply daily a “Code of Evidence.” Yet unlike your federal counterparts, and legislators in many sister states, you, as members of the General Assembly, have never enacted this “Code.” By what authority does the Judicial Branch legislate the adoption of a “Code?”

The recent upheaval at the highest level of Connecticut’s Judicial Department, including an attempt to deny information to an equal branch of government exercising its powers of advice and consent, has highlighted the need for the proposed constitutional amendment, as well as changes in the applicable statutes.

While virtually everyone applauds the actions of Acting Chief Justice David M. Borden to provide greater openness and transparency in the Judicial Department, reforms adopted by the superior Court judges will have no effect upon the Clemente decision and its progeny, and any reforms may be rescinded when no one is looking and pressure is off.

For example, the Rules Committee of the Superior Court will now hold meetings open to the public. But while implicitly acknowledging that Attorney Raphael Podolsky was right when he sought to open those meetings in the 1970s and early 1980s, the case of Rules Committee of the Superior Court vs. Freedom of Information Commission, 192 Conn. 234 (1984) remains the law of this state. A return to secrecy may be voted at any time if a bare majority of the judges desires.

Recently, consistent with the campaign for openness, the judges voted to open meetings of the Judicial Department's Executive Committee, a clearly administrative body that deals with job classifications, personnel matters, and other items referred to it. But there has been a failure to explicitly recognize the application of the Freedom of Information Act, (FOIA) to that committee, even though current law does not exempt the Judicial Department from the FOIA when the department is performing administrative functions.

I have attached a copy of the minutes of a meeting held in the Judicial District of Fairfield at Bridgeport, called to elect a member to the Executive Committee. Despite a request from the floor for a ruling, the chair refused to acknowledge the application of the Freedom of Information Act to this proceeding. One judge reported that an inquiry made to "Hartford" resulted in no definite answer concerning the application of the FOIA.

This meeting of judges concerning no pending case, did not affect the rights of a single litigant, and involved no issues of law. Yet the application of the FOIA to such meetings is still in doubt.

Some suggest that Section 51-14 of the General Statutes renders a constitutional amendment unnecessary. This ignores that the statute was in effect well before Clemente and did not deter the court when it held that the General Assembly was without power to make rules of administration, practice, or procedure. (State vs. Clemente, supra, 507.)

In fact, years before instituting the openness campaign, Acting Chief Justice Borden himself wrote: “The ... focus on Section 51-14 ignores the fundamental principle that in our state the primary authority over matters of practice and procedure lies with the judicial branch.” (Spitzer vs. Haines & Co., 217 Conn. 532, 543, 1991). The case cited by Justice Borden in support of that proposition was State vs. Clemente.

Of course Clemente seems to validate the adage “hard cases make bad law.” The case involved a horrific sexual assault and other atrocities.

The issue on appeal concerned a statute passed by the General Assembly requiring that any statement of a witness be provided to defense counsel, following testimony by the witness. This is sometimes referred to as the “Little Jenks Act.”

The state Supreme Court, by a 3-2 vote, upheld the refusal of the trial judge to order disclosure of the statements, holding that the legislature had no power to dictate court procedure.

Some selected statutes are appended to this testimony. Each of these and many other could be attacked through a broad interpretation of the holding in the Clemente case. There is nothing in these or any other statute that is so detailed, so arduous, or so difficult, as to be beyond the understanding of members of this General Assembly, even those of you who lack formal legal training.

The adoption of a constitutional amendment will have no impact on the independence of judges or the judiciary generally when hearing cases and resolving disputes. The ability of judges to decide cases and render decisions based on the law and the facts, without regard to momentary social or political forces, must be zealously protected and defended. To do otherwise would imperil the only power the courts have - the power of judgment.

Nothing in this proposed constitutional amendment threatens the type of judicial independence on which Connecticut citizens depend when they resort to the courts for redress. Only the legislative function of rule making and law making is affected.

I urge the committee to act favorably on this resolution.