

**Statement by Richard S. Kay
in support of Senate Joint Resolution 32
An Act Concerning the Practices and Procedures of the Courts**

**Judiciary Committee
Monday, April 9, 2007**

I have been a member of the faculty at the University of Connecticut School of Law for more than 30 years and I am now the Wallace Stevens Professor of Law. My principal research interest has been in the field of constitutional law, including a more particular interest in the constitutional law of Connecticut.

I am submitting this statement to express my support of proposed amendments, such as that represented by Senate Joint Resolution 32, to the state Constitution that would explicitly pronounce the final authority of legislation governing administrative, procedural, and institutional aspects of the Judicial Department.

My views on the proper allocation of authority over this field are a matter of public record. I believe the extraordinarily broad view of exclusive power over judicial matters claimed for the courts in certain decisions of the Connecticut Supreme Court in the late 1960s and early 1970s is unsupported by constitutional text, history, or prior judicial precedent.

More significantly the broad view of exclusive judicial power is deeply at odds with the idea of separation of powers. The central rationale for that form of constitutional design was concern about unchecked power. The consequence of the current Supreme Court doctrine is that the operation of a critical aspect of government is left, in every respect, in the hands of judges. This power is immune to restraint by the other branches or to influence from popular opinion. This is the opposite of separation of powers in the American constitutional tradition. Only a change in the Constitution can bring the system back into balance.

I have expounded my position on this state of affairs at greater length elsewhere. I would, however, like to comment briefly on two arguments that have been advanced against constitutional amendment.

The first argument is to the effect that the first recourse in alleviating our current situation is to the judiciary itself, asking the Supreme Court to overrule the offending precedents. The fact is that the Supreme Court has had numerous opportunities to repudiate the erroneous claims in its earlier cases. Instead it has taken pains to avoid confronting the validity of judicial supremacy.

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The Court has held no legislation unconstitutional on separation of powers grounds since 1974, but that does not mean that the claim of exclusive judicial power has become irrelevant. The Judicial Department has found ways to manifest it that do not require it to confront the flaws of that doctrine. Most prominently, the Supreme Court has cited that position as relevant to its construction of legislation that might otherwise raise the constitutional question directly.

Its decisions, giving an unnaturally narrow meaning to the “administrative” functions subject to the Freedom of Information Act, are well-known examples. In *Clerk of the Superior Court v. Freedom of Information Commission*, last year’s decision triggering much of our current unhappiness, the Court based its improbable construction of the Act, in part, on the proposition that it “is essential for the independence of the judicial branch that the courts have control over court records.”

It is harder to document, but easy to believe, the further impression that the threat of unconstitutionality plays a role in pressing the Judicial Department’s opposition to proposals for legislation touching on the courts.

For 30 years the Supreme Court has shown a marked reluctance to engage in a candid re-evaluation of the erroneous cases that have vested it with so much unreviewable power. There is little reason to hope the court will review the erroneous cases in the future. I am doubtful that legislation could be designed that would make such review inevitable.

The second, and more common, argument against proceeding with constitutional amendment is premised on an assumption that the reforms instituted by the Judicial Department in the past few months have eliminated the need for imposing further restraint.

It is true that the Judicial Department has made substantial and heartening changes in the way it deals with public access. But it has not gone so far as might be thought.

“Meetings” in the Judicial Department are to be open. But “meeting” is defined with several exclusions. The new system also makes provisions for “closed sessions” upon vote of two-thirds of the members present if they conclude that one of two conditions is met: that the session be for a purpose for which closed meetings are allowed by the Freedom of Information Act or “if a public session would have a deleterious impact on debate or the receipt of information and thereby substantially impede the ability of the committee or entity to perform its duties.”

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The provision for closed sessions is remarkably telling with respect to the extent of change contemplated. The second category, roughly translated, means that meetings may be closed whenever two-thirds of the members think it would be a good idea. More strikingly, this possibility is for closed meetings that the legislature has determined ought to be open under the Freedom of Information Act. Otherwise, the second alternative would be redundant. This amounts, in other words, to a bald statement that judicial meetings operate outside that legislation.

The real answer to this objection, however, is more basic. These recent changes are instituted at the discretion of the judges and they will be maintained at their discretion. The policy that "meetings" shall be open is to obtain "except as otherwise provided by statute or Practice Book rule."

I believe it would be a great shame if the scrutiny and effort given to the powers of the courts over the last year were to end with this inconclusion. I understand the desire to leave things alone. The qualities of toleration, trust, and accommodation are usually admirable. But we need to be clear that, starting in 1818, our Constitution adopted the exact opposite approach to controlling the power of government. Our governors were not enjoined "to work things out." The safer course was thought to be defining power by law. The definition of judicial power has for decades now lacked that legal definition. A constitutional amendment is only the way to provide it.

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Professor Kay's statement is distributed by the Connecticut Council on Freedom of Information.

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