

Testimony

To the Judiciary Committee of the Connecticut General Assembly

Regarding

Senate Joint Resolution 32

***A RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION
CONCERNING THE PRACTICES AND PROCEDURES OF THE COURTS.***

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The Need For A Constitutional Amendment To Clarify That Rule-Making Authority For Connecticut's Courts Is Vested In The General Assembly.

The call for constitutional clarity on judicial boundaries is not new in Connecticut. It has been mounting for years as the Judicial Department has aggregated to itself increasing authority, and has become more arrogant in its stand that it alone holds rule-making power. After a year in which machinations on the part of the Judicial Department came to a head, it may seem as though this call for a constitutional amendment was born simply as the cap on a slew of other proposed judicial reforms. It was not.

Problems in the Judicial Department often do not garner the kind of publicity as those in the other two branches of government. Un-elected judges do not have the kind of loyal opposition as do legislators and governors. The workings of the Judicial Department are arcane to most lay people. But there have been some, the press included, who have been watching, and have on numerous occasions previously tried to impress on the committees of the General Assembly the growing indifference of the judiciary to be at all accountable to the public it serves.

It is time to halt the Judicial Department's assertions of untouchability. The people of Connecticut have not ceded the authority they vested in the legislature to the judiciary. The legislature must not, through inaction and accession to faulty logic, hand over the responsibilities that the public expects you to be in charge of.

While legal historians point to the court's development of a body of case law affirming its independence from legislative authority, most of that case law centered on the court's

inherent adjudicative functions, rather than its rule-making functions. Indeed, in one of the earliest cases cited by scholars, *Norwalk Street Railway Co. 's Appeal*, then Justice Hammersley “distinguished the fact that legislation could not properly foist legislative duties on judges from the fact that judicial power itself must be exercised in manner which ‘must to a large extent by legislation in respect to procedure.’” (“The Rule-Making Authority and Separation of Powers in Connecticut,” Richard S. Kay, *Connecticut Law Review*, Fall 1975.)

Professor Kay¹, a noted legal scholar, wrote the seminal article on Connecticut’s separation of powers issue. That 1975 Connecticut Law Review article sets out a detailed and illustrative argument that the Connecticut General Assembly, and not the courts, already hold the rule-making power over the courts, but that the courts have been engaged for the last few decades in a slow evisceration of that authority. While having never flatly asserted its dominion over rule-making, the Judicial Department has nonetheless flirted with the assertion on numerous occasions, in what former Connecticut Freedom of Information Commission Executive Director and General Counsel Mitchell Pearlman detailed as a game of “chicken” with the legislature.²

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² [Excerpts from Mitchell W. Pearlman’s June 14, 2006, memo to the Governor’s Commission on Judicial Reform regarding the administrative functions of the Connecticut Judicial Department.]

“...What is clear is that the FOI issue is part of an as yet unsettled separation of powers struggle in Connecticut, principally involving the legislative and judicial branches. See Professor Richard Kay’s ‘The Rule-making Authority and Separation of Powers in Connecticut,’ 8 Conn. Law Review No.1 (Fall 1975). At times this constitutional struggle seems like a game of ‘chicken,’ with one branch testing the resolve of the other. Thus on some occasions, the Supreme Court has threatened to rule, or actually ruled, that statutes affecting the courts are unconstitutional as infringements of the separation of powers doctrine. In effect, the court has dared the legislature to initiate a constitutional amendment limiting the judicial power. On other occasions, however, the legislature, for its part, has threatened the judicial department with such a constitutional amendment, in effect daring the courts to declare an enactment unconstitutional. A brief – albeit admittedly highly selective – history of this game of ‘chicken,’ in a context focusing in significant measure on the ‘administrative functions’ of the judiciary, might provide helpful background to this commission in making its recommendations to the Governor with respect to the possible amendment to the FOI Act in this regard.

“In contemporary times, the first warning shot in an increasingly tense game of ‘chicken’ between the legislature and the judiciary can be said to have been fired in the 1968 Supreme Court decision in *Adams v.*

Rubinow, 157 Conn. 150. In that case, the court upheld a statute, on a constitutional separation of powers challenge, that delegated to a Superior Court judge the duties of Probate Court Administrator. But the court cautioned the legislature that ‘if the Superior Court finds itself significantly interfered with in the orderly conduct of its judicial functions, it has the inherent power to refuse to acquiesce in this imposition on a judge of its court, and in that event, of course, the attempted delegation would fall as an unconstitutional interference with the proper performance, by the Superior Court, of its judicial functions.’ *Id.* at 160-161.

‘It’s unclear whether the legislature got the message then. But it certainly did after the next round of ‘chicken,’ which involved the case of *State v. Clemente*, 166 Conn. 501 (1974). In that case, the Supreme Court, in a 3-2 decision (with two future Chief Justices – i.e., Cotter and Bogdanski – dissenting), invalidated a statute requiring production of certain statements in criminal cases on the ground that the statute invaded the exclusive province of the judicial branch. ‘To be unconstitutional in this context, a statute must not only deal with subject-matter which is within the judicial power, but it must operate in an area which lies exclusively under the control of the courts.’ *Id.* at 510-511. The dissenting justices essentially concurred with the majority’s view of the separation of powers doctrine, but strongly disagreed with its application in that case, primarily because the courts have long ‘recognized the right of the general assembly to control the causes of action which can be maintained *and the procedure which is to be followed in them. . . .*’ *Id.* at 534. (Emphasis in the original.)”

... “The game of ‘chicken’ again re-emerged in 1984 in the case of *Rules Committee of the Superior Court v. FOI Commission*, 192 Conn. 234. That case addressed the question of whether the Rules Committee performed an ‘administrative function’ making it subject to the FOI Act, or whether it performed a judicial function outside the purview of the act. Then Justice Peters, writing for a unanimous Supreme Court, essentially shifted the issue from one of constitutional separation of powers to one of statutory construction. Nonetheless, she strongly implied that if the legislature challenged the court’s interpretation of the statute, the court would find such a challenge invalid as a violation of the separation of powers doctrine. ‘In endeavoring to interpret the language of §1-18a(a), we must take account of our duty, when presented with a constitutional challenge to a validly enacted statute, to construe the statute, if possible, to comport with the constitution’s requirements. [Citations omitted.] This general principle of construction is of particular importance in the context of the present litigation, which involves extraordinarily sensitive issues surrounding the delicate balance among the coordinate branches of our state government.’ *Id.* at 240. From personal experience, I know that this message was also communicated directly to the legislature through the office of the Chief Court Administrator, which had a sophisticated lobbying presence by that time.”

...“The game of constitutional ‘chicken’ was again joined in 2002. That was when the public and the legislature first became aware that the courts had devised and employed certain secret protocols for sealing court records and closing court proceedings. Under these protocols, so-called ‘level 1’ cases were so secret that every aspect of them was hidden from public view, including the fact of their very existence. It was also discovered that some of these cases involved prominent public figures, including judges. The outcry and indignation over this revelation was so great that the legislature threatened to take remedial action, including presumably the initiation of a constitutional amendment. This time the judicial department blinked. Its representatives informed the legislature that it would fix the problem through rule-making. The legislature decided to wait and see. The judicial department subsequently promulgated prospective rules reasserting the presumptive nature of most court records and proceedings and establishing due process procedures for contesting sealings and closures. See Conn. Practice Book §§11-20(c)-(e), 11-20A, 25-59, 25-59A, 7-4B, 42-49 and 42-49A. A federal law suit was filed with respect to ‘level 1’ cases previously sealed and the parties have recently agreed to have those cases reviewed in state court. For background into that case, see *Hartford Courant Co. v. Pellegrino*, No. 03-9141 (2nd Cir. August 13, 2004). Consequently, the legislature has taken no further action with respect to this matter.

“Then in 2003 came the decision of a divided Supreme Court in the case of *State v. Courchesne*, 262 Conn. 537, in which the majority announced a new standard for construing statutes giving less weight to the text actually employed by the legislature. With this decision, it became clear that the legislature had had

Recently, Professor Kay weighed in on the topic again. In a commentary piece published on Sept. 17, 2006, in the Hartford Courant, the legal scholar noted that:

“...[T]here is a ... fundamental issue -- not what things to change, but who may change them. That issue cannot be resolved by anything less than an amendment to the state Constitution.

About 30 years ago, the Connecticut Supreme Court started taking a new and assertive view of its own constitutional authority. It held that the legislature had no power to regulate the operations of the courts. These holdings were, to put it charitably, arguable as a matter of constitutional law.

The Supreme Court has never defined this exclusive judicial authority with much precision. In fact, in recent years, it has gone out of its way to avoid invoking it. Instead, the courts have found ways to protect judicial turf without actually holding legislation unconstitutional.

Sometimes, this takes the form of stretching (even to the breaking point) the meaning of a potentially encroaching statute. Sometimes, the courts and legislatures quietly compromise disputed matters before a law is enacted. Of course, in such discussions, the threat of the courts holding unwelcome legislative initiatives unconstitutional is always the 800-pound gorilla in the corner.”

Connecticut’s Constitution says little about the judiciary. But the Constitution provides an explanation for this brevity. After establishing the Supreme Court, the Appellate Court, and the Superior Court, and after giving the General Assembly and the governor the power to establish other courts, the Constitution says: “The powers and jurisdiction of these courts shall be defined by law.”

There is certainly a constitutional principle of separation of powers, but it does not mean what the court has tried to make it say; it does not mean that the courts can make their

enough of giving way to the judiciary. It passed a statute reestablishing and codifying the pre-*Courchesne* standard; and, in essence, dared the court to declare that statute unconstitutional as an invasion of the exclusive judicial role of interpreting statutes. See Conn. Gen. §1-2z. This time the court simply ‘chickened out.’ Without comment, it’s now adhering to that statute. See, for example, *Board of Education v. State Board of Education*, 278 Conn. 326, 331 (2006).

12. a. In the wake of the legislature’s new found resolve to challenge the judiciary over separation of powers issues, the controversial decision in *Clerk of the Superior Court v. FOI Commission*, *supra*, was at first withheld by the former Chief Justice, and then made public, during the confirmation process for a new Chief Justice nominee. That case involved the question of whether certain non-exempt, pending case information, contained in judicial department computers, are related to the branch’s ‘administrative functions’ and therefore are subject to the FOI Act. The majority of the court ... held, again on threat of declaring unconstitutional the portion of the FOI Act at issue, that ‘the judicial branch’s administrative functions consist solely of activities relating to its budget, personnel, facilities and physical operations and that records unrelated to those activities are exempt [from the FOI Act].’ *Id.* at 53. Since the computer records at issue don’t relate to any of these specific activities, they aren’t covered by the FOI Act.”

... “With the preceding background as prologue, it’s clear that that the law is unsettled both as to where the separation of powers begins and ends with respect to the legislative and judicial branches”

own rules. Separation of powers means that each branch of government can exercise only its own powers and not the powers of the other branches. Separation of powers does not mean that the legislature and the governor cannot define the powers of the judiciary. For defining the powers of the judiciary is exactly what the Constitution says the legislature and the governor must do, by enacting law, since, without that law, the judiciary would have no powers at all.

EFFORTS TO MAKE THE JUDICIAL DEPARTMENT MORE TRANSPARENT, ACCESSIBLE AND ACCOUNTABLE.

In the past year, there have been two commissions – one by the Judicial Department itself, one appointed by the Governor – and several hearings of this body, all charged with looking at ways to achieve three objectives: making the Judicial Department more transparent, accessible and accountable.

In attempting to carry out this mission, these bodies have so far done substantial work looking for ways to carry out the first two objectives. But, because the Judicial Department has clearly moved in the direction of trying to limit legislative authority, there is no guarantee that any of the recommendations made by any body, other than the judges themselves, will stand against claims of judicial immunity. There is no way to truly make the Judicial Department more accountable to the public than by clarifying, through a constitutional amendment, that rule-making and procedure are subject to statute.

The question of separation of powers among the branches of government is an important one, and one that does not take to being trifled with. Accordingly, there have been calls to resist the idea of a constitutional amendment, that it would be more prudent to wait and see if any of the reforms so far suggested are effective in their mission. But that tack undercuts the duty to insure the Judicial Department is accountable to the public, and does not envision the ability to craft language which respects and balances both the need for independence in adjudication with the importance of the Judicial Department remaining a democratic, and not imperial, branch of government.

While it is commendable that change is in the air, the very extent of the changes proposed so far indicates that there has been a long-growing and unabated culture of secrecy and unaccountability. Suddenly, there is a glimmering that judicial rule making sessions should be open to the public, that the public should be able to see what happens in a courtroom to the same extent that it can see what happens in other branches of government, that judicial administrative files should be open to the public, that financial affidavits should not be automatically sealed, that docketing and scheduling information should be a matter of public record, that disciplinary admonishments against judges should be public record. After causing substantial cost to taxpayers and tension on separation of powers grounds over access to judicial attendance records, the Judicial Department now sees absolutely no reason why those records shouldn't be public, after all.

These problems did not all develop in the last few months. They have been growing for years in the judicial branch, growing with impunity. There was no judge speaking up publicly to change any of these rules, no push for openness from within the system. Only the taint of scandal forced these issues to light, and forced anyone at all to even try to act on them.

That is not a basis for a system of responsive government, and it is the reason why we simply cannot take a “wait and see” approach. Unfortunately, without a public scandal, the judicial branch does nothing to make itself more open and accountable, it merely bides its time as rule changes and an accumulation of decisions against openness slowly nick, nick, nick away at the rights of the public. The judiciary is not a fiefdom, it is not an autocratic arm of governance. We talk about three separate branches of government, but two of those branches are at least nominally responsive to the people they serve, while one is not.

This committee can make an important difference in the quest for good governance of this state. It can take seriously its charge to hold the judicial department accountable to the people, and put in place the mechanism for that to happen.

Therefore, the commission should adopt a recommendation to amend Article 5 of the state Constitution, as amended by Article 20 of amendments, to read:

“The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law, and the practices and procedures of the courts, including their openness and accountability to the public, shall be established by statute.”

This committee should urge adoption of this state constitutional amendment, by which the people might reestablish the Constitution’s plain meaning.

That is, Connecticut’s courts would continue to be sole custodians of the adjudicative power, and the exercise of the powers of government would remain separated among the three branches. But the courts would have to start following democracy’s rules -- rules enacted by the legislative and executive branches of government, as the state Constitution requires.

This is, moreover, hardly an outlandish suggestion, even were it not meant to simply clarify what is presumably already the law of Connecticut. It is precisely the underlying basis for our federal system, in which Congress has *delegated* rule making authority to the Supreme Court, but retains its oversight and final authority. It is similarly the case in numerous other state jurisdictions.

The argument for action on our part was made succinctly by Prof. Kay in his recent Hartford Courant commentary:

“In fact, in the American version of separation of powers, judicial, legislative and executive functions are never exercised in isolation. They inevitably collide with, or require the cooperation of, the other departments. Judges need legislation to organize and fund the courts; they need police and prisons to enforce criminal convictions.

At every turn, each “independent” branch relies on the other branches. That is no accident. It is part of a constitutional plan to make the exercise of state power more difficult. “Ambition,” as James Madison said, “must be made to counteract ambition.”

This design has been put at risk by judicial insistence on broad, exclusive powers. Since this position has been deployed in un-reviewable constitutional terms, there is no way to overcome it except by constitutional amendment. Such an amendment would reserve to the legislature the authority to make law governing the general operations of the courts - not the decision of cases. It might mention court rules, judicial organization or the openness of proceedings.

All these matters are regulated by elected legislatures elsewhere without notable damage to the rule of law.

It would be a great mistake to leave untouched Connecticut judiciary’s vague and restless claim to final say. That is the problem that has produced all the others. The process of constitutional amendment is slow and difficult, but this may be a perfect time to start it.

This committee is in a position, at last, to call for fundamental, constitutional accountability. The public’s right to demand transparency and accountability shouldn’t be left to the forbearance of those in temporary custody of the reins of power.