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Testimony of Wesley W. Horton
On behalf of the Connecticut Bar Association
**Senate Joint Resolution 46, Resolution Proposing An Amendment to the State
Constitution Concerning the Procedures of the Courts**
Judiciary Committee
March 26, 2009

Senator McDonald, Representative Lawlor, members of the Judiciary Committee, thank you for the opportunity to appear before you to comment on Senate Resolution 46, Resolution Proposing an Amendment to the State Constitution Concerning the Procedures of the Courts. On behalf of the Connecticut Bar Association, I urge the committee not to act favorably on this resolution.

There are two reasons why the Connecticut Bar Association opposes Senate Joint Resolution 46. First, the resolution creates tension with the doctrine of separation of powers under Article Second of the Connecticut Constitution by interfering with the judicial branch's authority to promulgate its own rules. Second, amendments are traditionally remedies of last resort, and where as here there is no fundamental crisis, or even problem, there is no need for an amendment.

Before 1818 there was no separation of powers doctrine in Connecticut. The General Assembly, for the most part, wielded all the power in the state. When the Constitutional Convention was convened in 1818, the real interest and controversy surrounded questions of religious freedom, independence of the judiciary, and suffrage. The subject of judicial independence was the subject of much debate. One of the results of the 1818 Convention was the creation of a separation of powers where previously there

had been none. Ultimately, the Constitution separated the three branches of government and to put them on equal terms. This was done in Article Second, which expressly provides for both the distribution and the separation of powers among the three branches of Connecticut's government. The separation of powers doctrine provides that the action of one branch of government will be declared unconstitutional if: (1) it assumes powers that belong exclusively to another branch; (2) if it confers duties on one branch that belong exclusively to another branch, or; (3) if it confers duties on one branch that interfere with the orderly performance of that branch's essential function. Separation of powers is vital to the strength and effectiveness of any democratic government, including Connecticut's government.

Senate Joint Resolution 46 would interfere with the authority of the judicial branch and its ability to promulgate its own rules. The Judicial Branch's intimate familiarity and knowledge of how the court system functions puts it in the best position to promulgate its own rules, just as the Legislative Branch's intimate familiarity and knowledge of how the General Assembly functions puts it in the best position to promulgate its own rules. Moreover, many reforms have been made in the past three years and the judicial system is now very open to the public. Public hearings are held to provide an opportunity for people to speak on behalf of newly proposed rules and amendments, and several judicial committee meetings are open to the public. Further, the Judicial Branch is the only non-political branch of government. Involving the legislative branch in the judicial rulemaking process compromises the independence of the Judicial Branch because the occasional adverse public reaction to a particular judicial decision can lead to pressure on the political branches to "do something" to the Judicial Branch

because of the unpopular decision. Since the result in the particular case normally cannot be changed by legislation, attacking the courts via its rule-making power could be an unfortunate proxy.

There is no need for the amendment. The Constitution is the foundation of our government. It creates and defines the roles of each branch of government and provides the authority for those branches to exercise that authority. If you analogized Connecticut's government to a house, the Constitution would be the foundation with the three branches of government and the people making up the framing, plumbing, exterior, etc. As any builder will tell you, the foundation of a house is essential because it provides the base upon which the house is constructed. If that base is weakened in any way, the integrity of the structure is threatened. Thus, if changes are going to be made, the owner should consider making changes to the non-foundational elements before deciding to make substantive changes to the foundation. Changes to the foundation should only be made when all other avenues have been explored and there is some fundamental crisis which the current structure cannot effectively accommodate. There is no such fundamental crisis today.

For decades the General Assembly and the judicial branch have worked together on issues of court practice and procedure. There have occasionally been inconsistencies between the Practice Book and statutes, and when these inconsistencies have occurred the two branches have worked together to ameliorate the problem, with the judiciary either amending the rule or requesting amendments to the statutes. For example, 16 sections of the Practice Book dealing with family matters were amended in light of the legislature's

authorization of Civil Unions. Under the current system, the branches have worked well together in addressing potential issues. There is no reason to change things now.

In fact, even in 2006, in light of the circumstances surrounding the super-sealing of cases and the delay in the release of the *G.A. 7* case the Legislature defeated a proposal similar to Senate Joint Resolution 46. If the Legislature didn't believe that there was a fundamental crisis then, there certainly isn't one now, especially considering the changes made by the Judicial Branch. Led by acting Chief Justice Borden, the Judicial Branch undertook massive steps to enhance accountability to the public by increasing the openness, transparency, and public accessibility of the courts. That initiative has been continued by Chief Justice Chase Rogers.

For all the reasons set forth herein, I urge the committee **not to act favorably** on Senate Joint Resolution 46. Thank you, again, for the opportunity to appear and testify before you today. I would be pleased to answer any questions you may have.

Wesley W. Horton
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