

STATE OF CONNECTICUT
SUPERIOR COURT
JUDICIAL DISTRICT OF WATERBURY

COPY

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WILLIAM J. SULLIVAN)
) DATED: JUNE 26, 2006
VS.)
)
ANDREW J. McDONALD AND)
MICHAEL P. LAWLOR)
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THE COURT'S RULING

BEFORE :

THE HONORABLE DENNIS G. EVELEIGH

APPEARANCES :

EDWARD MAUM SHEEHY, ESQ.
ROBERT J. COONEY, ESQ.
(REPRESENTING JUSTICE WILLIAM SULLIVAN)

RICHARD BLUMENTHAL, ESQ., ATTORNEY GENERAL
SUSAN COBB, ESQ., ASSISTANT ATTORNEY GENERAL
(REPRESENTING MESSRS. McDONALD AND LAWLOR)

STEVEN D. ECKER, ESQ.
(REPRESENTING THE JUDICIAL DEPARTMENT)

LINDA D. RINALDI
COURT MONITOR

1 THE COURT'S DECISION:

2 THE COURT: I want to thank everyone for waiting.
3 Sorry for the delay. I did review all of the
4 memorandum of law and the "Law Review" article which
5 was submitted to the Court.

6 At the outset the Court should note that I'm
7 going to read what I would call a modified decision
8 into the record. It is the decision of the Court.
9 The Court intends to follow up this decision, and the
10 Court will order a transcript and sign it and will
11 follow up this decision with a more detailed written
12 decision which the Court hopes to release by the end
13 of this week. But in view of the time constraints,
14 the Court issues the following decision.

15 This action arises from a subpoena served upon
16 the plaintiff, William J. Sullivan, a Senior Justice
17 of the Supreme Court of Connecticut on June 22, 2006,
18 signed by Senator Andrew J. McDonald and
19 Representative Michael P. Lawlor in their capacity as
20 cochairmen of the Judiciary Committee of the
21 Connecticut General Assembly which subpoena commands
22 the plaintiff to testify before the Judiciary
23 Committee of the Connecticut General Assembly on
24 June 27, 2006 at ten o'clock a.m.

25 On June 23, 2006, in response to being served
26 with the subpoena, the plaintiff initiated this action
27 in which the plaintiff requests that the Court issue

1 an ex parte temporary injunction to quash the subpoena
2 until such time as the Court conducts a full hearing
3 on the plaintiff's request for a temporary and
4 permanent injunction to quash the subpoena and request
5 for an order to quash the subpoena and to stay the
6 enforcement of the subpoena until such time as the
7 Court conducts a hearing on the matter.

8 It is noted by the Court that at the present time
9 this subpoena was not issued in connection with any
10 impeachment proceeding. No impeachment proceeding is
11 pending. Indeed, no appointment proceeding is
12 pending. Moreover, there has not been a resolution
13 passed by the House of Representatives to create a
14 committee to investigate whether there are grounds to
15 impeach any governmental officer.

16 The underlying facts arise from circumstances
17 surrounding the delayed release of the Supreme Court's
18 decision in the case of Clerk of the Superior Court,
19 Geographical Area Number Seven versus Freedom of
20 Information Commission found at 278 Connecticut 28,
21 2006.

22 These facts initially came to light in a letter
23 dated April 24, 2006 from Justice David Borden to
24 Governor Rell and members of the Judiciary Committee
25 of the General Assembly which has been marked Exhibit
26 D in this hearing.

27 This letter sets forth the circumstances

1 surrounding the release of the decision in the GA 7
2 case, the usual practices of the Supreme Court in
3 connection with the release of judicial decisions and
4 the measures taken by the Supreme Court in response to
5 the situation.

6 On the same date that the Borden letter was
7 issued, copies of a letter to Justice Borden from
8 Justice Peter Zarella, then the nominee for Chief
9 Justice, were distributed by Justice Zarella to the
10 Governor and members of the Judiciary Committee, which
11 is Exhibit E of this hearing.

12 Justice Borden responded to Justice Zarella by
13 letter dated April 24, 2006, copies of which were also
14 provided to Governor Rell and the leadership of the
15 Judiciary Committee, Exhibit F of this hearing.

16 The nomination of Justice Zarella was withdrawn
17 by Governor Rell at Justice Zarella's request on or
18 about April 24, 2006. The legislative session ended
19 on May 3, 2006.

20 The legislature is not currently in session. To
21 date no one has been nominated to fill the position of
22 Chief Justice since Justice Zarella's name was
23 withdrawn from consideration on April 24, 2006.

24 Justice Borden as Senior Associate Justice has
25 been exercising the powers and authority of the office
26 of the Chief Justice pursuant to Connecticut General
27 Statute Section 51-3 since Justice Sullivan's

1 resignation on April 15, 2006.

2 The Judiciary Committee recently has announced
3 its intention to hold what in their letter is referred
4 to as an "informational hearing," on June 27, 2006,
5 regarding the circumstances surrounding the Supreme
6 Court's consideration and dissemination of its
7 decision in the GA 7 case. This is in a letter dated
8 June 20, 2006 from Senator McDonald and Representative
9 Lawlor to Justice Borden, Exhibit C of this hearing.

10 On June 20, 2006, the cochairmen of the Judiciary
11 Committee, the defendants herein, issued a letter
12 inviting Justice Borden to participate in the hearing
13 to contribute any facts or opinions regarding this
14 matter and associated issues.

15 Justice Borden has accepted the committee's
16 invitation and intends to appear and voluntarily
17 participate in the hearing. It's a letter dated
18 June 21, 2006 from Justice Borden to Senator McDonald
19 and Representative Lawlor which is Exhibit G herein.

20 In addition, Justice Borden, again acting in his
21 official capacity, has provided the Judiciary
22 Committee with a written explanation containing
23 information about two particular topics identified by
24 the committee as being of interest. Number one, the
25 procedural steps that a case in the Supreme Court
26 generally follows from oral argument to publication.
27 Number two, the process of disqualification of a

1 justice from consideration of a case and how a
2 substitute for that justice is chosen. It's contained
3 in a letter dated June 21, 2006 from Justice Borden to
4 Senator McDonald and Representative Lawlor, Exhibit H
5 herein.

6 This information was provided to the Judiciary
7 Committee of the General Assembly by Justice Borden as
8 acting head of the Judicial Department on a voluntary
9 and cooperative basis.

10 Thereafter, as previously indicated, a subpoena
11 was served on June 22, 2006 on Justice Sullivan
12 commanding him to appear and testify at the
13 committee's informational hearing on Tuesday,
14 June 27, 2006. That subpoena has been marked Exhibit
15 A of this hearing.

16 Thereafter, Friday, June 23, Justice Sullivan
17 filed this lawsuit to quash the subpoena and order to
18 show cause was signed on June 23; and the hearing
19 therein was conducted today, June 26.

20 At the outset it should be noted that our system
21 of government requires that courts on occasion
22 interpret the Constitution in a manner at variance
23 with the construction given the document by another
24 branch. The alleged conflict that such an
25 adjudication may cause cannot justify the Court's
26 avoiding their constitutional responsibility. That's
27 Powell v. McCormack, 395 U.S. 549. Rather,

1 adjudicating a claim of violation of separation of
2 powers is the ultimate expression of respect for
3 equality among the branches of government. The
4 separation of powers places a limitation of
5 constitutional dimensions on the exercise of authority
6 by each branch of government. The separation of
7 powers is one of the fundamental principles of the
8 American and Connecticut Constitutional systems as
9 stated in Stolberg v Caldwell, 175 Connecticut 586,
10 1978, also, Loving v. United States, 517 U.S. 748,
11 757. It remains a basic principle of our
12 constitutional theme that one branch of the government
13 may not intrude upon the central prerogatives of
14 another.

15 Also, Nixon v. Fitzgerald, 457 U.S. 731, 1982,
16 Chief Justice Berger in his concurring opinion stated
17 the essential purpose of the separation of powers is
18 to allow for independent functioning of each coequal
19 branch of government within its assigned sphere of
20 responsibility, free from risk of control,
21 interference or intimidation by other branches.

22 The separation of powers in Connecticut under the
23 Connecticut Constitution is contained as an explicit
24 provision in Article 2nd of the Constitution of 1818.

25 Indeed, as stated in State versus Clemente, 166
26 Connecticut 501, concern over the separation of powers
27 and specifically about legislative encroachment on the

1 judicial power has been identified as an important
2 factor leading to the adoption of the Constitution of
3 1818.

4 As stated in that Constitution, the powers of
5 government shall be divided into three distinct
6 departments and each of them confided to a separate
7 magistrate, to wit, those which are legislative to
8 one, those which are executive to another, and those
9 which are judicial to another.

10 In its review of cases both in Connecticut and
11 throughout the country this Court has been unable to
12 find anything directly in point -- probably the
13 closest two cases are those cited in Attorney Ecker's
14 brief -- where a legislative body has attempted to
15 subpoena a judge, and that both were in 1953, and in
16 both those cases the judges refused to appear to offer
17 their testimony and the matter was not pursued.

18 Further, the Court notes in the case of Forbes v.
19 Earl, 298 Southern 2nd Florida, 1974 was an action
20 brought by a legislative subcommittee chairman seeking
21 a writ of mandamus compelling the chairman of the
22 Judicial Qualifications Commission to comply with a
23 subpoena duces tecum to present all files in the
24 possession of the Judicial Qualifications Commission
25 containing information of asserted judicial misconduct
26 which could lead to impeachment. The court resolved
27 the matter by allowing an in-camera inspection of

1 certain files which could lead to potential
2 impeachment proceedings but avoided a discussion or a
3 decision on the separation of powers issue. Again,
4 that case, although involving a mandamus action, was
5 another case that's an incident involving an
6 investigation pursuant to impeachment proceedings
7 which are most of the case law in this regard.

8 Certainly the two cases in Connecticut indicate
9 that -- particularly the most recent case, that for
10 purposes of impeachment a subpoena issued by a
11 lawfully governed and appointed committee must be
12 honored by other branches of government. In that
13 particular case it was the office of the governor.
14 But it's clear from the decision that if it involved a
15 judicial officer that such a duly appointed committee
16 subpoena would have to be honored by that judicial
17 officer, again limited to an impeachment proceeding.

18 With regard to Connecticut General Statute
19 Section 2-46, the most comprehensive discussion of
20 this statute as probably contained in an opinion of
21 the Attorney General, number 84-130, which was issued
22 in response to an inquiry regarding the scope of the
23 phrase "case under examination" as it appears in the
24 statute. The Attorney General after reviewing the
25 legislative history and federal precedent concluded
26 that the statute vests the legislature with the
27 broadest possible subpoena authority consistent with

1 legislative powers. Thus the legislature can utilize
2 its subpoena power for any matter which the designated
3 legislative officers are otherwise authorized to
4 investigate. Thus it appears that the legislature can
5 issue a subpoena in connection with any proper
6 legislative function or concerning any area in which
7 it could appropriately legislate.

8 And the opinion of the Attorney General appears
9 to be consistent with federal authority as well as the
10 decisions of other states in recognizing a broad
11 subpoena power, and more particularly the United
12 States Supreme Court case of McGrain versus Daugherty,
13 273 U.S. 135, 1927 case. The power of inquiry with
14 process to enforce it is an essential and appropriate
15 part to the legislative function. It falls nothing
16 short of a practical construction long continued of
17 the constitutional provisions respecting their powers.

18 Again, the Court must recognize the legislative
19 authority contained in General Statute Section 2-46
20 and then balance that authority with a consideration
21 of the separation of powers and the authority to issue
22 a subpoena to a judicial officer who does not wish to
23 voluntarily testify before that committee.

24 Todd Peterson in his "Law Review" article, 90
25 Iowa Law Review One, 2004 indicates in the article
26 that it is unprecedented for a judge to be subpoenaed
27 in the absence of impeachment proceedings. He

1 counsels that allegations that a judge has engaged in
2 misconduct in the administration of judicial business
3 do not justify the deployment of teams of
4 congressional, in that case, investigators to right
5 wrongs that can be adequately addressed within the
6 Judicial Branch without threatening the independence
7 of the Federal Courts.

8 Congress, in our case the Legislature, has a
9 constitutional obligation to ensure that it does not
10 turn the force of its political will on the Judicial
11 Branch, and the Federal Judiciary has a corresponding
12 obligation to resist such efforts.

13 It was argued before the Court today by Attorney
14 Ecker that the independence of the Judicial Branch
15 would quite plainly be gravely undermined if a
16 legislative body in its discretion possessed the
17 authority outside the impeachment process to compel
18 the appearance of a judicial officer to answer
19 questions relating to his official duties or the
20 performance of judicial functions. The potential for
21 harm under such a regimen is manifest, even assuming
22 that the legislature utilizes such power to pursue
23 otherwise legitimate objectives.

24 In the absence of impeachment proceedings, the
25 legal authority of the Legislative Branch to subpoena
26 members of the judiciary cannot be coterminous with
27 the broad scope of the legislature's constitutional

1 authority to enact legislation or otherwise conduct
2 hearings on matters of public interest. Otherwise the
3 legislature's authority to compel the testimony of a
4 judicial officer would be virtually limitless.

5 If the members of the judiciary operated under
6 the constant threat of being brought before the
7 legislature to give testimony concerning their
8 judicial decisions and proceedings, the Judicial
9 Department would be at a serious risk of losing its
10 identity as an independent branch of government, and
11 its judicial officers would be inhibited from
12 effectively discharging their constitutional duties
13 without fear of political intimidation. As indicated
14 by the brief filed by Attorney Ecker, this cannot be
15 what the Constitution intended.

16 There must be constitutional separation of powers
17 by recognizing that the legislature may not subpoena a
18 judicial official to give testimony relating to his
19 official duties or the performance of judicial
20 functions except where the constitution expressly
21 contemplates such a direct legislative encroachment
22 into judicial affairs. This is certainly true in
23 impeachment proceedings. We had a discussion whether
24 it may also be true in appointment proceedings, at
25 least as to the person who is being considered for
26 appointment.

27 The Court does not have to reach that question

1 today, however. It's dealing with the exercise of a
2 subpoena issued on a judicial officer acting in the
3 function of his duties.

4 As the Supreme Court held in the Office of
5 Governor versus Select Committee, the Supreme Court
6 upheld the validity of the legislative subpoena in
7 that case precisely because the impeachment power is
8 an essential component in furtherance of the
9 separation of powers, not in derogation of it.

10 Impeachment is a different nature than the
11 subject we are talking about today. It alters
12 entirely the balance of interests that would otherwise
13 control when a legislative subpoena encroaches upon
14 the constitutional independence of another coequal
15 branch of government.

16 It was recognized in that case that allowing the
17 chief executive officer to ^{with} ~~up~~hold information from the
18 select committee on the basis of the Separation of
19 Powers Doctrine undercuts that goal of assuring that
20 the chief executive is not above the law by hindering
21 the only constitutionally authorized process by which
22 the legislature may hold him accountable for the
23 alleged misconduct.

24 Thus, the Court recognized in that case that
25 without violating the separation of powers there was
26 only one constitutionally authorized process by which
27 the legislature was able lawfully to compel Governor

1 Rowland to appear before a legislative body and
2 provide evidence, and that was the impeachment
3 process.

4 The subpoena directed to Justice Sullivan by the
5 Judiciary Committee in the present case was issued as
6 part of an informational hearing that is not part of
7 any impeachment process.

8 It is important and recognized through various
9 decisions that it's essential that all three branches
10 of government work together so that they can achieve
11 what is in the best interests of the citizens of the
12 state of Connecticut. It is a relationship between
13 the branches which should be characterized generally
14 by mutual respect and cooperation. It is in this
15 nature the Court feels that out of a spirit of
16 cooperation and comity that Justice Borden, Justice
17 Palmer and Justice Zarella have voluntarily agreed to
18 testify before the committee on June 27.

19 But this Court is faced with a different issue,
20 and that issue is whether or not this Court or any
21 Court can compel and obligate a sitting judicial
22 officer to testify pursuant to a subpoena issued in a
23 nonimpeachment atmosphere to testify and give evidence
24 before that committee.

25 As indicated previously, this Court through the
26 assistance of individuals working over the weekend has
27 attempted to find a similar case in the nation and has

1 been unable to do so. And the Court feels there's a
2 very good reason for that and suggests that the reason
3 is that it's the spirit of cooperation that the three
4 branches of government must relate to each other and
5 cooperate that the issue has not been raised to this
6 point.

7 The Separation of Powers Doctrine is of such
8 importance and such a cornerstone to our
9 constitutional form of government that the Court feels
10 a subpoena of this nature in the absence of express
11 constitutional authority, which is definitely found in
12 the impeachment power contained in the Constitution,
13 but beyond that would violate the Separation of Powers
14 Doctrine.

15 Therefore, the Court pursuant to the opinion just
16 rendered grants the Motion to Quash and issues a
17 temporary injunction barring any further requisite
18 attendance on the part of Justice Sullivan at the
19 hearing scheduled for June 27 and thereafter.

20 In making this decision the Court also notes and
21 quotes from Exhibit J, a letter from the Judiciary
22 Committee dated April 27, 2006, full exhibit in this
23 hearing. The letter is signed by Senator Andrew
24 McDonald and Representative Michael Lawlor as cochairs
25 of the committee.

26 The last paragraph of the letter reads as
27 follows: While we understand that the Judicial Branch

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1 is a separate coordinate branch of government and is
2 not required to comply with this request, that being
3 the request to testify, we hope that you will agree
4 that the faith and trust of the public and the
5 integrity of the Judicial Branch requires compliance
6 with it.

7 The Court feels that in their letter Senator
8 McDonald and Representative Lawlor were correct, that
9 the Judicial Branch is a separate coordinate branch of
10 government and in the absence of express
11 constitutional authority members of the Judicial
12 Branch cannot be compelled to testify before another
13 branch of government.

14 I'll order the transcript and sign it, please.

15 Thank you everyone. Have a good day.
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Eveleigh, J.

Dated 6-27-06

-----X
WILLIAM J. SULLIVAN)

VS.)

ANDREW J. McDONALD AND)
MICHAEL P. LAWLOR)
-----X

SUPERIOR COURT OF CONNECTICUT
JUDICIAL DISTRICT OF WATERBURY
JUNE 26, 2006

C E R T I F I C A T I O N

This is to certify that I, Linda D. Rinaldi, court recording monitor in and for the State of Connecticut, certify that the foregoing is a true and accurate transcript of the electronic recordings taken with reference to the above-entitled matter, heard before the Honorable Dennis Eveleigh, Judge, at the Waterbury Superior Court, Judicial District of Waterbury on June 26, 2006.

Dated at Waterbury, Connecticut this twenty-seventh day of June, 2006.



Linda D. Rinaldi
Court Monitor