

D.N. CV-06 401 0696

WILLIAM J. SULLIVAN : SUPERIOR COURT
VS. : JUDICIAL DISTRICT
ANDREW J. McDONALD : OF WATERBURY
MICHAEL P. LAWLOR : AT WATERBURY
: JUNE 30, 2006

MEMORANDUM OF DECISION

QUASH RE: PLAINTIFF'S MOTION TO
THE ISSUANCE SUBPOENA AND FOR
AND PERMANENT OF A TEMPORARY
INJUNCTION

I. BACKGROUND

On April 24, 2006 Connecticut Supreme Court Justice David M. Borden authored a letter (hereinafter referred to as the “Borden Letter” and marked as Exhibit D) to Connecticut Governor M. Jodi Rell and members of the Judiciary Committee of the General Assembly. The Borden Letter sets forth the circumstances surrounding the release of the Connecticut Supreme Court’s decision in Clerk of the Superior Court, Geographical Area Number 7 v. Freedom of Information Commission, 278 Conn. 28 (2006) (hereinafter referred to as the “GA 7 Case”), the usual practices of the Supreme Court in connection with the release of judicial decisions, and the measures taken by the Supreme Court in response to the situation. The circumstances prompting the Borden Letter concern a delay in the release of the GA 7 Case by the plaintiff herein, former Chief Justice of the Supreme Court William J. Sullivan (who had retired as Chief Justice on April 15, 2006 and taken Senior Justice status), and the reasons for that delay. It is suggested in that letter that Justice Sullivan improperly withheld the release of the G.A. 7 case for the purpose of aiding the appointment of Justice Peter Zarella who had been nominated as Chief Justice. Justice Zarella had voted with the majority in the G.A. 7 case, which held that Court Motor Vehicle and Criminal Dockets were administrative documents and, therefore, not subject to disclosure pursuant to a Freedom of Information request for the release of public documents. On the same date that the Borden Letter was issued, copies of a letter to Justice Borden from Justice Peter T. Zarella were distributed by Justice Zarella to the Governor and members of the Judiciary Committee. (Ex. E) Justice Borden responded to Justice Zarella

by letter dated April 24, 2006, copies of which were also provided to Governor Rell and the leadership of the Judiciary Committee. (Ex. F) The nomination of Justice Zarella was withdrawn by Governor Rell, at Justice Zarella's request, on or about April 24, 2006. The legislative session ended on May 3, 2006. The legislature is not currently in session. No one has been nominated to fill the position of Chief Justice since Justice Zarella's name was withdrawn from consideration on April 24, 2006. Justice Borden, as Senior Associate Justice, has been exercising the powers and authority of the office of the Chief Justice, pursuant to Connecticut General Statutes Section 51-3, since Justice Sullivan's resignation on April 15, 2006.

The Judiciary Committee alerted Justice Borden, by way of a letter dated June 20, 2006 (Ex. C) that it intended to hold an "informational hearing" on June 27, 2006, regarding "the circumstances surrounding the Supreme Court's consideration and dissemination of its decision in (the GA 7 Case)." On June 20, 2006, the co-chairmen of the Judiciary Committee, named as defendants herein, issued a letter inviting Justice Borden to participate in the hearing "to contribute any facts or opinions regarding this matter and associated issues." Justice Borden accepted the Committee's invitation and intended to appear and voluntarily participate in the hearing. (Ex.G) In a prior letter to Justice Borden, dated April 25, 2006 (Ex. J), requesting the preservation of documents relating to the GA 7 Case, Senator McDonald and Representative Lawlor indicated that "while we understand that the Judicial Branch is a separate, coordinate branch of government and is not required to comply with this request, we hope you will agree that the faith and trust of the public in the integrity of the Judicial Branch requires compliance with it."

Justice Borden, acting in his official capacity, provided the Judiciary Committee with a written explanation containing information about two particular topics identified by the Committee as being of interest: (1) the procedural steps that a case in the Supreme Court generally follows from oral argument to publication, and (2) the process of disqualification of a Justice from consideration of a case, and how a substitute for that Justice is chosen (Ex. H). This information was provided to the Judiciary Committee of the General Assembly by Justice Borden, as acting head of the Judicial Department, on a voluntary basis.

On June 22, 2006, the Judiciary Committee served a subpoena on Justice William J. Sullivan commanding him to appear and testify at the Committee's Informational Hearing on June 27, 2006 (Ex. A). The subpoena was signed by Senator McDonald and Representative Lawlor as co-chairmen of the Committee. On June 23, 2006, Justice Sullivan, a resident of Waterbury, filed an action in Waterbury Superior Court, in which he requested that the court : (1) issue an ex-parte temporary injunction to quash the subpoena until such time as the court conducted a full hearing on the plaintiff's request for a temporary and permanent injunction to quash the subpoena and (2) for an order to quash the subpoena, and to stay the enforcement of the subpoena until such time as the court conducted a hearing on the matter. The matter was assigned to the undersigned on June 23, 2006. The court reviewed the paperwork and denied the request for any ex-parte relief. Instead, the court signed an Order to Show Cause for a hearing on June 26, 2006 at 9:00 A.M.

Senator McDonald and Representative Lawlor were served with the Order to Show Cause on Saturday June 24, 2006. All

parties appeared at the hearing on June 26, 2006. At that time, the Judicial Department of the State of Connecticut moved to intervene in the case. The motion to intervene was granted without objection. The court also received a request to televise the proceedings from CT-N television network, which request was granted without objection.

The parties stipulated to numerous facts which have been recited in the body of this opinion. At the hearing, plaintiff's counsel represented to the court that Justice Sullivan's actions were the subject of a Judicial Review Council investigation. Plaintiff and The Judicial Department submitted briefs to the court. The court afforded the defendants an opportunity to brief the matter. The Attorney-General of the State of Connecticut, acting on behalf of the defendants, requested that, if the court were so inclined, that any orders be temporary, until the defendants had an opportunity to brief the matter. The court has honored this request. The court conducted the hearing and, after reviewing the briefs filed and the Law Review Article cited, the court rendered its' decision. As indicated in the decision, the court intended to issue a written decision when there was enough time for the court to write on the matter. In view of the extreme time constraints on the court to act before June 27, 2006, however, it was necessary for the court to issue its' decision from the bench on June 26, 2006. This decision is intended to supplement the decision rendered on June 26, 2006 in which the court ruled in favor of the plaintiff.

II. LAW

The issue before this court is whether a legislative

committee, acting in a non-impeachment setting, has the power to obligate a sitting judicial officer to testify before that committee by way of subpoena. The issue is one of first impression in the State of Connecticut. In fact, this court has been unable to locate a similar case in the United States.

The separation of powers “is one of the fundamental principles of the American and Connecticut Constitutional systems.” Stolberg v. Caldwell, 175 Conn. 586, 598 (1978), appeal dismissed sub.nom. Stolberg v. Davidson, 454 U.S. 958 (1981). As stated in the United States Supreme Court case of Loving v. United States, 517 U. S. 748, 757 (1996), “it remains a basic principle of our constitutional scheme that one branch of government may not intrude upon the central prerogatives of another.” Former Chief Justice of the United States Supreme Court Warren Burger wrote in his concurring opinion in Nixon v. Fitzgerald, 457 U. S. 731, 760-61 (1982) that “the essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.”

The Separation of Powers provision is contained in Article Second of the Connecticut Constitution of 1818. The provision states that “The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another, and those which are judicial, to another.” Concern over the separation of powers, specifically about legislative encroachment on the judicial power, appears to be one of the important factors in the adoption of the Constitution of 1818. State v. Clemente, 166 Conn. 501,

513 (1974). The adoption of the Separation of Powers clause in 1818 constituted a fundamental change in the governmental structure of the State of Connecticut. It was noted in Norwalk Street Ry. Co. Appeal, 69 Conn. 576, 37 A. 1080, 1084 (1897) that “ A government of men has been superseded by a government of laws.... Distinct and independent bodies of magistracy have been constituted; their powers and duties defined, limited and separated.” Thus, in the Norwalk Street Railway case a legislative enactment conferring upon judges certain non-judicial functions concerning approval of plans for the operation of street railways was ruled unconstitutional on the basis of separation of powers.

It appears to the court that there have only been two prior reported instances, in the history of the country, in which a legislative body has ever attempted to subpoena a judge. Both instances occurred in 1953, during the McCarthy era. Both judges refused to testify. One instance involved a subpoena, issued by the House Un-American Activities Committee, for the appearance of United States Supreme Court Justice Tom C. Clark. Justice Clark responded by letter in which he stated that he declined to appear based on the separation of powers. See N. Y. Times, Nov. 14, 1953, at p. 9, col. 5. In his letter Justice Clark stated: “The independence of the three branches of our Government is the cardinal principle on which our constitutional system is founded. This complete independence of the judiciary is necessary to the proper administration of justice.” In the second incident, Judge Louis Goodman declined to testify, and instead read a statement from the Judges for the Northern District of California to a House Sub-Committee indicating that, based on separation of powers grounds, no judge could “ testify with respect to any Judicial proceedings.” See Statement of

Judges, 14 F. R. D. 335, 335-36 (N. D. Cal. 1953).

It is clear to the court that Connecticut law would allow the issuance of a subpoena, and compel the attendance of a person served by a subpoena, by a duly authorized legislative committee acting pursuant to an impeachment investigation. In Office of the Governor v. Select Committee, 271 Conn. 540, 578 (2004) the Connecticut Supreme Court held that the separation of powers doctrine does not prevent the legislative subpoena of a governor in an impeachment proceeding. The court rejected the claim of Governor Rowland that, under the separation of powers, he was “categorically immune” from the command of a legislative subpoena issued as part of an impeachment proceeding. The Supreme Court upheld the validity of the legislative subpoena in that case precisely because the impeachment power is an essential component “in furtherance” of the separation of powers, “not in derogation of it.” Id. at 579. The Supreme Court explained that impeachment is a unique process. The Court opined:

“Allowing the chief executive officer to withhold information from the (Select Committee) on the basis of the separation of powers doctrine undercuts that goal (of ensuring that the chief executive is not above the law) by hindering the only constitutionally authorized process by which the legislature may hold him accountable for the alleged misconduct.”

Thus, the Court recognized that there was only one constitutionally authorized process by which the legislature was able lawfully to compel Governor Rowland to appear before a legislative body and provide evidence, and that was the

impeachment process. The Subpoena directed to Justice Sullivan by the Judiciary Committee in the present case was issued as part of an “Informational Hearing” that is not part of any impeachment process.

Article XXV of the State of Connecticut Constitution was adopted in 1986. It amended Section 2 of Article XX which had previously amended both sections one and two of Article Fifth of the Constitution. Article XXV provides.

Judges of all courts, except those courts to which judges are elected, shall be nominated by the governor exclusively from candidates submitted by the judicial selection commission. The commission shall seek and recommend qualified candidates in such numbers as shall by law be prescribed. Judges so nominated shall be appointed by the general assembly in such manner as shall by law be prescribed. They shall hold their offices for the term of eight years, but may be removed by impeachment. The governor shall also remove them on the address of two-thirds of each house of the general assembly and the supreme court may also remove them as is provided by law.

In the absence of these specific constitutional mandates, (at least relating to the impeachment process), however, the use of the subpoena power, in order to compel a sitting judge to testify, must be viewed with a jaundiced eye. The court need not consider any other avenues wherein the subpoena power might be exercised by a legislative committee, since none of the topics addressed in Article XXV are presently before this court.

The subpoena in question was issued pursuant to Connecticut General Statute Section 2-46 authorizing the chairperson of any legislative committee to issue a subpoena. The most comprehensive discussion of the statute is contained in

the Opinion of the Attorney General No. 84-130, which was issued in response to an inquiry regarding the scope of the phrase “case under examination” as it appears in the statute. The Attorney-General, after reviewing the legislative history and federal precedent, concluded that the statute vests the legislature with the broadest possible subpoena authority consistent with legislative powers. Thus, the legislature can utilize its subpoena power for “any matter which the designated legislative officers are otherwise authorized to investigate.” Thus, it appears that the legislature can issue a subpoena in connection with any proper legislative function or concerning any area in which it could appropriately legislate. This opinion appears to be consistent with federal authority, as well as the decisions of other states, in recognizing a broad subpoena power. See McGrain v. Daugherty, 273 U. S. 135 (1927). The U. S. Supreme Court stated in McGrain that “The power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function... It falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers.”

The issue for the court, herein, is whether the statutory power contained in C.G. S. 2-46 can survive the constitutional scrutiny of an analysis performed pursuant to the separation of powers clause of the Connecticut Constitution, with respect to a subpoena served on a sitting judicial officer.

Professor Todd Peterson, in his article entitled “Congressional Investigations of Federal Judges” , 90 Iowa Law Review 1, pp.1-66 (2004), indicates that it is unprecedented for a judge to be subpoenaed in the absence of impeachment proceedings. He advises: “allegations that a judge has engaged in misconduct in the administration of judicial business do not

justify the deployment of teams of congressional investigators to right wrongs that can be adequately addressed within the judicial branch without threatening independence of the federal courts. Congress has a constitutional obligation to ensure that it does not turn the force of its political will on the judicial branch, and the federal judiciary has a corresponding obligation to resist such efforts.” Id. at p. 66.

Professor Peterson discusses the case of Judge Martin in the Sixth Circuit. Judge Martin had been criticized by Judge Boggs, in the appendix to an opinion, for the manner in which the panel was selected to hear the case. Judge Boggs further alleged that Judge Martin did not distribute the appellant’s petition for hearing en banc until two Republican appointees had taken senior status and would no longer be eligible for participation in en banc review panels. Subsequently, Judge Martin received a letter from the House Judiciary Committee dated May 14, 2002, in which the Committee requested Judge Martin to produce a number of internal Sixth Circuit documents related to the case which had been the subject of the appeal. Initially, Judge Martin cooperated by providing documents pursuant to the Committee’s request. Thereafter, a formal complaint was filed against Judge Martin by the conservative organization Judicial Watch. The matter was reviewed by the Sixth Circuit Review Council which dismissed the case because corrective action had already been taken. In the fall of 2003, however, the Judiciary Committee renewed its investigation of Chief Judge Martin by seeking additional documents and confidential records of the court. There was further concern expressed that the Republican Judiciary Committee majority intended to retaliate against Judge Martin because of their unhappiness with the substantive decision in the initial case.

Professor Peterson suggests that Congress should allow the judiciary to police any alleged abuses within the judiciary. This court notes that the present matter is already the subject of a Judicial Review investigation.

In the matter of Forbes v. Earle, 298 So. 2d (Fla. 1974) a legislative subcommittee chairman sought a writ of mandamus compelling the Chairman of the Judicial Qualifications Commission to comply with a subpoena duces tecum to present all files in the possession of the Judicial Qualifications Commission containing information of asserted judicial misconduct which could lead to impeachment. The subpoena also required the Chairman to testify concerning said matters.

The court avoided the constitutional issue raised by allowing a representative of the legislative committee to review, in camera, in the presence of a representative of the judicial branch, the matters and investigative files in the possession of the Judicial Qualifications Commission that concerned a named officer who, in the opinion of the legislative representative, may be the subject of an impeachment investigation. Again, this decision was rendered in the context of an impeachment investigation.

The independence of the Judicial Branch would be gravely undermined if a legislative body, in its discretion, possessed the authority, outside of constitutional authority, to compel the appearance of a judicial officer to answer questions relating to his official duties or the performance of judicial functions. The potential for harm under such a regimen is manifest, even assuming that the legislature utilizes such power to pursue otherwise legitimate objectives.

In the absence of express constitutional authority, the legal authority of the Legislative Branch to subpoena members of the judiciary cannot be coterminous with the broad scope of the

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

If the members of the judiciary operated under the constant threat of being brought before the legislature to give testimony concerning their judicial decisions and proceedings, the Judicial Department would be at a serious risk of losing its identity as an independent branch of government, and its judicial officers would be inhibited from effectively discharging their constitutional duties without fear of political intimidation. This cannot be what the framers of our Constitution intended.

There must be a constitutional separation of powers by recognizing that the legislature may not subpoena a judicial official to give testimony relating to his official duties or the performance of judicial functions, except where the Constitution expressly contemplates such a direct legislative encroachment into judicial affairs. This is certainly true in the impeachment process. Attorney-General Blumenthal has argued that the subpoena issued in this matter is pursuant to the appointment process. However, there is no appointment pending at the present time. Further, the Chairmen of the Committee have entitled this hearing as an "informational hearing." There is no candidate currently before the legislative committee. Therefore, the constitutional mandates cannot be invoked.

If this court were to obligate the plaintiff to attend the hearing, the potential future scenarios are endless. What if the legislature did not agree with a Supreme Court decision and wished to investigate future legislation to change the law. Could they, as part of their investigation, subpoena all of the members of the Supreme Court to explain their decision-making process?

Further, could they question any judge whenever they disagreed with a decision? Could a Legislative Committee investigating changes in the sentencing of individuals, subpoena judges who have sentenced individuals to explain their thought processes regarding the sentencing? Where would it end? The cost to the judiciary for the sake of legislative gain would be irreparable.

It is essential that all three branches of government work together so that they can achieve what is in the best interests of the people of the State of Connecticut. The process of cooperation and comity has already taken place in this case. Justice Borden has voluntarily preserved documents and provided the legislative committee with information. Further, Justice Borden, Justice Palmer, and Justice Zarella have voluntarily agreed to testify before the committee. The legislative and judicial departments are constitutionally separate and independent, but they must work together in pursuit of joint objectives and in the best interests of the people of the State of Connecticut. The relationship between the branches is characterized by mutual respect and cooperation. It may be that: (1) this spirit of cooperation or (2) the recognition that a subpoena power from one governmental branch to another is very limited, or (3) a combination of both factors, explains why there has never been a similar case. The court is confident that much, if not most, of the information which the committee is seeking can be produced through a voluntary spirit of cooperation. In addition, the disciplinary process provided through the Judicial Review Council creates a very significant remedial framework to address the allegations of judicial misconduct. The use of the Judicial Review Council is precisely the manner in which Professor Peterson suggests that a matter of this nature should be handled.

The Judicial Department has argued to the court that it does not intend, in any way, to diminish the importance and seriousness of the subject matter under investigation by the Judiciary Committee. The Judicial Department indicates, in its' brief, that the underlying circumstances involve matters of serious concern and has submitted that it intends to cooperate voluntarily with the Judiciary Committee.

No branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803); Kinsella v. Jaekle, 192 Conn. 704 (1984). “ It is the role and duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles.” Marbury, supra., at p.177. “Our system of government requires thatcourts on occasion interpret the constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.” Powell v. McCormack, 395 U.S. 486, 549, 89 S. Ct. 1944, 23 L. Ed. 2d (1969). “Rather, adjudicating a claim of violation of separation of powers is the ultimate expression of respect for equality among the branches of government”. Office of Governor v. Select Committee, 271 Conn. 540, 576 (2004).

The Separation of Powers Doctrine is of such importance, and such a cornerstone, to our constitutional form of government that it must be honored in the absence of a direct constitutional mandate to the contrary. Such a mandate is contained in the impeachment power, as recognized in the Office of the Governor case previously discussed. Therefore, the court grants

the Motion to Quash the subpoena and issues a temporary injunction barring any further requisite attendance on the part of Justice Sullivan at the hearing scheduled for June 27 and thereafter. In this regard, it is noted that:

Unlike many other constitutional guarantees, violations of which a showing of harm in order to entitle the victim of the violation to relief, a breach of the separation of powers principle is, contemporaneously, a constitutional violation and a tangible harm. In other words, action by one branch of government, that violates the separation of powers is, in and of itself, a harm, and that branch whose sphere of authority has been encroached upon has remained neither independent nor free from risk of control, interference or intimidation by other branches.

Office of The Governor v. Select Committee of Inquiry, supra., at 559.

In making this decision, the court recites from Ex. J which was a letter from the defendants to Justice Borden: “While we understand that the Judicial Branch is a separate coordinate branch of government and is not required to comply with this request, we hope that you will agree that the faith and trust of the public and the integrity of the Judicial Branch requires compliance with it.” The court agrees with the defendants in their assessment of the Judicial Branch as a separate branch of government, and their authority to compel either information or testimony under the circumstances of this case. It also agrees that the faith and trust of the public and the integrity of the Judicial Branch requires a spirit of compliance and cooperation that can be balanced with the preservation of the Separation of Powers Doctrine.

III. CONCLUSION

For the foregoing reasons, the court grants the plaintiff's motion to quash the subpoena and issues a temporary injunction preventing the defendants from compelling the attendance of Justice Sullivan at this hearing in the future. The failure to rule in this manner would allow unbridled power in any legislative committee to compel the attendance of sitting judicial officers. Such a ruling would cast a chilling effect upon the independence of the judiciary.

THE COURT

Dennis G. Eveleigh, Judge