credit him; as well, the *Boston Herald* was interested in creating a "media frenzy" with this series of articles (at 762), despite assertions to the contrary by Wedge, as seen in the *Boston Herald*, *Boston Globe*, and *New York Times* the day after the Massachusetts's high court's decision. Nevertheless, the question becomes, does this decision chill future media coverage on judges or the courts?

What will happen, for instance, the next time the media question a judicial decision, whether from a local trial court or the United States Supreme Court? Perhaps Wedge was the rogue reporter as the court implies, such that this defamation award was appropriate. However, the ramifications of the court's opinion seem to apply beyond unethical reporting, as the ruling potentially ensnares as liable for defamation journalists or others who publish critiques about the courts. At a minimum, the opinion admonishes journalists to be thorough in their investigations. As Stephen Burgard, director of the School of Journalism at Northeastern University, said in reaction to this case, "This is a wake-up call to reporters everywhere that you better have your reporting down solid. You better have heard it yourself, or you better have people on the record" (*Boston Globe*, May 8, 2007, at B1). In addition, notwithstanding the actual-malice standard intended to protect the media under the First Amendment, when a judge sues his or her critics for defamation, the critics risk having the plaintiff's judicial colleagues hearing the lawsuit siding with the judge alleging defamation, or at least having the plaintiff (as Judge Murphy perhaps did) try to leave the impression that defendants do not stand a chance. **jsj**

A Constitutional Crisis Averted in Connecticut

J. MICHAEL GREEN

A question of separation of powers between the Connecticut General Assembly and the Connecticut Supreme Court began with a bang and ended with a whimper. The confrontation between the legislative and the judicial branches began in March 2006, when the chief justice of the Connecticut Supreme Court, William Sullivan, announced his intention to retire at the age of 67 in April 2006. In Connecticut, judges automatically must retire at the age of 70, but they remain judges, which allows them to be recalled to service on an ad hoc basis. Thus, they remain subject to the Judicial Code of Conduct.

Upon the announcement of Chief Justice Sullivan's impending retirement, Governor M. Jodi Rell nominated Associate Justice Peter Zarella to be elevated to chief justice. However, unbeknownst to the governor and just before her announcement, the chief justice had already begun to play politics with the Zarella nomination. In early March 2006, the chief justice had ordered the reporter of judicial decisions to delay the printing of a controversial decision regarding freedom of information and the judicial branch. *Clerk of the Superior Court v. Freedom of Information*

Commission, 895 A.2d 743 (Ct. 2006). Thus, in his attempt to aid and elevate his friend Justice Zarella, Chief Justice Sullivan obstructed the course of the nomination process by depriving the Connecticut General Assembly's Judiciary Committee of knowledge of Justice Zarella's concurrence in the opinion.

This matter would not have come to light, however, had Acting Chief Justice David Bordon not publicly exposed the incident in a letter to the Judiciary Committee, in which Bordon revealed Sullivan's directive to a staff member on March 14, 2006 not to release the opinion until instructed to do so. Acting Chief Justice Bordon indicated that this matter had come to light when he had made a routine inquiry into the status of the decision on April 17, 2006. In addition, Chief Justice Sullivan had placed the hold on the opinion just three days before Governor Rell announced his retirement and the nomination of Zarella on March 14, 2006. Bordon described the chief justice's actions as "very unusual" and stated that it was done to "deprive the legislature of timely knowledge of Justice Zarella's vote in the case" (Touhy, 2006). The acting chief justice's revelation occurred just two days before the Judiciary Committee had scheduled hearings on the Zarella nomination.

As a result of this revelation, Governor Rell withdrew the Zarella nomination pending further inquiries and upon Associate Justice Zarella's request. The Judiciary Committee scheduled a hearing, to be held on June 27, 2006, to investigate the motives of Chief Justice Sullivan. Four justices were expected to testify—Associate Justices Peter Zarella and Richard Palmer, Acting Chief Justice Bordon, and former Chief Justice William Sullivan. All except Sullivan had accepted the invitation of the Judiciary Committee to testify. After working several weeks behind the scenes to convince the former chief to testify, the Judiciary Committee on June 22, 2006, resorted to issuing a subpoena ordering Sullivan to appear.

Sullivan refused and began court actions to quash the subpoena citing separation of powers as justification. On June 26, 2006, the litigants appeared before superior court judge Dennis G. Eveleigh. In his opinion in *William J. Sullivan vs. Andrew McDonald and Michael P. Lawlor,* Judge Eveleigh stated that "in the absence of . . . specific constitutional mandates (at least relating to the impeachment process), 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 avenue where in the subpoena power might be exercised by a legislative committee." 41 Conn. L. Rptr. 618, 621 (Conn. Super. Ct. 2006). Therefore, concluded Eveleigh, as the Judiciary Committee had issued the subpoena for an informational hearing and not an impeachment hearing, the reason for the subpoena fell short of the long-continued practical construction of the constitutional provisions respecting the separation of powers. Judge Eveleigh thus quashed the subpoena and issued a temporary injunction preventing the defendants from "compelling the attendance of Justice Sullivan at this hearing or in the future" (at 621).

This was not the last word in the matter, as Attorney General Richard Blumenthal, who represented the Judiciary Committee, asked the Connecticut

Supreme Court to hear the case. In an unprecedented move, the entire membership of the Connecticut Supreme Court recused themselves; this resulted in the designation of seven Appellate Court judges to act as the supreme court; Appellate Judge Thomas Bishop served as the chief justice. Finally, three days before Christmas, William Sullivan had a change of heart and agreed to testify voluntarily before the Judiciary Committee. However, the obstacle that remained was Judge Eveleigh's order that Sullivan could not be compelled to testify. Consequently, on January 12, 2007, the newly constructed Connecticut Supreme Court stayed the lower-court decision, thereby removing any impediments to scheduled hearings and ensuring that legislators would not face any legal action. The judges, in a per curiam decision, reserved the right to rule on the separation-of-powers issue at a later date. 913 A. 2d 403 (Ct. 2007). The court did this in the event that William Sullivan had another change of heart and would again refuse to testify (Touhy, 2007).

After the Judiciary Committee hearings concluded, the same set of judges, continuing to act as the Connecticut Supreme Court for this case, issued an order on March 9, 2007, which they declared the separation-of-powers issue a moot point and vacated the lower-court decision, thereby avoiding a landmark decision. Nevertheless, a precedent has been set. By staying the injunction of the superior court, the Connecticut Supreme Court removed the legal barriers that could compel Justice Sullivan to testify. Thus, the Connecticut Supreme Court in effect issued a decision, though stealthily, regarding the power of the legislature to compel judges to comply with a legislative subpoena. **jsj**

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