



THE SEPARATION OF POWERS AND THE OBLIGATION OF THE BAR IN A FREE SOCIETY

By Richard Tulisano

The concept of the separation of powers as a means by which one branch of government did not become all powerful, and by which we began our concepts of an independent judiciary, is under attack—and the silence is eerie.

In the famous Lung case of 1815, the Connecticut General Assembly, exercising what was then an all powerful role, intervened in the murder case of Lung who had been convicted of the murder of his wife. At that time, all governmental power, including judicial power, was vested in the General Assembly. It held all political power as well as absolute power of legislation—much like the British system.

Rather than taking an appeal, the case went directly to the Connecticut General Assembly for relief. The hall of the Capital became a court room.

I ask you to remember the Connecticut General Assembly as the repository of all power to pardon, and the current Board of Pardons is a delegation of the Legislative power, and not the executive power, as it is in most states.

Because of the obvious interference with the developing concepts of an independent judiciary, the intervening of the General Assembly by effectively having a trial de-Novo was beginning to hamper the developing separation of powers doctrine and was a major impetus in the adoption of the Constitution of 1818, which firmly established in Connecticut three separate and equal branches of government.

The conflict between and independent judiciary and the General Assembly continues to ebb and flow. Most recently, of course, is the attack upon the rule making power of the court, which has been exercised by the General Assembly. The Connecticut General Assembly was proposing a Constitutional Amendment to remove the rule making power from the court and give it to the legislature; however, it did not make it out of committee. However, there is a bill that requires rules of evidence to be sent to the legislature's Judiciary Committee for approval.

Unfortunately, current members of the General Assembly, as well as members of the Bar, have failed to recognize that the accommodations which have developed since *Clemente and Adams vs. Rubinow* have worked, and mutual respect and accord have been acknowledged by both branches of government.

As a young legislator, I had proposed a similar amendment which was roundly opposed by members of the Bar at that time. Ultimately, the General Assembly and the Judicial Branch were able to reach an accommodation in which both were recognized with regard to the court's rule making powers. The Bar was indeed a very influential force in moving towards this accommodation.

This power grab by the General Assembly reverses a trend which has served Connecticut well in recent history. In most places, the rule making power rests with the Legislative Branch. We here in Connecticut have reached our own workable accommodation.

Today, the Bar is strangely silent—it has the obligation as independent observers and participants in the system to identify when the system is NOT working, but also has an obligation to understand when the system is working, and more importantly, an obligation to speak out and defend its integrity.

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