

“Your Honor, You Are Hereby Comanded to Appear...”: When a Legislative Committee Subpoenas a Sitting Judge

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I. INTRODUCTION

In August 2016, an Arkansas legislative committee voted to subpoena Judge Patricia James to testify before them about her handling of certain cases.¹ This was the culmination of an ongoing dis-

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1. See Max Brantley, *Legislature subpoenas judge to testify about child custody decisions*, ARK. TIMES (Aug. 30, 2016, 6:30 PM), <http://www.arktimes.com/ArkansasBlog/archives/2016/08/30/legislature-subpoenas-judge-to-testify-about-child-custody-decisions>.

pute between Judge James and the committee.² Eventually, the committee did not subpoena Judge James and pursued its goals through other means. When the committee voted to issue its subpoena, I sent a letter to the committee arguing that the subpoena violated the Arkansas State Constitution's separation of powers. This essay will expand on that letter in order to amplify its argument and to explore the general separation of powers issues it highlighted. I will argue that such subpoenas violate general separation of powers principles as well as the specific provisions of the Arkansas Constitution. I will suggest that while impeachment, judicial discipline, and removal by the voters are the most likely ways to control judicial behavior, cooperation between the judiciary and the legislature will allow each to perform its constitutional functions without overstepping their bounds.

II. SUBPOENAS TO SITTING JUDGES VIOLATE THE SEPARATION OF POWERS

Issuing a subpoena to a sitting judge to testify about cases in her court is unprecedented in Arkansas and almost unheard of in the rest of the country. I could find only one other case of a state legislative committee issuing a subpoena to a sitting state judge: *Sullivan v. McDonald*.³ The case arose from a dispute over the handling of a matter involving the applicability of the Connecticut Freedom of Information Act to court records.⁴ The court's former Chief Justice William Sullivan was accused of delaying the opinion's release to help the appointment of another justice to succeed him.⁵ The contro-

2. *Pulaski County judge subpoenaed over foster care placement*, AP (Aug. 31, 2016), <https://www.apnews.com/3550ade68d474acbb0750434183b1e96> (stating that Judge James had failed to respond to committee questions since April 2016 and that Arkansas Senator Alan Clark responded by stating that “[t]he power of this committee is to investigate,” not to set policy or interfere, but “it is highly unusual that anyone does not answer an invitation to a legislative committee and especially that staff does not return phone calls”).

3. *Sullivan v. McDonald* (*Sullivan I*), No. CV064010696, 2006 WL 2054052 (Conn. Super. Ct. June 30, 2006).

4. *Clerk of the Superior Court v. Freedom of Info. Comm'n*, 895 A.2d 743, 756 (Conn. 2006) (stating court records of criminal cases categorically exempt from disclosure under freedom of information law).

5. *Sullivan I*, 2006 WL 2054052, at *1.

versy apparently caused Justice Zarella, the justice nominated to succeed Justice Sullivan, to withdraw from consideration.⁶ A legislative committee asked, by letter, the acting Chief Justice William Borden to respond to a request and appear at an “informational hearing” to discuss the circumstances surrounding the handling and disposition of the case.⁷ Justice Borden intended to appear “voluntarily” and supplied the committee with generic information about how cases are handled and how judges are disqualified from cases.⁸ The committee then issued a subpoena to the former Chief Justice Sullivan, directing him to appear at and testify during the “informational hearing.”⁹ Sullivan moved to quash the subpoena.¹⁰

The Connecticut court quashed the subpoena as a violation of Connecticut Constitution’s Separation of Powers provision.¹¹ The court framed the issue as “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.”¹² The court noted that this was unprecedented in Connecticut and across the country.¹³

The fact that there have been so few instances is strong evidence that it is improper. As the Connecticut court said:

6. *Id.*

7. *Id.* The committee “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.” *Id.* (citations omitted).

8. *Id.* at 1–2.

9. *Id.* at 2.

10. *Id.*

11. *Id.* at *8. Connecticut has the exact separation of powers language in its Constitution as Arkansas. *Compare* ARK. CONST. art. 4, § 1 (“The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.”), *with* CONN. CONST. art. II (“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.”).

12. *See Sullivan I*, 2006 WL 2054052, at *3.

13. *Id.* (“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 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*.¹⁴

The court noted that the separation of powers principles are at the heart of the American constitutional order.¹⁵ The branches of government must be able to carry out their constitutional functions without undue interference from the other branches.¹⁶ It has been said:

[T]he 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.¹⁷

The court held 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

14. *Id.* at *6 (emphasis added).

15. *Id.* at *3.

16. *Id.* at *7 (citing inter alia, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("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.")).

17. *Id.* at *6.

judicial affairs.”¹⁸ Because the situation was neither an impeachment nor an appointment, the court quashed the subpoena.¹⁹

The Sullivan court discussed the problems that might arise if legislatures could subpoena sitting judges outside of impeachment proceedings.²⁰ Routine legislative subpoenas would put the judiciary “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.”²¹ A precedent that allowed legislatures to subpoena sitting judges to testify about their cases would be the beginning of a slippery slope.

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?²²

There have only been two instances of such subpoenas in the federal system, both during the McCarthy era. In the first case, the House Un-American Activities Committee subpoenaed former President Harry Truman and Supreme Court Associate Justice Tom

18. *Id.* The court mentioned impeachment of a judge and testifying before a committee deciding a judicial appointment as examples of a specific constitutional override of the separation of powers. *Id.*

19. *Id.* at *8. Justice Sullivan eventually decided to voluntarily appear before the committee and answer questions, and the Connecticut Supreme Court stayed the injunction in light of this development. *See Sullivan v. McDonald (Sullivan II)*, 913 A.2d 403, 403 (Conn. 2007) (staying injunction).

20. *Sullivan I*, 2006 WL 2054052, at *6.

21. *Id.*

22. *Id.* at *7.

Clark.²³ Justice Clark was caught up in a congressional investigation concerning the appointment of an alleged communist spy during the Truman administration.²⁴ Clark was the Attorney General at the time.²⁵ Reports suggested that he and President Truman were aware of the person's connections to the Soviet Union.²⁶ Justice Clark sent a letter to the committee declining to appear, noting that "[t]he 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."²⁷

In the other case, a House committee subpoenaed all the judges from the Northern District of California to testify during the committee's investigation of the way the Department of Justice handled certain criminal prosecutions.²⁸ United States District Court Judge Louis Goodman, along with all of the other judges in his district, sent

23. See David M. O'Brien, *Packing the Supreme Court*, VQR (1986), <http://www.vqronline.org/essay/packing-supreme-court> (discussing the instance where former President Truman and Justice Clark were subpoenaed); see also *Justice Clark Also Summoned in White Case*, SAN BERNARDINO DAILY SUN, Nov. 11, 1953, at 1 (reporting on the subpoenas of Justice Clark and President Truman). President Truman claimed executive privilege as a former president and refused to testify. O'Brien, *supra* note 23.

24. See O'Brien, *supra* note 23; see also *Justice Clark Also Summoned in White Case*, *supra* note 23 (reporting on the allegations of Justice Clark being a communist spy).

25. See O'Brien, *supra* note 23; see also *Justice Clark Also Summoned in White Case*, *supra* note 23 (mentioning reports that suggested Justice Clark and President Truman were aware of connections to the Soviet Union).

26. See O'Brien, *supra* note 23.

27. Letter from President Richard Nixon, to Honorable Peter W. Rodino, Jr., Chairman, Comm. on the Judiciary, House of Representatives (June 10, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4239> (responding to the House Judiciary Committee's subpoenas requiring production of presidential tape recordings and documents). Clark indicated an interest in replying to written questions relating to his memories of the events in question. Eventually, he met informally with the Attorney General, Emery Brownell.

28. ELIZABETH B. BAZAN, CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 5 & n.11 (2005), <https://www.senate.gov/CRSpubs/47f4b3d8-f0da-46b3-9bc8-a536c375554d.pdf>.

a letter to the committee declining to testify on separation of powers grounds.²⁹ They said:

The Constitution does not contemplate that such matters be reviewed by the Legislative Branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.³⁰

Professor Todd Peterson thoroughly canvassed the history of investigations into federal judges and concluded that it is unconstitutional for a judge to be subpoenaed in the absence of impeachment proceedings. He noted:

[A]llegations 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.³¹

The problem is that the legislature and the judiciary have always interacted.³² Judges have frequently testified before legislative committees concerning appropriations for the judiciary, matters of judicial administration, and other matters that may affect the judiciary.³³ On occasion, federal judges have testified on policy matters that did not involve the judiciary.³⁴

29. See Statement of Judges, 14 F.R.D. 335, 335–36 (N.D. Cal. 1953).

30. See *id.* at 336.

31. Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 66 (2004).

32. See *id.* at 7–12 (showing how the legislature and the judiciary have interacted).

33. *Id.* at 7–12. As of 2004, Federal judges had made 166 appearances before congressional committees. See *id.* at 9–10 (citing the Mercer study). Federal judges have testified on a number of matters:

The legislature sometimes has a legitimate interest in gathering information relating to judicial affairs. Professor Peterson points out that Congress needed information about sentencing practices in order to legislate under the Sentencing Reform Act.³⁵ State legislators may need information about the disposition of child welfare cases in order to develop laws concerning the child welfare system.³⁶ Indeed, the need for information may be even more pressing. For example, when Congress subpoenaed Justice Clark they were investigating credible reports that he and the President of the United States had appointed a foreign spy to an important international monetary post.³⁷

Professor Peterson's comprehensive survey could find only one instance of a congressional investigation of an individual judge outside of an impeachment context.³⁸ In the 1930s, a House committee investigated complaints about the way a particular judge dismissed a grand jury.³⁹ Although the committee introduced judicial transcripts into the record, it is significant that the committee did not call the judge to testify or subpoena any documents.⁴⁰ Rather, they seemed to act under the implicit understanding that to do so would violate the separation of powers.

These topics have included such issues as the representation of indigent defendants, habeas corpus appeals, modification of the exclusionary rule, and judges' use of legislative history. Federal judges have also testified on a wide range of legislative proposals relating to the courts, such as the Juvenile Delinquency Prevention Act, amendments to the Criminal Justice Act of 1990, the Citizens' Right to Standing in Federal Courts Act, the Bankruptcy Antifraud Act, the Violent Crime Control Act, and the Civil Justice Reform Act. Testimony relating to the Sentencing Reform Act falls within this category as well.

Id. (citations omitted).

34. *Id.* at 11.

35. *Id.* at 6.

36. This was the issue at the heart of the Arkansas controversy.

37. *Top Leaders Comment on Truman Call*, THE STANFORD DAILY (Nov. 12, 1953), <http://stanforddailyarchive.com/cgi-bin/stanford?a=d&d=stanford19531112-01.2.21&e=-----en-20-1-txt-txIN-----#>.

38. Peterson, *supra* note 31, at 12.

39. *Id.*

40. *Id.* at 13.

It becomes a harder case when legislatures want information about a category of cases rather than specific ones. For example, suppose a legislative committee is developing policies concerning the child welfare system. It subpoenas a sitting judge who handles a large number of child welfare cases to “provide information” about the handling of those cases. In that situation, the intrusion into the judicial function is not so great as the first instance but still severe. The danger is that asking a single judge to explain her handling of a category of cases leaves the judge subject to the same political pressures. A judge who knows that the legislature can compel public testimony about certain kinds of cases may begin to make decisions with that in mind instead of objectively applying the law. Thus, the rule should be that a legislature cannot compel a judge to testify about specific cases or categories of cases. He concluded that:

The paucity of investigations of individual judges, and the accompanying demands for testimony or documents, is not surprising. Such investigations have no clear constitutional foundation in the non-impeachment context, and they may pose a threat of politically motivated legislative intimidation.⁴¹

We can start with a foundational principle: judges must be able to decide cases without fear of interference by the legislative branch. Subpoenas to testify about particular cases clearly implicate this principle. Here a bright line rule makes sense. Absent some constitutional authorization (like an impeachment inquiry), a legislative committee cannot compel a judge to testify about a particular case or, for that matter, a class of cases.

Peterson discusses a situation from the early 2000’s as an example of legislative overreach. It dealt with the sentencing reform act. Congress became concerned about the number of downward departures in sentencing.⁴² Chief Judge Rosenbaum voluntarily testified before a committee and illustrated his testimony with examples from cases.⁴³ The committee was not satisfied with his testimony and

41. *Id.*

42. *Id.*

43. *Id.* at 13–14.

sought additional documents.⁴⁴ The judge sought to narrow the scope of the committee's request.⁴⁵ In the meantime, some committee members came to believe that the judge had misled the committee and pressed for more information.⁴⁶ The committee harshly criticized the judge and his testimony in their report on the bill and its amendments.⁴⁷ The dispute erupted into partisan bickering.⁴⁸ Finally, the committee intimated that they were considering issuing a subpoena to call the judge back to the committee.⁴⁹ After protest by members of the bench and the bar, the judge negotiated an agreement allowing the committee to seek the documents from the Administrative Office of the Courts instead of directly from the judge.⁵⁰

This case shows how incompatible the political world and the judicial world can be. Judge Rosenbaum sought to give information to Congress to help it make some decisions about amending the Sentencing Reform Act. Judge Rosenbaum stepped in to testify when the original judge slated to speak, who was an outspoken critic of the federal sentencing guidelines, became unavailable.⁵¹ Judge Rosenbaum became part of a larger partisan debate about the guidelines. The ranking democrat on the sub-committee noted that the Republican member of the committee wanted to "punish" the judge because they did not like his conclusions.⁵² He criticized them for intensively reviewing the judge's testimony and creating disputes over semantics.⁵³ He concluded that "If you went over everybody's testimony like they went over this judge's testimony, nobody would ever want to testify."⁵⁴

Legislatures and the public have few options in the face of allegations of judicial misconduct. Legislators can begin impeachment proceedings or members of the public can file judicial misconduct

44. *Id.* at 14.

45. *Id.*

46. *Id.* at 17–18.

47. *Id.* at 17 (The report included 20 pages on the judge's testimony.).

48. *Id.* at 18.

49. *Id.* at 18–19.

50. *Id.* at 19.

51. *Id.* at 14.

52. *Id.* at 18.

53. *Id.*

54. *Id.*

charges. Impeachment is effective more in theory than in fact. Few judges are impeached and convicted. Impeachment is thought to be a remedy of last resort and should not be used to wage a partisan or unprincipled campaign against the judiciary. Our view on impeachment was undoubtedly shaped by the country's earliest experience with impeachment.⁵⁵ That experience set a precedent that something more than partisan disagreement was necessary to remove a judge. If we relied too heavily on impeachment to remedy perceived judicial misconduct, we run the risk of intimidating judges at least as much as with subpoenas. Indeed, the 1938 investigation mentioned earlier seemed to have no purpose other than to intimidate the judge under investigation.⁵⁶ More recently, state and federal elected officials have threatened investigations, legislation, or impeachment over the decisions of controversial cases. On the other hand, if we completely slam the door on legislative inquiries into judicial behavior, then we may leave legislators no option but to resort to impeachment. It is as though the system needs a safety valve to release the inevitable political pressure that builds up over time. Making it too difficult for the legislative process to release that pressure may force it to lean on and, therefore, trivialize impeachment and politicize the courts.

It seems clear that the issue cannot be solved by building an impregnable wall between the legislature and the judiciary. The answer lies in a sensitive recognition and balancing of the various interests at stake. Professor Peterson suggests a balancing test that "take[s] account of the particular facts involved in a demand by Congress or the courts for testimony or documents from a coordinate branch of the federal government."⁵⁷ Some factors emerge when we study the few instances where legislatures sought to subpoena judges. In all of the cases discussed in this essay, the judges did not categorically refuse to testify. Rather, they first sought ways to cooperate with the legislature while respecting the separation of powers.

Justice Clark was willing to reply to a set of written questions limited to his recollection of the events surrounding Mr. So and So's appointment. He eventually discussed the matter in private with the

55. See William H Rehnquist, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JACKSON*. (1992).

56. Peterson, *supra* note 31, at 12–13.

57. *Id.* at 48.

Attorney General. In Connecticut, Justice Borden sent a letter outlining the general procedures for handling cases that he believed would be relevant to the committee's inquiry. Only after the committee issued a subpoena to the former Chief Justice did the matter turn to the courts. Judge Rosenbaum voluntarily testified generally on sentencing procedures and cases. Later, in the face of a subpoena, he negotiated a deal to refine the committee's request and to allow it to get information from the administrative office of the court instead of him directly.

These examples show several factors at work: (1) the nature of the investigation; (2) the scope of the request; (3) the target of the request; and (4) the availability of the information from other sources.

III. FACTORS RELEVANT TO A LEGISLATURE'S DECISION TO SUBPOENA A SITTING JUDGE

A. The Nature of the Investigation

The legislature's interest should weigh heavily when it is seeking information necessary for it to construct adequate public policy. For example, Professor Peterson concludes that statutes requiring courts to collect and produce records about matters within the legislative province are constitutional.⁵⁸ On the other hand, a legislative request for documents relating to the internal procedures of a court would interfere with the judicial prerogative to manage and decide its cases.

B. The Scope of the Request

A narrow request for records of a specific case directly intrudes into the judicial power. It allows the legislature to second-guess the court's decision in a political context devoid of the constitutional and procedural strictures in which a court operates. On the other hand, a broad request for more generic information about how a court handles a category of cases has less of a risk to intrude into the judicial function.

58. *Id.* at 48–49.

C. The Target of the Request

A subpoena directed to an individual judge is dangerous to the separation of powers. Here, however, the interest can only be understood in light of the other two interests. Thus, a request for information from a single judge about how she handled certain cases is different than a request for information from the chief judge of a panel about court procedures. The latter places an individual judge in the political spotlight and subjects her to criticism of particular decisions. The risk that judges will skew decisions because of this possibility is obvious. On the other hand, asking a judge with administrative responsibilities to testify about the workings of his court presents much less of a danger of intimidating the judiciary.

D. The Availability of the Information from Other Sources

All things being equal, if a legislative committee can do its job by getting the requested information from a non-judicial source, it should do so. This respects the interests of the branches while allowing each to do its job within its sphere. Thus, legislative committees should work with members of the judiciary to define the information being sought and to identify whether other, non-judicial sources can provide the information.

IV. CONCLUSION

Given the inherent tension between the legislative branch and judicial review of its actions, it is surprising that there are so few open confrontations. Generally, legislatures and courts work together:

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.⁵⁹

In any event, these instances provide a template for cooperative resolution of any future confrontations. Such cooperative resolu-

59. *Sullivan v. McDonald*, No. CV064010696, 2006 WL 2054052, at *7 (Conn. Super. Ct. June 30, 2006).

tions properly balance the legitimate interests of the legislature for information needed to make policy and the needs of an independent judiciary.