

Legislative History for Connecticut Act

2003

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Thank you, Madam President.

THE CHAIR:

Senator Looney.

SEN. LOONEY:

Thank you, Madam President. Madam President, I would move that this item be referred to the Commerce Committee.

THE CHAIR:

Motion is to refer this item to the Commerce Committee. Without objection, so ordered.

THE CLERK:

Calendar 490, File 570, Substitute for H.B. 5033 An Act Concerning Statutory Interpretation. Favorable Report of the Committee on Judiciary.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Madam President. Madam President, I move acceptance of the Joint Committee's Favorable Report and passage of the bill.

THE CHAIR:

The question is on passage. Will you remark?

SEN. MCDONALD:

Thank you, Madam President. Madam President, this bill comes to us in the wake of a Supreme Court decision

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recently issued by the Connecticut Supreme Court in State v. Courchesne which raised an interesting issue and one that the Judiciary Committee thought was important for the Legislature to debate and vote upon.

Historically, the courts of the State of Connecticut have interpreted our statutes under several rules of statutory construction. But one of the prime rules that has always guided court interpretation of statutes is something called the Plain Meaning Rule.

And without going into great detail about the Plain Meaning Rule, it essentially says that if a statute is on its face, clear and unambiguous, and interpreting it in light of that clear and unambiguous language would not yield absurd or unworkable results, the courts are not permitted to look beyond the language in the statute itself for purposes of determining what our legislative intent was in adopting that legislation.

And what I mean by that is oftentimes, courts will look to the debates that exist on the floor of the House or the Senate or, if that does not yield any significant insight into the thinking of the Chambers, the court will then look to debate that may or may not have existed in a Committee.

And in other circumstances, courts probably with not a lot of enthusiasm, have dug down so far as to look

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at testimony before committees to discern what the motivation of the Legislature might have been in adopting any particular piece of legislation.

In the Courchesne (Kor-^{Shan}chez-knee - phonetic) decision, the Supreme Court in a five to two ruling retrenched from that traditional rule of statutory construction and in doing so, the court essentially indicated that in every instance, it was the obligation, if necessary of a court, to look to the broader context surrounding the adoption of any particular legislation.

The Judiciary Committee believed, and apparently the House in adopting this unanimously, believed, that if our statutes are in fact clear and unambiguous and if, in the first instance, that clear and unambiguous language would not yield absurd or unworkable results, no reference what are known as extra textual evidence could be used in interpreting the statute.

We bring this legislation before this Chamber because as the Supreme Court has held, there could be significant implications to court interpretations of our statutes that may or may not have ever been intended by this body in the absence of some specific language that may have taken, in some specific debate that may or may not have existed with respect to any other debate.

But I am concerned in addition, because if the

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Plain Meaning Rule is, in fact, thrown out, what we say and what we vote on could diverge and it is my belief that the duty of this Chamber and the House is to write with specific clarity, the laws, the bills that we ultimately pass.

And if we do not do our job, it is my belief that it is our responsibility to correct that language in either that session or another session of the General Assembly.

And while I understand that when we adopt legislation, we all may have different reasons for voting for a piece of legislation, we all have the language in front of us, and whatever our motivations may or may not be for voting one way or the other, the language doesn't change and that must guide, in my estimation, the interpretation of the statutes.

So with that being said, I am concerned that if the Plain Meaning Rule is obliterated, that the costs of litigation could be substantially enhanced, that individuals who do not necessarily have access to the State Law Library up here in Hartford or one of the other branch law libraries with extensive legislative history, that they will be at a disadvantage, especially in commercial litigation situations where their opponent might be a sophisticated party and have ready access to

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such materials.

And I am also concerned that in the absence of passing this legislation, unless every bill and every amendment is specifically explained in excruciating detail, we may not be doing that which we intend to do and in fact, that the courts might interpret our statutes in a manner never intended by this body or the House.

And so, I apologize to the Chamber. Some of this sounds like esoteric legalese, but it is in fact, extraordinarily important that we have this debate and that we provide guidance to the courts of the State of Connecticut about how we intend our statutes to be interpreted, about how we intend them to be implemented and that if we've gotten it wrong, to afford us the opportunity to get it right.

And so, in case this bill does actually pass in accordance with the House's passage, let me be very clear for the purposes of legislative intent, that if this bill passes, it is the intent to overrule the portion of State v. Courchesne which recanted or retrenched from the Plain Meaning Rule under the rules of statutory construction.

Thank you, Madam President.

THE CHAIR:

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Senator Kissel.

SEN. KISSEL:

Thank you very much, Madam President. At the outset, I'd like to at least state that I agree with many of the sentiments expressed by my good friend and the Co-Chair of the Judiciary Committee, Senator McDonald.

Indeed, the repercussions, and I would call it Courchesne (Kor-shayne - phonetic) as opposed to Courchesne, of the Courchesne decision in my mind, poses some real concerns for the future. The ability of the average individual to seek and attain legal assistance as they move through our society. If every legal person involved in the law, attorneys, have to go and dig into the legislative history of any statute they cite in a memorandum or brief, then everybody's going to be piling down to Hartford going across the street.

I'm really not sure, other than across the street, where they have the legislative histories, the committee documents, the record from the Senate and the House. I don't know how available that is. I'm not quite sure that that's all been put on line. Just right off the bat in habeas corpus applications out of our corrections facilities, where those folks have an awful lot of time that they can come up with arguments, if they don't have

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easy access or ample access to legislative histories, I think it's just a few steps down the road where they will be seeking as a part of their due process rights, access to that.

And so I do believe that the Courchesne decision in that small part cited by Senator McDonald is a Pandora's Box and was a faux pas. But that's not for me to decide. That is for the Supreme Court. Those are the folks, those men and women across the street that have that authority.

And so that leads me to my question. Through you, Madam President. You know, ever since Merberry v. Madison in a variety of ways, the courts have assumed that certain abilities, and they are a separate branch of government. We're the legislature. They are the judiciary.

My question to Senator McDonald at the outset is, what authority do we have in statute to tell the Supreme Court how they are to interpret our laws? Where do we find that authority to tell them how to do that part of their job? Through you, Madam President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Madam President. Through you, Madam

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President, to Senator Kissel, the ability of the, and if I may paraphrase the comment of one of my colleagues. We are the law. We have the right in our collective will to establish what the law of the State of Connecticut is.

And we have the opportunity in this Chamber to pass legislation dictating how the courts shall operate. And I, if we could stand at ease for one moment, Madam President.

Thank you, Madam President. A direct answer to Senator Kissel's question. The authority comes from the Constitution of the State of Connecticut in Article V, Section 1, which indicates that the judicial power of the state is vested in the Supreme Court and the Superior Court and such other lower courts as the General Assembly shall from time to time ordain and establish.

And then it says, the powers and jurisdiction of these courts shall be defined by law. And as I indicated earlier, it is this body in conjunction with the House that establishes the law.

So, pursuant to the Constitution of the State of Connecticut, I believe that we have the authority to pass legislation in this body implicating the powers and jurisdiction of the courts of the State of Connecticut.

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I should also indicate, Madam President, that under our law as it exists today, Section 1-1a of the General Statutes indicates that all the words and terms appearing in any statute shall be construed to mean what they ordinarily mean and it is my belief that this legislation is intended to expand on legislation that we have already passed, that has existed from literally the first statute in our general statutes, Madam President.

THE CHAIR:

Senator Kissel.

SEN. KISSEL:

Thank you very much. I have one other question, but a statement in response to what Senator McDonald said.

There is a term. I believe it is called oro boro and what that is, is that's the name of the symbol of a snake swallowing its tail. And that's what I'm thinking of here, because to the extent we say, well, the words have plain meaning, I can go into any Merriam Webster's dictionary and for a variety of words find three, four, five definitions.

Even within that context, I think in any statute that we have, sometimes shall is interpreted as may, and may is interpreted as shall. Almost any word in the English lexicon affords itself to a variety of

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interpretations.

And what we call upon our courts to do is to look at all those words in the context of the arguments. Sometimes in Appellate briefs there are contrary arguments all with the same goal, but they don't necessarily support one another.

There are a variety of statutes cited, so we have in our great wisdom as from the founding days, said we have this separate branch of government.

I commend the leadership of the Judiciary Committee for setting this beacon on a hill. But I think that ultimately, unless the courts themselves reverse Courchesne or that portion that has given us pause, for a variety of reasons, I don't know in my heart of hearts whether we have the authority to command them to do so.

And I actually don't believe that we are the law. I mean, first of all, we are here representing the will of the people and when we try to express that in the only way that we know how, and that is language, that language opens itself up to a variety of interpretations.

And we see that just around this circle on any given day on how things trundle their way to becoming statutes.

My last question is this, before I would yield to

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Senator Sullivan. Assuming this goes forward and it become statute, we have a Supreme Court decision that says what it says. We have this statute. How would litigants, and how would litigants on appeal utilize this statute? Are we asking the Supreme Court because we've passed this statute, to somehow take unilateral attention to this and just view themselves as hamstrung and unable to follow their own precedent?

Is that what we're trying to do? I don't recognize that that's ever been done. So, my guess would be, as with so many other things that they need to have an actionable case before them. And so, is it the contemplation that should this statute pass that someone would have to raise this issue in an underlying Superior Court matter, probably ultimately lose. My guess would be that one of the salient or quintessential rationale why they lost was that the statute wasn't followed and that this would have to work its way up through the Appellate stages and ultimately get before the Supreme Court such that they could look at this statute and say, and actually, they will make a decision as to whether they are indeed bound by this or not.

So my question to Senator McDonald is, assuming we all hold hands, sing Kumbaya, pass the statute, how will it affect court cases in the future?

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Through you, Madam President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Through you, Madam President, clearly, I don't have a crystal ball how it would play out. My suspicion, however, is that it would, in fact, be the subject of litigation in one context or another, like so many of our other statutes are on a daily basis and I think ultimately under the system of government we have, the Supreme Court would be called upon to determine whether we have passed something that they are going to abide by, whether they intend to honor the will of this Chamber, whether they intend to honor the intention of our statutes and whether they intent to give effect to the statutes as written.

SEN. KISSEL:

Well, let me simply conclude with this, Madam President.

THE CHAIR:

Senator Kissel.

SEN. KISSEL:

Just in that answer, I think it begs the question. Whether they will abide by the intention of this statute and when this eventually gets before them in some way,

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shape or form, my guess is that the attorneys presenting the case would have some form of legislative history to bolster what their interpretation of the intention of the words means.

And I think that even in that instance, the courts will then take the statute, it's plain meaning, whatever that is divined to be, by a variety of individuals, lay it against precedent, stare decisis, that they have already articulated their majority position and they will come to a conclusion.

So, I will support this, but I wish to acknowledge that there was ample testimony at our public hearing in the Judiciary Committee by representatives of the Bar Association of Connecticut, at least at this time, they offered us caution and actually were speaking in opposition to the legislation, for many of those folks seemed to indicate that we were stepping into a briar patch and that this was an area where the courts really had the ability to make these determinations.

I will support the legislation, if for no other reason than it sends a signal that I believe moving away from the plain language rule will take us into areas we haven't yet contemplated, will actually work to undermine people's access to attorneys and affordable justice and representation in the State of Connecticut

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and that it also will open up a Pandora's Box as folks begin to assert their right to have free and unfettered access to legislative histories, no matter where they may be, whether that's incarcerated or not.

Thank you very much, Madam President.

THE CHAIR:

Thank you, Sir. Senator Sullivan.

SEN. SULLIVAN:

Thank you, Madam President. I thank Senator Kissel for the yield and I thank him for his questions and his analysis of the defects of this legislation.

And while he reaches one conclusion as to what he will do in voting, I reach another. And that is, that I reluctantly, reluctantly because no one has gained my esteem so quickly as our new Chair of the Judiciary Committee, reluctantly, nonetheless, rise to oppose this bill.

I do so for a number of reasons, one of which in a sense has already been well mentioned by Senator Kissel. And it is the idea that it is a very small step from the laissez nous to the laissez moi, that we are the law, I am the law. That is not true. We are, indeed, all the law. And when this Legislature acts, it does not act with one voice, it acts with many intentions.

And it is critically important that whoever

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construes the laws of the Legislature and that power we have given under our Constitution to the courts of this state, that whoever construes the acts of this Legislature have the ability to understand what this Legislature meant when it acted and we all know in our heart and hearts, our soul and our souls, that every time we vote on a bill there are 36 reasons why that bill has passed the State Senate, not one. And there are likely 36 meanings behind the action that we take.

It is sort of comforting to know, and particularly with Senator Kissel's remarks as one who will vote for the bill and therefore hopefully will be looked to in the record of this deliberation as to what this legislation means, when it is first applied, that the court will be called upon first to construe what we meant when we passed this bill.

And therefore, I am somewhat comforted that a wise and learned justice such as Justice Borden, can just as easily reapply the precedent that he has set in construing this proposal. And I say that because it is not what Senator McDonald says or what I say, that go to the record of what this bill means. It is what we all say that goes to the record of what this bill means.

Second, I often as I look at what we do here, am moved by the degree to which courts in looking at our

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deliberations and our conclusions, start with the premise of the great deference that is owed to the Legislature, a deference which courts are reluctant to set aside.

And in the comedy of a federal system and the comedy of a divided government, one in which we assign certain powers to ourselves, the people, excuse me, in which the people assign certain powers to ourselves in the Legislature and the people assign certain powers to the executive and assign certain powers to the judicial branch, a co-equal branch of government, that we, too, are obligated to give deference to that fundamental constitutional authority that we have divided in three parts. Not one. Because we are not the law. The law is the summation of those three parts and what those three parts determine it to be. We are but one part of the process.

If you read, as several in the circle have, and certainly the learned Chair and Ranking Member of the Judiciary Committee have, if you read this case, you are driven to two possible immediate conclusions.

One, that the majority and minority opinions are actually saying exactly the same thing and that we are here debating virtually nothing, but debating it at length, or two, that there is a fundamental difference

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in their point of view.

And I say the first because no matter what has been said of the majority opinion in this case, and this is not a little old Superior Court case about whether we, or even a Supreme Court case, about whether we intended this specific crime to be included or this particular intent to be demonstrated, or this particular section to apply or not apply. This goes to a fundamental statement of this court about its responsibilities under the Constitution.

But when you read this case, it is not that the majority has said we disregard the words of the statute. They have said just as clearly as the minority has said in this decision, that the first and most fundamental stopping point of any construction are the words as written, the words as enacted.

The difference is, there is a certain intellectual honesty to the analysis which the majority goes through to reach its conclusion in setting this portion of their decision. And that honest is, that a decision of the Legislature is a complex act. It is not a simple statement. It is a complex act which finds its first iteration in the words and as Justice Borden in writing for the majority says, where the words are clear, the words are clear.

But it also is a complex act that may allow for the exploration of what the Legislature truly meant when it acted, which may at times, rare times, give more meaning to the law that simply relying on a first quick read of the magic words that are on a piece of paper.

I don't think the majority of our State Supreme Court and anyone who knows Justice Borden knows him essentially to be a conservative judge, so this is not some wild eyed person who ought to be drummed out of the United States Supreme Court or the State Supreme Court for his funny ideas about the power of the court and the power of the Legislature. He's a fairly conservative jurist throughout his history. I think Justice Borden is really saying, as a conservative jurist, that there is an organic nature to the work that we do as a people, through the Legislature, and that is reflected in the diversity of our actions, our motivations, our words, our thoughts and our deeds.

Nor does the majority opinion suggest that the first, second, third, fourth, or fifth step in construction is to run out and check what the Clerk of the General Law Committee said during a break to some person walking by in the cloak room to figure out what the intent of a piece of legislation is. It's not that kind of process of intention seeking and intention

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determination that the majority is talking about.

And I think at times we sort of heard people suggest that there's some sort of casual idea that you can go out and glean as far down as you can to every word that's ever been said about a piece of legislation. The court is very clear, very clear, that this is not about gleaning for every nugget, every grain, every piece of information. Clearly, there is a priority in which actions, first words, and then actions and sources of authority have determinative impact.

And frankly, when you read the majority opinion and you read the minority opinion, they really truly do not differ all that much. The difference is that I think our system of government, we have determined, decreed ourselves in three co-equal branches.

Someone must decide what it is that we do on occasion, because on occasion, you'll forgive me, we don't always know what we are doing. We don't always write it well. We don't always say it well and we don't always think it well.

And sometimes in the history of this country, the last protection we have had as a people, and it pains me to say this, has not rested in our hallowed legislative halls, whether here or in Washington or in any other state. They have rested on the last day in the

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willingness of a court to take the words of the Constitution, the words of a statute, and the history of that legislation. And the Constitution by the way, is legislation as well, though not at this context.

To take the history and the words and the intention, and find the heart of the law, the heart of the law that may on occasion not be beating so strongly on just the plain words.

So I worry. I worry. I worry enough to come down to a different conclusion and I think it's a close call. But I worry enough to come down to a different conclusion that first I owe this Supreme Court my deference on this issue, which is at the heart of their role and does no injustice to anything we do if this precedent stands.

Second, I worry about the overall message that we send to the court, and more importantly to the people at large when we suppose that we, we are the law. We are all the law. We are three equal branches of government. Someone must determine what it is we do just as someone must determine what the laws are, what those laws mean is not for us to say, it is for us to suggest, it is for us to write, and it is for the court, in the last analysis, to determine because in our society we have given the court that power as the final refuge of

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interpretation for those who take issue or have doubt as to what it is that we have done.

Senator McDonald has done a marvelous job with this Committee this year and some have said in our caucus, this is only a debate that only lawyers could love. But it is more than a debate than only lawyers can love. It is about the fundamental responsibilities and relationships of the three branches of government. It is just as fundamentally so, I know, in Senator McDonald's argument as it is in mine, it is only that I know how imperfect our process is and I guess I feel fairly profoundly that this country of ours would not have advanced to where it is had we historically, historically, attempted in ways like this to narrowly handcuff and limit those who we charge as the last refuge of interpretation with the ability to speak to and for the people of the State of Connecticut, just as we attempt to speak for and to the people of the State of Connecticut.

As a legislator, I should love this bill. I should be up here saying it's the greatest thing ever. We're going to tell that court, you know what, none of your damned business. We'll write it on the piece of paper. What it says there is what it means there.

I hesitate to ask any one of us at the end of any

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one of our wonderfully deliberative days, to take the first bill out that we acted on that day and in two minutes I'll pick a random sentence, tell me what it means. Thirty-six people will tell us 36 things. That's why we have a Supreme Court. That's why we have the construction rules that this court has enunciated that are an honest statement of what every court does.

I'm afraid the minority's point of view is a bit of a myth.

THE CHAIR:

Thank you, Senator. Senator Roraback.

SEN. RORABACK:

Thank you, Madam President. I rise to agree with much of what Senator Sullivan has said, most of all, that our process is an imperfect process at best. And that being the case, Madam President, the Supreme Court can take comfort in knowing that they're still going to have plenty of business construing the volume of ambiguity that comes out of this Chamber every year.

Madam President, all this bill does is to say, in those rare instances when we get it right, when we know what we mean and we say what we mean, that it's going to be our expectation that the court will give life to the plain words that the people of the State of Connecticut have expressed through their legislative

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representatives.

And Madam President, I think the risk is, as Senator Sullivan correctly points out, every time a bill passes this Chamber, there are 36 different sets of reasons why each and every one of us thinks the bill is passed and what each and every one of us would hope that a particular bill would do. But we can't ask the court to resort to mind reading or to gleaning legislative intent from our often fragmented remarks, particularly not in those cases when the words that we vote on stand alone, provide the necessary guidance for the court to do what we wish for them to do.

The good news, Madam President, is, each and every year this Legislature convenes. And each and every year this Legislature takes cognizance of the decisions that are being made by the Supreme Court and we have the ability when their construction of the plain meaning of our laws yields results that we think can be improved upon, we have the ability to change those laws and to change the words so that the next time out the results will be better than what came from our original first stab at something.

I think, Madam President, we also need to be mindful of what the implications of the Courchesne decision might be on the trial courts of this state.

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The Supreme Court has the luxury of being able to take the time to look deeply into every statute that we pass. But, Madam President, the trial courts of this state day in and day out are called upon to do the people's business, to make decisions and when we tell the trial courts that it's not enough for them to rely on the plain language of the statutes that we pass, we invite a digression which is going to consume resources and which is going to frustrate not only our intent but the intent of the people of the State of Connecticut in getting judicial business accomplished in a timely fashion.

Madam President, some would suggest that we are unfairly trampling upon the province of the judiciary and I would respectfully suggest that while we do need to be mindful of the separation of powers, so, too, should the judiciary be respectful of the plain words that the people's elected representatives pass into law and when there isn't any doubt as to what they mean, I think the only fair rule for them to apply is the rule which this proposal before us embodies.

I urge support of the bill and I thank you, Madam President.

THE CHAIR:

Thank you, Senator. Senator McKinney.

SEN. MCKINNEY:

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Thank you, Madam President. Madam President, I rise in support of the legislation. Madam President, let me first come clean, I guess, with the circle, and state that I may be the only member currently serving in the Legislature who was a law clerk for a Justice of the Connecticut Supreme Court and a Supreme Court Justice who was in the majority opinion of this case.

I had a wonderful year clerking for Justice Palmer, got to know all of the Justices of the Connecticut Supreme Court and I dare say there's no one here who has a greater respect and regard for the members of the Connecticut Supreme Court than I do.

Justice Borden, who wrote the majority opinion, as Senator Sullivan said, is an extremely talented jurist, a brilliant, brilliant man, one of the smartest and most intellectually honest people I've ever had the chance to meet.

So, my position in favor of this measure should in no way be seen as a slap at our Supreme Court or the members thereon. It is not about strict constructionism or judicial activism. This is simply about the role of the legislative branch of government versus the role of the judicial branch of government.

I don't take issue with much of what Senator Sullivan has said except for a few things, and let me

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just briefly touch upon them. One is a statement that in reading the decision, and I have read the entire decision, that the majority in dissenting opinions aren't that different. And if you read the dissent and in particular, foot note 12, it states, and I'm quoting, "I do not intend to deemphasize my fundamental disagreement with the majority's rejection of the plain meaning rule."

And so, in the very most important respects, in the dispositive issue of this case on statutory interpretation, the majority in the dissent have very different conclusions. The majority does away with the plain meaning rule and the dissents from that rejection.

Let no Superior Court judge, Appellate Court judge or Supreme Court judge, should they look at this legislative intent and understand the passage of this bill to mean anything other than our rejection of the majority's rejection of the plain meaning rule.

And it is very much our role as a legislative branch of government when we disagree with the court's interpretation of our statutes, to come back and say, that's not what we meant, you got it wrong. We are the co-equal branch of government that writes the laws.

Much of the rest of what Senator Sullivan I don't disagree with, although not everyone in this circle are

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lawyers. All 36 of us are law makers and it is our job to write the laws. And therefore, this may be inside baseball but it is very important to our role of government.

I think much of what has gone on in this debate is actually Exhibit A as to why we need to pass this legislation. Our process, as Senator Sullivan mentioned, is imperfect, but it is the imperfectness of that process that in rejecting the plain meaning rule, the court wants to rely more upon, rather than the language. And I would say that the less you rely upon the language of a statute and the more you rely upon the process which created that statute, the less likely you are to get the right result because we all could have different meanings. We could all stand up in the circle and say, this statute means X. It says Y, but for purposes of legislative intent, it really means X. Well no it doesn't because it means Y, you're voting on Y, it's Y. It doesn't matter four Senators or twelve Senators stand up and say it means X, it says Y, that's what it means and that's what the court should determine.

The other thing I would say is that this is, as has been suggested, not simply the court just taking a cursory look at the language, a quick pass, or a quick

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look. It's looking at the language of the statute and seeing if it has a plain and unambiguous meaning and seeing if that statute makes sense in the context of all our other statutes. That is not a cursory look. That is a very developed and full look at what our statutes mean with respect to our other statutes.

Madam President, I think at the end of the day our constituents will care little about this debate. But at the end of the day, by passing this law, we will have helped them tremendously because we will have stopped the process, if we don't pass this, of where lawyers are going to go in, and we're going to debate as a famous president once said, the meaning of is, is.

At some point, you have to say to the lawyers, you know what? You can't have too many different interpretations of what a statute is saying. It is what it is. We mean what we say and the courts have to give that, the deference that we as a legislative branch of government deserve.

And I'm sorry for boring the circle, but I think we should pass this. Thank you.

THE CHAIR:

Thank you, Senator. Senator Handley.

SEN. HANDLEY:

Thank you, Madam President. It's with a bit of

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trepidation I get into this lawyerly debate, since I am not a lawyer. But I am an historian by trade, and my understanding of what I've been hearing today, suggests to me that by limiting the opportunity for a judge or a court to take the widest view of the background of a bill, of a piece of legislation very much limits the richness and the fullness of the understanding of the bill.

And so, on those grounds, I will be opposing this legislation.

THE CHAIR:

Senator Looney.

SEN. LOONEY:

Yes, thank you. Thank you, Madam President. Madam President, I rise also in opposition to the bill. I think that clearly it is something that this decision, the Courchesne decision is one that is, has caused a great deal of concern because of the struggle over principles of interpretation and I certainly commend the Judiciary Committee and Senator McDonald for bringing this debate forward to focus on principles of interpretation.

But I believe that the Supreme Court in the majority opinion in that case, actually did take into account the complexities of how we have to go about

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evaluating the meaning of language. And as the court said in that decision, we make explicit that we will ordinarily consider all sources in order to determine the clarity of language.

But also the court there emphasized that clearly, the language of the statute itself is the most important factor to be considered for three very fundamental reasons. First, the language of the statute is what the Legislature enacted and the Governor signed. It is, therefore, the law.

Second, the process of interpretation is in essence the search for the meaning of that language as applied to the facts of the case, including the question of whether it does apply to those facts, and that is absolutely essential and true.

And third, all language has limits in the sense that we are not free to attribute to the legislative language a meaning that it simply will not bear in the usage of the English language.

So the court in its majority opinion acknowledges that it will always begin the process of interpretation with, as it says in the decision, a searching examination of that language attempting to determine the range of plausible meanings that it may have in the context in which it appears.

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So that therefore, I think that the court does, in fact, recognize that the, there is a great elusive quality to the sense of plain meaning, because what is, in fact, ambiguous itself may be open to determination and interpretation in certain cases. So the court in embracing the so-called bender formulations does, in fact, make an analysis of what it means to interpret and the plain meaning rule, I think as provided for under this bill, would, in effect, bar the court from the active interpretation which is essential to the function of the court in many context.

So one of the things that the court points out in the decision regarding the plain meaning rule is that to some extent, the plain meaning rule is in itself inherently self-contradictory, that because it really is a misnomer to say that if the language is plain and unambiguous there is no room for interpretation because the very active applying a statute to certain facts necessarily requires interpretation.

And there is another sense, I think that the plain meaning rule is inherently self-contradictory and that's recognized by the court and I think is also recognized in the language of the proposed bill. And that is because there is a part of the language of the bill and also the plain meaning rule that exempts from that rule,

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a case where the language of the text may be plain and unambiguous but may yield absurd or unworkable results.

That, in itself is a recognition that in some cases we do have to go beyond what may even appear to be unambiguous plain language. And that is because in those cases, the only plausible reason for that part of the rule is that the Legislature could not have intended for its language to have a meaning that yielded such an implausible result.

So therefore, because of the great difficulty pinning down the elusive, quicksilver quality of language, we should not, I think, limit the court unreasonably from doing the kind of searching analysis that we trust the court to undertake, that as a separate and independent branch of government we presumably select people for that court who are skilled in that act, who have the skill to apply it in a way that reflects knowledge of the law, analysis of language and overall wisdom.

And therefore, I think we should recognize that as an inherent quality of the judicial act. And therefore, despite all of the difficulties that particular cases might rise, I would urge rejection of the bill.

Thank you, Madam President.

THE CHAIR:

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Thank you, Sir. Will you remark further? Senator McKinney.

SEN. MCKINNEY:

Thank you, Madam President. I rise for a second time because I forgot one point. But I just want to note that we have done some good today. I think the Connecticut State Senate has found a cure for insomnia. Just watch this tape and you'll fall right asleep.

Madam President, what I forgot to mention in my first remarks is, what is really the somewhat historic nature of the Courchesne decision, and I want to read you a footnote from the majority's decision in which they reject the plain meaning rule.

We acknowledge at the outset that the particular approach to the judicial process of statutory interpretation that we now specifically adopt, has not been adopted in the same specific formulation by any other court in the nation.

Now, they go on to say that Alaska takes a similar route but not exactly the same, and that Texas, by statute, follows a similar route. Interesting, by statute follows a similar route.

But what this decision does is unique among the 50 states. And so, by saying to the courts and the judicial branch of government that we want you to first look at

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our language and if that language is plain and unambiguous within the context of our other statutes and doesn't lead to an absurd result, that is what it means and it's unreasonable to think that it could mean anything else based on legislative intent or the things. That's where you should stop.

By saying bring back the plain meaning rule, we are following what 47 other states are doing. This decision is truly historic in the United States of America and so I think that needs to be part of that debate because this is not just, oh, ho hum, another decision. This is a historic one and the first of its kind in the nation and I think that's why we ought to reject it. Thank you. And vote for the bill.

THE CHAIR:

Thank you, Senator. Will you remark further? If not, would the Clerk please announce a roll call vote. The machine will be opened.

THE CLERK:

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

THE CHAIR:

Have all members voted? If all members have voted,

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the machine will be locked. The Clerk please announce the tally.

THE CLERK:

Motion is on passage of Substitute H.B. 5033.

Total number voting, 36. Necessary for passage, 19. Those voting yea, 20; those voting nay, 16. Those absent and not voting, 0.

THE CHAIR:

The bill is passed.

THE CLERK:

Calendar 491, Page 5 --

THE CHAIR:

Senator Looney.

SEN. LOONEY:

Yes, thank you, Madam President. With Calendar 491, would ask that item be passed temporarily.

THE CLERK:

Calendar 494.

SEN. LOONEY:

Madam President.

THE CHAIR:

Senator Looney.

SEN. LOONEY:

Yes, thank you, Madam President. Would also ask that that item be also passed temporarily.

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Please check the board and be sure your vote is properly cast.

If all members have voted, the machine will be locked and the Clerk will take a tally.

The Clerk will please announce the tally.

CLERK:

H.B. 6377, as amended by House Amendment Schedules "B" and "C"

Total Number Voting	144
Necessary for Passage	73
Those voting Yea	144
Those voting Nay	0
Those absent and not Voting	6

DEPUTY SPEAKER CURREY:

The bill, as amended passes.

Will the Clerk please call Calendar 390.

CLERK:

On page 7, Calendar 390, Substitute for H.B. 5033, AN ACT CONCERNING STATUTORY INTERPRETATION. Favorable Report of the Committee on Judiciary.

DEPUTY SPEAKER CURREY:

The Honorable Representative Stone from East Hartford, the 9th District.

REP. STONE: (9TH)

Thank you, Madam Speaker. It's good to see you on

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the Dias. I move acceptance of the Joint Committee's Favorable Report and passage of the bill.

DEPUTY SPEAKER CURREY:

The question before us is on acceptance and passage. Please proceed, sir.

REP. STONE: (9TH)

Yes, thank you, Madam Speaker. This bill is a relatively simple proposal. It is in response to a Supreme Court decision in a case entitled State vs. Courchesne in which the Supreme Court rejected our common law principle of the plain meaning rule for statutory interpretation.

Under common law, the plain meaning rule would prohibit the use of intrinsic evidence or outside evidence, where interpreting a statute, where the text of the statute itself is plain and unambiguous and does not yield to absurd or unworkable results.

The Supreme Court, in the decision, in the Courchesne decision, decided that even though the statute in that case was plain and unambiguous on its face, that they would still look beyond the statute to discern or attempt to discern what might have been, at least in their mind, the actual intent of the Legislature.

Madam Speaker, I move adoption.

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DEPUTY SPEAKER CURREY:

The question before us is on passage of the bill.
Would you care to comment on the bill before us?

Representative Farr of the 19th.

REP. FARR: (19TH)

Thank you, Madam Speaker. Madam Speaker, this is, indeed, an important bill before us today. Representative Stone, I think, correctly identified what we're attempting to do and that is to restore the law in Connecticut to what it was before the recent Supreme Court case. And that law was that the plain meaning of the statute is what actually controls. What the majority in that law -- excuse me, in that recent case said was that you could trump the plain language of the statute by looking at the legislative intent. The danger with that is the fact that in order to determine legislative intent, the courts go back, they read the transcripts of the hearings, they read the transcripts of what is said on this House, in this body. And quite frankly, anyone whose been here for any length of time, knows how often it is that a bill is brought out and it's mis-explained. An amendment is brought out, it's mis-explained. We've seen that over and over again.

No one in this body jumps to their feet and takes an exception and demands a correction so that the record

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will reflect what we intend because we rely upon the language of the act that's before us. And we depend upon the court also relying upon that plain language.

What the court did in the Courchesne case is quite extraordinary. What they said was that we had passed a statute concerning the imposition of the death penalty and they said despite the plain language of that statute, and they interpreted the plain language as saying that an individual who committed two crimes could be subject to the death penalty if he did both crimes in a heinous fashion, if he committed both murders, rather, in a heinous fashion.

The majority in that case then turned around and said well, even though the statute is clear and unambiguous, we're going to look at the intent of the Legislature and we're going to say that you can impose the death penalty because despite what the statute says, the Legislature meant something different.

To me, that's a very, very dangerous case. The precedent here is a precedent that doesn't exist in any other jurisdiction in America. Every other state in our union looks at the plain language and the plain language is what controls.

We, as a Legislature, have a very unique and powerful function and that function is to draft and

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adopt legislation. We can make a statute say anything we want and all we have to do is draft it so that it says what we want. What the court is saying is that despite every effort we make to draft the statute and make it clear and even though it is clear, they can look behind it and say that wasn't what we intended.

The danger with this is not only does it -- the real danger with this case is it takes away the ability of everybody in our society to rely upon the plain language of our statutes. When you go to an attorney and the attorney gets a statute out and sees what the laws says, the attorney shouldn't have to go back and research the legislative intent of that statute. If the statute is clear, he ought to be able to rely upon it.

Individuals who read our statutes should be able to rely upon the clear language of the statute. And it's really up to us to make that language say what we intend. If we don't intend what the language says, we have that unique power to change the language. The courts don't write statutes. The Governor doesn't write statutes. We do it. And what we're saying by this bill is that what the statute means is what it says unless it's ambiguous.

And that's what every other state in the nation says. It's my understanding it's what every

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industrialized country in the world uses. They rely upon the plain language of the statutes.

So I think this is an important bill because it re-establishes the fact that the language of the statute we control and it's really up to us to discipline ourselves and make sure that the statute says what we intend it to mean.

And I would urge passage of the bill.

Thank you.

DEPUTY SPEAKER CURREY:

Thank you, sir. Would you care to comment further on the bill before us?

Representative Fox of the 144th.

REP. FOX: (144TH)

Thank you, Madam Speaker. Just to reiterate what Representative Farr has said, I think this is possibly one of the most important pieces of legislation we will have during the session. There is a very honest debate as to what our role is and what the role of the courts are, especially the Appellate courts. This makes it clear, I think, what our role is and what we say is important and that should play the prominent position in terms of the interpretation of the statute.

It's a very important piece of legislation and I would urge its adoption.

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DEPUTY SPEAKER CURREY:

Thank you, sir.

Representative Belden of the 113th.

REP. BELDEN: (113TH)

Thank you, Madam Speaker. Madam Speaker, I rise to support the bill before us. But I think along with that goes, perhaps, a little discussion and maybe some advanced warning.

I think the bill will add probably another volume to our state statutes over the next two or three years. Even today, earlier in the debate, I heard in one bill several times, "for legislative intent", "for legislative intent". This is what it means. If we're going to have clear language statutes, which we ought to have, then how we rely in this Chamber on getting up and putting in the debate specific points that we want to be considered by the courts, will disappear and I think that next year when we convene, everybody should have that right on the edge of their mind because if it's not said in the words before us, it's not applicable.

And in order to make sure it's in the words before us, there's going to have to be more words.

And I think we have all seen, over the years, whenever an issue comes up that's not specifically covered in the statutes, what do we do? We write

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another paragraph to cover that specifically in the statutes.

So I think it's fair warning. I think it is the duty of the Legislature, acting as the policy board of the State of Connecticut, to say what we write and what we put in the law is what the courts shall consider and I think this particular bill goes a long way in that regard.

Thank you.

DEPUTY SPEAKER CURREY:

Would you care to comment further on the bill before us? Representative Ward of the 86th.

REP. WARD: (86TH)

Thank you, Madam Speaker. Madam Speaker, I rise in support of the bill and to echo the words of some of those that spoke before me, that this is, in fact, a critical piece of legislation. Most of us that have participated in legislative debates in the past and have sometimes raised questions about not only what is meant by the bill, but what does the language say and perhaps, for myself and Representative Belden, been a bit fussy and said it's not enough to say well we want the law to mean this, we have to write it carefully so that the plain language of the bill says what we intend because, after all, that was the standard which we knew the

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courts used in examining our legislation. If we say it, and it has a common meaning in the English language, then that's the law that we passed.

I think sometimes we've been a bit sloppy in some of the writing over the last several years that people have kind of answered questions in this Chamber and said, well what we mean to say is and often it's been stated in the debate, well you can't mean to say it, you need to actually say it.

Well, the courts sort of threw us a curveball because they interpreted one of our statutes to say well, we know exactly what they said and we know what those words mean, but we don't think that's what they really meant and therefore, we'll interpret the statutes to be what we thought they really meant.

This statute that is before us, I'm sorry, this bill that is before us, which I hope becomes a law, would say that court must, in the first instance, read the language that we wrote and apply it with its regular normal meaning. If there are words of art, apply it with the usual meaning to those words of art, but in the first instance, it's what it is that we have said as long as it isn't contradicted by other language or ambiguous. When it is ambiguous, it is clearly the responsibility of the court to interpret that ambiguity

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and often the court would resort to a review of what was said as legislative history, what was said on the floor of this House of Representatives, what's said on the floor of the Senate and at times, even looking back at what was said in committee.

That won't change under this bill, but it will put us back to the standard that before the court would begin to even consider looking at what was said on the floor as to the intent, it would read the plain language. So it is both, I think, the appropriate measure as to how one interprets our statutes, and also a warning and a caution to all of us that we are putting in statute now, that we intend what it is we say.

If we spell it out in plain English, we ask the court to interpret that plain English. That then is the responsibility on all of us as we vote on bills, as we work in committee, as we work on amendments here, to write it as clearly as possible so that we know what we intend as we pass it is spelled out in the language and it's important because it's for the general public.

Whether it's a lawyer that picks up the statute, whether it's somebody who logs onto a website to try to find out how they conform to the conduct of the General Assembly as proscribed, that they can read it. If they have a basic understanding of English, a basic

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understanding of precedents that are there, they can then follow what that law is.

I'm afraid without this bill, the average person reading what is clear plain language would be left with then doing the research of legislative history and trying to guess how the court would interpret it.

So I think it is important that we say the court should, in the first instance, read what we said. If it has a plain meaning, it should apply that plain meaning and as a caution, we, as legislators, should be as clear as possible when we draft bills.

Finally, it clearly will not stop the courts from going on and interpreting. If it is ambiguous, if there is a conflict between statutes, it is appropriately the role of the court to make a determination then as to how it applies. But again, if it is ambiguous, it is -- I'm sorry, if it is unambiguous, the courts will interpret by following this law what it is that we've said.

Thank you, Madam Speaker.

DEPUTY SPEAKER CURREY:

Thank you, sir.

Representative Stone of the 9th.

REP. STONE: (9TH)

Thank you, Madam Speaker. And again, just briefly. I appreciate the comments of Representative Fox and Ward

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and others and particularly of the esteemed ranking member of the Judiciary Committee and I would only point out that it appears at least in conclusion that if we say what we mean, then we mean what we say and I think that's the message that we're trying to get across to our courts in interpreting those legislative enactments which are passed and signed into law by the Governor.

And I think it's also important to point out what this statute does not do and this is picking up on the last comment from Representative Ward. Where there is an ambiguity, or whether the language is unclear, or if the statute, in interpreting it, in relationship to other statutes, renders an absurd or unworkable result, the courts still have the ability to look at extra textual and extrinsic evidence in determining what the meaning of the statute is and how that statute should be interpreted and applied in a given case.

I thank my colleagues for their comments and I urge the Chamber to support this bill.

Thank you, Madam Speaker.

DEPUTY SPEAKER CURREY:

Would you care to comment further on the bill before us? Would you care to comment further on the bill before us?

If not, staff and guests to the Well of the House,

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the machine will be opened.

CLERK:

The House of Representatives is voting by roll call. Members to the Chamber. The House is voting by roll call. Members to the Chamber, please.

DEPUTY SPEAKER CURREY:

Have all members voted? Have all members voted? Please check the board and be sure your vote is properly cast.

If all members have voted, the machine will be locked and the Clerk will take a tally.

The Clerk will please announce the tally.

CLERK:

H. B. 5033

Total Number Voting	144
Necessary for Passage	73
Those voting Yea	144
Those voting Nay	0
Those absent and not Voting	6

DEPUTY SPEAKER CURREY:

The bill passes.

Will the Clerk please call Calendar 494.

CLERK:

On page 18, Calendar 494, Substitute for S.B. 1051,
AN ACT CONCERNING THE ESTABLISHMENT OF A LIMITED SHEET

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criteria for decision-making to ensure fair treatment, and the development of a continuum of treatment, supervision, and placement options and alternatives to incarceration.

I've also noted for this committee a recent report by the Connecticut Center for Effective Practice that was issued by the Child Health and Development Institute of Connecticut entitled, "Close to Home". Findings reveal that the best way to help youth in trouble is deeper attention to behavioral health issues and implementation of better family center treatment programs rather than the rush to expensive incarceration.

The report identifies a number of serious systems problems and service gaps in our current system. The absence of a systematic behavioral health screening for children, inadequate provider capacity to treat behaviorally disturbed children and families, ensuring state contracting mechanisms that fail to provide incentives or adequate reimbursement for using newer, more cost effective evidence based treatments, and the absence of effective service collaboration among education, mental health, child welfare, and judicial systems.

So I think that report would help you in your deliberations.

SEN. MCDONALD: Thank you very much. Any questions? Thank you for your testimony.

Next is Wes Horton, followed by Charles Bunnell. Welcome back, Mr. Horton.

WES HORTON: Thank you, Senator and Representative Lawlor. My partner here is Michael Taylor and I'm Wesley Horton, and I'm here on behalf of the Connecticut Bar Association to testify against Section 4 of H.B. 5033, which is talking about the rules of statutory construction.

Interestingly enough, exactly one month ago today was the 200th anniversary of Marberry vs. Madison which said that it is emphatically the duty of the courts to decide what the law is.

Now, I've given you written presentation on why I consider Section 4 to be unconstitutional under the Connecticut Constitution and I won't bore you with repeating it.

What it thought I would do is I would like to -- there are a number of people who I think there's -- that under the majority opinion, you basically -- it's wild and wooly and you can get away from -- the statutory language isn't very important if you can say well, you subjectively intended to something else and while I'm not taking a position that Borden was right and Zarella was wrong, because I'm not. I am saying I think some people have mischaracterized the majority opinion and I want to mention it.

On page 563 of the Courchesne opinion, Borden -- Justice Borden and the majority says first the language of the statute is what the Legislature enacted and the Governor signed. It is therefore the law. This is the majority opinion, now.

Second, the process of interpretation is, in essence, the search for the meaning of that language. In other words, the statutory language, as it applies to the facts of the case.

And third, all language has limits in the sense that we're not free to attribute to legislative language and meaning it simply will not bear.

I was thinking when I was coming over here, if I give you a good example and I was thinking of the Iraq War. And suppose you wanted to pass a statute today that said -- and your intention was that any citizens of Connecticut that were serving in the Iraq War would get a tax break, let's say and let's say that some computer gremlin substituted Vietnam for Iraq. I don't think even Borden's opinion would say it means Iraq because there's no way, if I read his last -- all language has limits in the sense we're not free to attribute to the legislative language and meaning that it simply will not bear.

The fact that somebody made a mistake and said Vietnam when they meant to say Iraq, I think all seven justices would say that's too bad, you should have read the statute and we can't do anything about that.

But suppose instead of saying Vietnam, it didn't say in the Iraq War, but it said in Iraq. And let's say somebody came back from Iraq that was serving, but was in Kuwait and didn't actually go over the boundary line into Iraq. That is where the debate is and it's really a judicial philosophy debate.

Now, the minority, I think, would say that well, you said Iraq, you didn't say the Iraq War. Iraq literally means those are boundary lines and you if don't go over the boundary line, you're not in it. Whereas, the majority, in my opinion, would say well, maybe it means a boundary line and maybe -- this is where we're saying Iraq may bear the meaning of the Iraq War. I think that's what the majority is saying.

Now, all I'm saying, for the Bar Association, is that that is a difficult problem of judicial philosophy and which is what courts are for. Now, many times you can second guess that by saying afterwards we're going to clarify what we really meant here, but that's a different thing than saying ahead of time we're binding you, even though you, with your judicial philosophy honestly think we, by saying Iraq, that means Iraq War, you're telling them ahead of time before you even pass such a statute that no, you can't do what you honestly think that language means. And that's why I say it's improper for this statute to be passed and my final remark is simply that regardless of which side -- if you're read the Courchesne decision, whichever side you think is right or wrong, I would -- I have, many times complained about certain Supreme Court decisions and I've written ones, I think are very bad, but this one, you can make a strong argument for either side, Justice Borden's side or Justice Zarella's side and this is a decision you really should be proud of the Supreme Court.

There are many Supreme Courts around the country that wouldn't even know what's going on in this discussion. I mean, this is a really interesting philosophical discussion by two -- and two very excellent ---

(INAUDIBLE-TAPE SWITCHED FROM SIDE 2B TO SIDE 3A-SOME TESTIMONY NOT RECORDED)

WES HORTON: --- themselves sorted out. In most cases it's not going to make any difference whatsoever. In fact, in Courchesne, there's many - I won't bore you with the details, but there are many points in Courchesne where you could say there are other ways you could have reached the same result.

SEN. MCDONALD: Thank you.

WES HORTON: That's all I have to say.

SEN. MCDONALD: Mr. Horton, I appreciate your testimony. As a general proposition, I think I would agree with you that it's important for the Legislature to step back and allow the judiciary to undertake its review and construction of statutes in accordance with normally accepted principles of statutory construction.

I do have to say, though, that the Courchesne decision seemed to me to be such a remarkable departure from normally accepted rules of statutory construction as to say that what the Legislature does or does not put into its statutes ultimately will not control the court's determination of the import of those statutes.

And it was a fairly broad proposition, as I read this rather lengthy decision. I've got it on my computer right now. It's a pretty astonishing proposition that the plain language of a statute is not necessarily determinative of what the statute is intended to accomplish.

WES HORTON: I understand, Senator and that's why I would urge you to read the bottom of 563 -- on the top of page 564 because I think, Senator McDonald, what you're doing is reading what Justice Zarella

says that Justice Borden is saying and not what Justice Borden is actually saying. I mean, that's why I --

SEN. MCDONALD: You've already acknowledged that Justice Zarella had a very wise and learned opinion.

WES HORTON: I did. I did. I did. Oh, I think they're both wise and learned people.

SEN. MCDONALD: Clearly then, the consequence could be that a jurist who is called upon to examine the import of the majority's decision could make reference to the dissent's opinion for understanding the context of that decision.

WES HORTON: Oh, that's true.

SEN. MCDONALD: And that is worrisome for me, as one legislator and I know that other members of this committee share that concern. It is a potentially devastating use of judicial authority to undermine the legislative purposes of this chamber and of the Legislature as a whole and I am open to suggestions by you, by the Bar Association, and by others who might be able to assist us in making sure that the scope of this decision does not go beyond your reading of the majority's opinion.

WES HORTON: First of all, it's Justice Borden. I mean, he isn't like a certain Justice I'll mention from the late 1990's whom I'd think I'd rather not put on the record right now, but seriously, it seems to me -- that's why I gave the Iraq versus Vietnam example because I can't imagine Justice Borden saying well, you said Vietnam, but you meant Iraq. I mean, I can't imagine, if I made that pitch, that there would be any chance of my winning that, which would be the extreme argument.

But if you said I can see a difference between Justice Zarella and Justice Borden if the law said Iraq and I said, well that means the Iraq War. I mean, that's a subtle distinction and I think that's what the majority in the dissent are arguing about.

You know, it's interesting, Senator McDonald, because the very next week, Chief Justice Sullivan said, "I'm not bound by the majority opinion in terms of judicial philosophy. I am bound by the result in the case, but judicial philosophy is something I have to have as a personal way. I know how I can interpret the statutes." It's hard for me to believe that Chief Justice Sullivan would say that he's not bound by somebody else's judicial philosophy if he didn't think that was a constitution question that nobody else could tell me how to think, is what it is.

But I see your problem and my view is that's why if I were arguing a case and I wanted to make sure that it said what you said, I would be careful to say, Justice Borden, I want to refer you to this paragraph starting at the bottom of 563 and I think that would be a strong argument.

SEN. MCDONALD: What is the limitation, if any, on the Legislature passing a statute explaining what its statutes are intended to accomplish and how they are intended to be read?

WES HORTON: Well, first of all, it's fine if you say it in a particular case. In other words, you pass a workers' compensation statute and you say, this statute, we intend it to be read broadly. I mean, you do things like that all the time. It's quite another thing to say, this is the way we want you to read -- this is the philosophy and the way we want you to read statutes that we haven't even thought about in the future and then you pass a statute like my Iraq example, in which you weren't thinking about rules of statutory construction at all and Justice Borden and Justice Zarella are trying to think, what does this language mean and Justice Borden can't answer that question according to what his conscience says the language means because you bound his hands ahead of time.

SEN. MCDONALD: Well, as I understand this language, and I think I do because I had a hand in drafting it, the language is intended to merely reincorporate that which we've always understood in this case that the primary goal of statutory construction is

to implement the will of the Legislature, that barring clear language, if we don't do our job, and we do not provide the clear language necessary for understanding the plain meaning of the statute, then there is, of course, rules of statutory construction that would allow for secondary, tertiary serves us to be examined for understanding whether we meant Iraq or the Iraq War in your example.

But if it is clear on the face of the statute, what is the down side from your perspective or from a constitutional perspective to the Legislature saying if we messed it up, then we should be held accountable for that error and allow us to correct it in our next session?

WES HORTON: Well, first of all, it may or may not be correctable. Also, you've got to remember, you have the power, according to the Supreme Court anyway, you have the power to clarify prior statutes. If the Supreme Court says the statute means just Iraq, you've got to go over the border line, you could say the next year, apparently, according to certain decisions. Now, our intention was to say the Iraq War, but that doesn't answer your question initially about ambiguity.

My view is there is -- the word "ambiguity" is ambiguous. I hate to say that. I mean, seriously. There's a distinction between -- that's what so subtle about this decision. Saying something's plain is not -- doesn't really answer the question and that's why I used my Iraq example. If you say served in Iraq, literally that means within the boundaries of the State of Iraq. It's not ambiguous according to Judge Zarella's theory it wouldn't be. It's not ambiguous. You said Iraq. You didn't say the Iraq War.

And yet, all words -- whenever you pass a statute, you're thinking -- you have an idea in mind. The whole reason you use words is to get across an idea and all Justice Borden is saying is the word "Iraq" in that context, may convey the thought of the Iraq War without doing violence to the English language even though literally Iraq means the State of Iraq.

So, I don't mean to say ambiguity is ambiguous, but there is -- that is what the judicial philosophy means about what does it mean to be ambiguous? That's why it's a philosophical problem and that's what makes -- you've got to read it about 17 times before you get a headache and -- it's a difficult opinion to read, but I would urge that you allow the Justices to maybe refine it.

My guess is that they will refine it over the next -- you notice, every week it has come out, they call it the Miller Decision talking about the Courchesne rule. My guess is over the course of the next few months, as lawyers argue about you've got to refine -- I mean, I can see myself saying specifically emphasize page 563. I urge you to stay on the sidelines on this issue and not just for me, I'm speaking on behalf of the Connecticut Bar Association.

SEN. MCDONALD: It is a Bar Association position?

WES HORTON: Yes. I'm speaking on -- I have been asked by the Bar leadership to present this position, that's correct. It happens to be my personal opinion also, Senator.

SEN. MCDONALD: And I'm sure you had no hand in bringing forward your opinion?

WES HORTON: No, I will say this, Senator. I was called.

SEN. MCDONALD: Thank you.

WES HORTON: I didn't go lobbying.

SEN. MCDONALD: Representative Farr.

REP. FARR: I guess my ballot, as a member of the Bar Association got lost in the mail.

WES HORTON: I guess, yes.

REP. FARR: When was the vote taken?

WES HORTON: I believe the way this committee works, is the Bar leadership heard about it rather like last

week. They have a -- seriously, they have a provision in their bylaws for when they have to do something quickly and the Bar leadership basically e-mails around to each other and says what do you want to do and then --

REP. FARR: I was under the impression we've had positions by committees of the Bar --

WES HORTON: Well, this is by the leadership.

REP. FARR: No, no. I understand that. Let me finish the question. Committees of the Bar and they have to take a formal position and it's my understanding that the House of Delegates or something usually acts on those requests for formal positions. I don't know when you say the "leadership" exactly how many people we're dealing with. It is this the entire delegates to the Bar Association? You're talking about the --

WES HORTON: You're getting -- all I know I was -- I'm not Bar leadership. I'm the head of the Ethics Committee, but that doesn't count here. I'm just a member myself. I was asked by the Bar leadership to present this -- my understanding is the rules of the Bar Association provide that when -- it's too fast, things are moving too fast, that the Bar leadership can take the position on behalf of the Bar Association. That's my understanding.

REP. FARR: Okay.

WES HORTON: That's all I can say. I don't know more.

REP. FARR: I --

WES HORTON: I'm not being a leader. I was --

REP. FARR: I was just sort of surprised that somebody -- I don't recall a case where somebody has come up and represented the Bar in a position that hasn't been more widely debated and discussed by the Bar.

WES HORTON: I can't explain.

REP. FARR: Let me ask you this. The present statute

says, "in the construction of the statute words and phrases shall be construed according to commonly approved usage of the language and technical words and phrases as have acquired particular and appropriate meaning of the law shall be construed and understood accordingly." And that's the Connecticut General Statutes as they exist today. Are you telling me that that's unconstitutional?

WES HORTON: No. --

REP. FARR: -- before the Legislature to tell the courts how to interpret our words when we've been, in fact, doing that for -- that statute goes back, I believe to before --

WES HORTON: No, because that's based -- well, first of all, the separation of powers article is Article Two and there is an acquiescence provision. In other words, if basically what the statute -- and it has to do with lots of procedural rules that the Legislature passes that are mirrored in the Practice Book.

In other words, if the courts are doing the same thing as the statute says, it is considered acquiescence and there's not constitutional question. So I mean, it's clear that that's what the courts are doing now is basically in accordance with what they've been doing for 200 years in accordance with 1-1. The problem here, of course, is if this statute passes, then what you're doing is telling them that they can't do what a majority of the court, five to two decision is saying that's what we're going to do. So, I mean, I can't conceive of the Supreme Court now or any other time saying oh, don't pay any attention the --

SEN. MCDONALD: You understand what we're trying to do then.

WES HORTON: Well, --

REP. FARR: But I don't understand if you're saying that we can't tell them to use the common usage or that we shouldn't -- I don't understand how you can say take that position and say that we can tell them

how that words will have common -- construed, according to common usage. Can't they then tomorrow say, well we don't care about the common usage, we're going to use some other usage of that word?

WES HORTON: Well, --

REP. FARR: Then in violation of our statute even though the statute said this isn't the way to --

WES HORTON: Well, first of all, Representative Farr, there are -- there's certainly -- it's certainly not inconsistent with the statute in my view to use a specialized meaning if a specialize meaning is clear. It should be used in a particular situation.

Secondly, my point is that 1-1 is consistent with what the Supreme Court does --

REP. FARR: Today.

WES HORTON: Well, that's true, but there's no -- I can't conceive -- let me put it this way. I mean, there are serious issues -- I don't consider 1-1 to be a controversial issue that says you're supposed to consider the dictionary meaning of words and you're supposed to consider its common meanings. I don't see that there's likely ever to be a problem, a conflict between the Legislature and the Supreme Court on that subject.

REP. FARR: Well, let me just say, the problem I have with the Supreme Court case is the multiple problems. But one of the problems is that it's pretty clear that the Legislature had no intent in adopting that particular statute to deal with the issue that was before the court. So, for the court to come out and say this was the intent, to me, is just kind of nonsense. It's pretty clear nobody ever really thought of this issue. There's no record that shows that the Legislature had any great discussion about whether you had to have --

WES HORTON: Representative Farr, you can solve that problem easily within the Constitution, just by passing a clarifying statute. You do that every year. On the particular case, I don't have a

problem with that under current language.

REP. FARR: But the problem that this leads us to is that as I understand it, the court now, they're saying despite something being clear on its face, it is no imperative that everybody understand what the Legislature meant and as a member of this legislative body, I have to tell you that in the vast majority of cases, we are not of one mind. When we passed the bill changing the death penalty last year, and that bill had provisions in it that limited the death penalty and broadened the death penalty and it passed and some members who put amendments out there did it because they didn't support the death penalty. Other people voted for the bill because they liked the broadening of it, but there was no mind, there was no intent of the Legislature, a common mind in the adoption of that bill.

And so when the courts look for the mind of the Legislature in acting, it, in most cases, doesn't exist. I mean, we all motivated by different reasons, but -- not that we're individually mindless, but as a group, there is no group --

WES HORTON: There's no (inaudible) intent in here today?

REP. FARR: There's no group intent in passing most of the --

WES HORTON: But --

REP. FARR: But more importantly, the ability of the public and of the Bar to rely upon plain language of a statute is in jeopardy here and I don't know how we now, each of us has to have a set of the statutes and a set of the records of all the public hearings and all of the testimony and of the floor debates on every bill in order to advise clients of what a bill means when it's plain on space. That disturbs me as much as anything.

WES HORTON: The issue of your question, it seems to me, is I think the word "plain language" is a bad use of the word "plain". My view is, the question is

the difference between literal language -- that's why I go back to the Iraq example. In other words, just because something literally says something, that doesn't mean it's plain. To my mind, my example of Iraq versus the Iraq War, literally it means the boundaries of Iraq, but I don't know why a judicial -- somebody using a judicial philosophy that's legitimate can't say that when you said Iraq, your group meaning was oh, the Iraq War. We didn't literally mean Iraq. In other words, you don't -- I agree with you, Representative Farr, that this can't be wide open. As I say, you can't say Iraq means Vietnam. In my opinion, Justice Borden agrees with that. It's a much more subtle argument than that in my view and I think Justice Borden, in his majority opinion, has limited it so that the issue you're talking about isn't going to come up and, in fact, in every case since Courchesne, it's come up a half a dozen times since Courchesne. There's no difference in the result. I mean, all you get is a concurring opinion by the Chief Justice or Justice Zarella we reach the same result, but we don't like Courchesne. There's no -- it's a very unusual case and even Courchesne, you could make an argument that it wouldn't have made any difference in the result.

That's all I can say, Representative Farr.

SEN. MCDONALD: Thank you. Representative Hamm.

REP. HAMM: We overrule Supreme Court decision all of the time if we think they got it wrong. So I'm interested in your testimony that we are somehow flying in the face of separation of powers.

I think I speak for a number of my colleagues who think that the Courchesne decision has rendered the entire legislative branch pretty irrelevant and everything is now open to judicial interpretation and I'm not getting a lot of comfort with you're saying trust the people who decided you were irrelevant and they're going to work it out and eventually you're going to be relevant again. I mean, express language, on its face, should speak for itself.

So, talk to me about the separation of power issue again because I think we ought to fix it fast.

WES HORTON: Okay. First of all, when you say you correct Supreme Court decision, usually that has to do with a particular substantive issue, not with a general judicial philosophy. I mean, usually you come in -- like for example, if you say, as Representative Farr said, you've got the Courchesne case wrong because we didn't have the intent that you said we had.

I mean, I understand, you do that all the time.

REP. HAMM: But we could -- what is to prevent us from making a decision that what they got wrong was their ability and their interpretation of statutory interpretation?

WES HORTON: Because it seems to me that is the essence of the judicial process. That's why I cited Marberry versus Madison at the beginning. In other words, it seems to me -- it's sort of like, Representative Hamm, you passed a statute that says -- I'm sorry, I don't know whose a republican and whose a democrat. But whichever one you are, you've got to think like the other party thinks.

I'm sorry -- I mean, I don't mean to be facetious about it. I mean, that is a statute that's asking somebody to think in a particular philosophical way. You see, Justice Borden isn't saying, in my opinion, that we really don't care what you said, we're trying to -- we always try to go behind what you said to see what you were collectively thinking. He's not saying that at all. That's why I would urge you, Representative Hamm, rather than -- to actually read the part of the opinion I was referring to at the bottom of page 563 and the top of page 564 because I think it's really a very narrow opinion by Justice Borden in which he --- that's why I like my -- and maybe the example isn't persuasive to you, but I like the Iraq example because the Iraq example is you're not -- literally, it's a difference to say a statute is plain and to say it literally means something.

In my view, Representative Hamm, there's a difference between saying the statute is clear and saying the statute literally means this. I think there's a difference between those two statements and I think what people are doing is putting them together. Something can literally say something without, in my view, gleaming that that obviously is what it means. That's my point.

REP. HAMM: I understand your point. I just am on record as not agreeing with you.

SEN. MCDONALD: Okay, thank you very much and I suspect that this is a debate that's not going to end here. The committee will have a lively one, too, I'm sure.

Thank you very much for --

WES HORTON: Thank you for giving me so much time to --

SEN. MCDONALD: Thank you. Next is Charles Bunnell, followed by Ellen Scalettar.

CHARLES BUNNELL: Good afternoon, Senator McDonald, and members of the Judiciary Committee.

I am Chuck Bunnell, Chief of Staff for Government and External Affairs of the Mohegan Tribe. On behalf of the Mohegan Tribe, I appreciate the opportunity to testify in support of committee H.B. 6129, AN ACT CONCERNING MINORS IN CLASS III GAMING FACILITIES. I'd also like to thank Representative Kevin Ryan of Montville who testified earlier today and the other sponsors from our region that are working with the Mohegan Tribe in partnership to protect the public safety of our region.

The Mohegan Tribe is proud of its commitment to being a good neighbor and an active partner in making Connecticut a better place to live. As the owner and operator of the Mohegan Sun, we take very seriously our obligation to protect the thousands of people who visit and work at the casino.

As part of that effort, we have established one of the most comprehensive security systems in the

letters go back for wrong addresses. Perhaps phone calls are made and maybe families are working and they don't get in touch with them.

But the home visit is really the only thing that can assess what is going on in that home that is keeping that kid from school.

It could be a lack of connectivity to school. It could be undiagnosed special ed needs. It could be family problems. I think it comes from a myriad of issues and that's why this bill asks for school-based truancy prevention.

The intervention piece looks at doing community collaborations. These ideas have come from programs we've research across the country. Nationwide successful truancy programs have collaborations with law enforcement, with their child welfare, with judicial departments. They have parents and students on these collaborations. They have mentoring programs. And they require home visits from the schools to these kids' homes.

So I would just say that the pieces of this bill have been researched. They do reflect nationwide practice and we urge you to support raised S.B. 1056.

And I appreciate you hearing our testimony. I can answer any questions that you might have.

SEN. MCDONALD: Any questions? Thank you very much.

STACY VIOLANTE-COTE: Thank you.

SEN. MCDONALD: Next is Maureen Knight-Price.

UNIDENTIFIED SPEAKER FROM THE AUDIENCE: Not here.

SEN. MCDONALD: Joanne Covey. Okay. Raphie. Oh, there's Raphie, followed by May Terry. No. Raphie's right on time.

RAPHAEL PODOLSKY: Senator McDonald, Representative HB 6460 Lawlor, and members of the committee, my name is HB 5259 HB 5031 Raphael Podolsky. I'm a lawyer with the Legal HB 5033

Assistance Research Center.

I'm really here to testify on three bills that deal with family law. Those bills are H.B. 6460, H.B. 5259, and H.B. 5031. And I mainly want to express to you the parts of those bills that are of concern to us, that in a sense, we hope you will not do.

H.B. 6460 deals with child support. There are two parts I want to call your attention to. Section 3 has the provision that the committee chose not to move forward last year. Maybe it was two years ago in a different bill. It says that if the rights of a parent -- the parental rights are terminated of a parent, then that parent's going to have to keep on paying child support until the child's adopted.

Given what we know about the framework of the adoption system and the timing, that could be a relatively short period of time or it could be 17-1/2 years. A child may never be adopted.

To me, first of all it's contrary to the concept of terminating parental rights, which is that you no longer have any connection with the child. Second, I think it's just plain mean spirited having taken away a person's child, you're now going to say they're going to support the child anyway.

And third, is actually counterproductive because it will really discourage voluntary terminations and the system works, in part, with parents who know they can't take care of a kid being willing to give the child up and if you're going to tell that parent you give your child up, you're going to pay child support for 18 years. People aren't going to want to do that.

The second thing in the bill I would ask you to take a closer look at is that it has a provision requiring mutual notification of changes in income of more than 10%. The first thing is the normal number we've been using in recent years because the Child Support Guidelines is 15%, but that really is not to me the real problem. I think that it raises more problems than it solves. Because what you're really saying is you want parents to stay in touch

And finally, I'll be very brief. The third bill is H.B. 5031, which deals with sanctions for noncompliance with court orders. It apparently attempts to codify this primarily in the visitation context. To the extent that it's just a codification, it's quite unnecessary and any time you leave something out of a codification, it's not clear what the meaning of leaving it out is.

The second thing is there's a tone that bothers me and the tone is that while it lists these kinds of quasi-punitive things, it fails to list the most obvious things like ordering mediation or counseling or things that will be designed to encourage sort of a consensual resolution.

So I have a feeling that there's a sense here that's trying to use the statute to push courts to be punitive when there's problems with visitation of maybe custody rather than finding other solutions. And to that extent, it's a bad idea.

So I would urge you to take no action on that bill.

Thank you. I could say something about Courchesne, HB 5033 but I think I'm not going to.

REP. FARR: Why not?

RAPHAEL PODOLSKY: Well, I'm sitting there reading it and the more you get into it, the harder it comes to figure out what the differences are between the plain meaning rule and the non-plain meaning rule because so much of it is semantic.

When I first read it, I felt that -- while I have doubts that you could do a bill that overturns it, I thought it was really a foolish decision because it throws even the plaintiff's thing open to legislative history and those of us who have been around this legislative history process for a while, know that what is said on the floor may or may not bear any resemblance to what's actually in the bill.

But --

SEN. MCDONALD: Say it isn't so.

RAPHAEL PODOLSKY: But reading the decision over again, I start to see how it doesn't -- it's not quite -- it's more -- the decision itself is more ambiguous because the plain meaning rule itself is ambiguous. I've always understood the plain meaning rule not to preclude using outside sources to argue that the language in the statute is, in fact, ambiguous. And that may include showing the context of how the statute got adopted or legislative purpose is meaning that it's ambiguous. So ambiguity is a threshold issue, but it's -- I think the court, in some ways, almost misconstrues the plain meaning rule to make it more exaggerated than it really is.

So, I finally decided that I didn't -- that it was perhaps a little bit more gray than I originally thought the situation was.

And so I answered the question because you asked me the question. I had decided not to say anything about it.

SEN. MCDONALD: Thank you. Representative Lawlor.

REP. LAWLOR: Just on that last point, we can apply the plain meaning rule to trying to figure out the meaning of Supreme Court decisions. As I understand it, this particular one, the Courchesne one, if you were a member of the Supreme Court who favors the death penalty, you voted to overturn it in this case and if you're a member of the Supreme Court who is opposed to the death penalty, you voted to uphold it in this case. So I wonder if we can apply the plain meaning rule to an interpretation of what they were trying to do with that decision as it relates to the death penalty.

So if you're for it, you should be against it and if you're against it, you should be for it.

RAPHAEL PODOLSKY: Well, see --

SEN. MCDONALD: You could be legislators.

RAPHAEL PODOLSKY: See, I also think that it's clear

from the decision that the language -- absolutely clear from the decision that the language of the statute is ambiguous. I mean, it obviously lends itself to two very different meanings and therefore, following the plain language, the plain meaning rule, you would, in fact, apply non-text standards because in order to figure out what the statute actually means, you need to look at its history and its context and all these other things.

So, to me it's strange that they would use this decision as a takeoff point for interpreting the plain meaning rule because the plain meaning rule doesn't appear to apply in this particular case.

REP. FARR: The interesting thing about that is they both -- that the statute was plain.

RAPHAEL PODOLSKY: It was plain, but I don't know if means something different.

REP. FARR: And it also -- talk about legislative intent, it was plain to me that the Legislature never thought of the concept. So there was no intent to do it one way or the other. We just -- it never occurred to us what the problem was.

RAPHAEL PODOLSKY: Right. And so what you're really doing is you're trying to figure out with words that are ambiguous in their application to the facts of the case. What is the most sensible, logical, consistent interpretation, which it seems to me -- it's some -- well, in a certain peculiar way, the majority opinion comes down more on the side of that approach, which therefore I think was the right approach, but I have a lot of problem with the way they express it because they seem, at least half the time, to be saying even though the language is crystal clear, we can turn it around. But then on the other hand, they say but we're going to always assume that the primary (inaudible-coughing in the background) the language itself.

So, it really becomes very hard to pin down exactly what -- I mean, I agree with you, to pin down exactly what the decision means.

REP. FARR: I don't think it was a good factual case for them to make this argument.

RAPHAEL PODOLSKY: It was not -- I know there's no way that you could argue that language. It seems to me was unambiguous. It was quite ambiguous and obviously difficult to figure out what was the most plausible way and to have in front of them two sort of logical alternative interpretations and they made a choice.

REP. FARR: I also point out that --

RAPHAEL PODOLSKY: Including the people who are for the death penalty.

REP. FARR: What we're not talking about should be part of the legislative intent on a bill to overturn the bill on plain language.

SEN. MCDONALD: Okay.

REP. LAWLOR: And can I chime in on one more thing?

SEN. MCDONALD: Sure.

REP. LAWLOR: It's especially interesting in light of the fact this is happening in the interpretation of a criminal statute where you would think there would be less, not to mention a case where the death penalty was actually imposed and we're talking about language relating to the imposition of the death penalty. So if there was ever going to be a situation where you wouldn't want to dig beneath the actual language of the statute, this would be it and they did it anyway, which is like unbelievable when you think about it.

RAPHAEL PODOLSKY: Well, except they also talk about the rule of lenity which is not something I was actually familiar with until I read the case, but in which you suggested, it seemed like the various judges were kind of the unnatural side that you would expect them to be on because especially if you're playing around the meaning of the statute, you would normally then not want to impose the death penalty as a result.

REP. LAWLOR: There you go.

SEN. MCDONALD: Thank you very much.

RAPHAEL PODOLSKY: Thank you. As I said, I really -- my primary reason for being here are the three family bills.

Thank you.

SEN. MCDONALD: I appreciate the side discussion between yourself and my esteemed colleagues.

May Terry. Al Turco. Beresford Wilson. Patience is a virtue, sir.

BERESFORD WILSON: That's what they say.

SEN. MCDONALD: Good evening.

BERESFORD WILSON: Good evening. Thank you for your perseverance and your audience.

Good evening to esteemed members of the Judiciary Committee. I'm here to support S.B. 1056, H.B. 6685, and H.B. 6686.

Excuse me, let me introduce myself. My name is Beresford Wilson. I'm a family advocate for a parent support group advocacy organization called AFCAMP, which you heard of earlier today, through earlier testimony.

And I'm also a family advocate for The Center for Children's Advocacy at UConn Law School and I'm an advocate for children's special needs. On the other hand, I'm an advocate for children and families involved with juvenile justice.

The reason I'm supporting these bills is because there's a very important component in one of them, H.B. 6686 speaking about cultural competency and I see that Representative Green had a lot of comments and questions about that component.

And I think that's very important and essential to all these bills that we're talking about. If you

002815



STATE OF CONNECTICUT
JUDICIAL BRANCH

EXTERNAL AFFAIRS DIVISION

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Testimony of Stephen N. Ment
Judiciary Committee Public Hearing
March 31, 2003

House Bill 5026, An Act Authorizing The Emancipation
Of A Youth In Crisis

Thank you for the opportunity to submit written testimony on behalf of the
Judicial Branch in regards to House Bill 5026, An Act Authorizing the Emancipation of
a Youth in Crisis.

The Judicial Branch respectfully suggests that the following language be added
to the bill:

1. In line 33, after "after", insert "a".
2. In line 33, after "hearing", insert "brought pursuant to section 46b-150 of the
general statutes".

The addition of this language will ensure that all parties receive adequate notice
of the emancipation proceeding.

Thank you for the opportunity to submit written testimony.

002817

March 31, 2003
Judiciary Committee
Testimony

Re: HB No. 5033 An Act Concerning the Statutory Short Form Power of Attorney and the Rules of Statutory Interpretation (Section 4)

From: Alfred A. Turco, Esq.
561 Mountain Road
West Hartford, CT 06117

My name is Al Turco. I am a practicing attorney - a partner in the law firm of Pepe & Hazard, LLP. I am also an elected member of the West Hartford Town Council, having served a total of five terms.

As a practicing attorney, I am of the opinion that the law and public policy is best served if there is certainty in reliance on the plain meaning of the text of the statutes that govern our lives, including our daily transactions.

As a Town Councilor responsible for legislation at the local level, I am of the opinion that our laws should be administered as written, absent ambiguity.

For these reasons, I support Section 4, HB No. 5033, which seeks to restore plain meaning to the reading of Connecticut statutes and to reserve extra-textual evidence for extraordinary circumstances.

Thank you.

002818

Gail LaFleche

Bill #5033

March 31, 2003

My name is Gail LaFleche and I contacted T.R. Rowe recently about making these changes to Power of Attorney laws because of my family's experience.

In 1995, my father was diagnosed with early onset Alzheimer's disease. His illness quickly progressed, and he lost his short and long term memory, reasoning skills, and many other critical abilities. After a while, he did not recognize close family members, could not drive a car, frequently wandered out of his house, and required 24-hour supervision.

In 1997, his sister had him sign a Power of Attorney and did not tell my mother or me about it. Over a period of time, she used it to transfer his shares in a real estate property that they owned jointly to her, her husband, and other members of her immediate family. The amount transferred was worth several hundreds of thousands of dollars. My father had never transferred any of his shares to her prior to his illness. In addition, she used the Power of Attorney to try to become his Guardian, giving her even greater access to his finances.

As a result of my aunt's actions, my family has been in litigation for over four years, and the litigation has cost my parents over \$250,000. We had to hire a medical expert and go through depositions. The attorney who executed the POA said in his deposition that my father was incompetent when he signed it but the damage had already been done. While my aunt can no longer use her POA, it will take additional litigation to reverse the transactions she initiated. The cost of caring for a person with Alzheimer's is enormous and my father could be ill for many more years, since he is only 69. Therefore, the result of the transferred assets, as well as the legal expenses, has made the impact of his disease even more severe to my family.

While these events occurred in another state, I believe the same events could occur in CT. I have read about many other families who have had similar experiences when a caregiver or relative took advantage of having a POA from a person who has dementia. Having additional controls in place when an individual signs a POA could protect others from experiencing the same events that happened to my family. Perhaps if this law had been passed when my aunt tried to get my father to sign his POA, the attorney would have thought twice before executing it. In addition, the law could protect attorneys from being sued because a mentally incompetent individual signed a Power of Attorney.

With more and more people being diagnosed with Alzheimer's and other diseases that cause dementia, it is critical that we protect them and their families.

CBA

CONNECTICUT BAR ASSOCIATION

Testimony of Wesley W. Horton
on behalf of the Connecticut Bar Association Opposing
Section 4 of House Bill No. 5033, An Act Concerning
the Statutory Short Form Power of Attorney and the Rules of
Statutory Interpretation
Judiciary Committee
March 31, 2003

Senator McDonald, Representative Lawlor and members of the Judiciary Committee,
thank you for the opportunity to appear before the committee to comment on House Bill No.
5033, An Act Concerning the Statutory Short Form Power of Attorney and the Rules of Statutory
Interpretation.

My name is Wes Horton and I am speaking this afternoon on behalf of the Connecticut
Bar Association. **The CBA is opposed to Section 4 of House Bill 5033 and respectfully**
requests that the Judiciary Committee reject the provision, which states:

The meaning of a statute shall be ascertained from the text of the statute itself and, if the
meaning of such text is plain and unambiguous and does not yield absurd or unworkable
results, extratextual evidence of the meaning of the statute shall not be considered.

I am an attorney in private practice in Hartford and a principal in the firm Horton Shields
& Cormier, where I concentrate mostly in appellate matters. I am chairman of the CBA's
Committee on Professional Ethics. Each year I present a seminar at the CBA's annual meeting
concerning recent decisions of the Connecticut Supreme and Appellate Courts. I am also the
author of an annual article concerning recent important decisions of the courts in the CBA's
scholarly publication for members, the Connecticut Bar Journal. I also am a historian of the
courts in Connecticut.

The CBA, which consists of a large number of attorneys in private practice and many who work for the government, as well as judges, is very interested in proposed legislation that concerns statutory interpretation, separation of powers between the three branches of government and judicial independence. It seems clear that Section 4 is a response to the Connecticut Supreme Court's recent ruling in State v. Courchesne, 262 Conn. 537 (2003), where the court decided no longer to follow the plain meaning rule. The CBA urges the Judiciary Committee to reject this bill for reasons of policy and also because it violates the separation of powers article of the Connecticut Constitution (Article Second).

In Courchesne, the court interpreted the meaning of the state's capital felony statute, Conn. Gen. Stat. § 53a-54b(8). The defendant in the case had stabbed a pregnant woman to death. Her child was later delivered and lived for 42 days, dying from a deprivation of oxygen to the brain. The defendant was convicted of capital felony for the murder of two persons in the course of a single transaction. The court held that the state, in order to prove the aggravating factor that the defendant committed the offense in an especially heinous, cruel or depraved manner, need only do so with respect to one of the murder victims.

In its analysis, a 5-2 majority of the court applied many of the ordinary principles of statutory construction, long set forth and recognized by the court in its prior decisions. In doing so, the court seeks to determine the meaning of the statutory language as applied to the facts of the case, including whether the language actually does apply. The court looks to the words of the statute itself, the legislative history and circumstances surrounding its enactment, the legislative policy it was designed to implement, and its relationship to existing legislation and common law principles governing the same general subject matter.

What is unique about the majority decision in Courchesne, is that the court, in its analysis, did not limit itself to the plain meaning rule when construing the language of the statute. The rule holds that where the statutory language is plain and unambiguous, the court must stop its interpretive process; there is no need to refer to any extratextual source for its meaning. In Courchesne, the court employed a “purposive and contextual” method of interpreting a statute. The court relied, as it had on many occasions prior to the decision in Courchesne, on sources beyond the specific text of the statute at issue to determine the meaning of the language as intended by the legislature. However, the court in Courchesne was clear to point out that the language of a statute is the most important factor in determining the meaning of a statute.

At its core, section 4 of H.B. 5033 is an attempt to intercede in and regulate a matter of judicial philosophy that has been at the center of a vigorous debate within the judiciary since the founding of the nation. Some of the greatest minds ever to sit on the bench, such as Felix Frankfurter and Learned Hand, have endlessly debated how best to determine what the law is. In all events, however, there can be no question that determining what the law is is the essence of the judicial function. As a result, the proposed bill clearly implicates the separation of powers, as the Legislature would be infringing on a judicial duty, indeed, the defining judicial duty. Article Second of the Connecticut Constitution, which explicitly establishes the separation of powers, states:

Distribution of Powers. Delegation of regulatory authority. Disapproval of administrative regulations. 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.

This provision has been discussed most recently in State v. McCahill, 261 Conn. 492, 510 (2002) ("As we previously have noted, one of the greatest achievements of the 1818 constitution was the separation of the powers of government into three departments"), citing Adams v. Rubinow, 157 Conn. 150, 153 (1968).

The proposed bill violates the separation of powers because it dictates how the judiciary should read and interpret statutes. Put another way, the Legislature would be influencing the means by which the court is to carry out its primary function of declaring what the law is, which would clearly be an infringement of that power. The judicial function of declaring what the law is was most famously established in the historic case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall for the U.S. Supreme Court established that "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177. This sentiment was echoed in the debates of the 1818 Connecticut Constitutional Convention, where the independence of the judiciary was one of the most important factors in the adoption of Connecticut's first constitution. Wesley W. Horton, "Annotated Debates of the 1818 Constitutional Convention," 65 Connecticut Bar Journal SI 1, 32 (Jan. 1991); Wesley W. Horton, The Connecticut State Constitution (Greenwood Press 1993), pp. 8-9. In fact, the Marbury rule was not first announced in America by Chief Justice Marshall. It was announced by judges in Connecticut 18 years earlier. Symsbury Case, 1 Kirby 444, 447 (1785). Subsequently, the Connecticut Supreme Court ruled that the power to declare what the law is or has been is a judicial function. Atwood v. Buckingham, 78 Conn. 423, 428 (1905) ("It is the province of the legislative department to define rights and prescribe remedies: *of the judicial to construe legislative enactments*, determine the rights secured thereby, and apply the remedies prescribed") (emphasis added); Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 144-45

(1930). Just last year the Supreme Court, in a unanimous *en banc* opinion, reaffirmed its long-standing position that a statute is unconstitutional under Article 2 if "it presents a significant interference with the orderly functioning of the Superior Court's judicial role." State v. McCahill, 261 Conn. 492, 506 (2002). While McCahill specifically concerns the Superior Court's powers, Article Second applies in its full force to all the constitutional courts. It is clear that this statute interferes with the judicial role to declare what the law is.

The bill also should be rejected on public policy grounds. A judge's judicial philosophy is entitled to as much respect as a legislator's political philosophy. No one would dream of passing a statute requiring legislators to vote according to a certain political philosophy. Nor should judges be required to vote according to a certain judicial philosophy. In fact, Chief Justice Sullivan and Justice Zarella have, correctly in our view, stated that they do not consider themselves bound by the judicial philosophy stated by the majority in Courchesne, although they do consider themselves bound by the substantive result in that case. If a majority of the justices cannot impose their judicial philosophy on the minority, surely the Legislature should not attempt to impose its judicial philosophy on either the majority or on the minority.¹

¹/ The CBA does not take a position on whether the judicial philosophy of the majority or the judicial philosophy of the dissent is the correct one. The CBA's sole position is that judicial philosophy is for the judges to decide.

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Accordingly, on behalf of the Connecticut Bar Association, I respectfully request that the Judiciary Committee reject section 4 of House Bill No. 5033, An Act Concerning the Statutory Short Form Power of Attorney and the Rules of Statutory Interpretation.

Respectfully submitted:



Wesley W. Horton

On behalf of the Connecticut Bar Association

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Legal Assistance Resource Center
❖ of Connecticut, Inc. ❖

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H.B. 5259 -- Accounting for child support payments
Judiciary Committee Public Hearing -- March 31, 2003

Recommended Committee action: **REJECTION OF THE BILL**

This bill would require custodial parents to "submit an accounting" to the court with respect to the expenditure of child support. This requirement would be overwhelmingly burdensome to custodial parents, compel record-keeping that almost no custodial parents now keep, provide no significant useful information, and border on the punitive. The bill should be rejected.

The bill is based on the false assumption that child support payments are solely for the support of the child and not for the support of the household of which the child is a part. In a world in which every two-year-old has his or her own bank account, individualized accounting might at least theoretically (but not practically) be possible. But the expenses of all members of a household are inextricably woven together, and families do not itemize or apportion expenditures on a per person basis. Indeed, the Child Support Guidelines implicitly assume that the general income of both parents is in part being applied to the children. Should the rent and utilities be allocated? How about the television set or the ping-pong table down the basement? Does it depend on how many hours each member of the family watches or plays? In addition, the accounting proposal ignores the fact that general improvements in the life of the household also benefit the child. If the custodial parent buys a larger house with a bigger back yard for the kids to play in, is that purchase for the benefit of the child or of the parent? If the custodial parent takes a vacation with the child, should the child's share be allocated? But what about the fact that the child cannot take the vacation alone and that, if the custodial parent does not go, the child does not get the vacation? In addition, consider the record-keeping burden. The custodial parent spends \$150 at the grocery store. How much is for the child? Must she now keep an itemized record of every item purchased so that she can allocate it not only between her child and herself but also among funding sources (i.e., child support payments and her own wages or other income sources)? And what about the large percentage of the custodial parent's own wages which go to supporting the child?

The point is that the bill makes impossible demands that even a diligent custodial parent could not accurately and thoroughly comply with in the absence of an enormous investment of time. Indeed, the time necessary for this kind of accounting would dwarf the time which people put into preparing their own income tax returns.

The bill is unworkable and should be rejected.

-- Submitted by Raphael L. Podolsky

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**STATE OF CONNECTICUT
JUDICIAL BRANCH**

EXTERNAL AFFAIRS DIVISION

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**Testimony of Stephen N. Ment
Judiciary Committee Public Hearing
March 31, 2003**

**House Bill 5259, An Act Requiring An Accounting Of
The Disbursement Of Child Support Payments**

Good afternoon. My name is Stephen Ment and I am here to testify on behalf of the Judicial Branch in regards to House Bill 5259, An Act Requiring an Accounting of the Disbursement of Child Support Payments. The Judicial Branch has concerns with this bill.

This bill would require that any order for the payment of child support include a requirement that the custodial parent or guardian receiving the payments submit an accounting of how the money is spent. The proposal does not specify the purpose of this accounting. Are certain types of expenditures permissible, while others are not? This is contrary to case law, which has long held that child support is paid for the benefit of the receiving family, not specifically for the children. Furthermore, the proposal would no doubt lead to an increase in litigation between the parties regarding expenditures listed in the accounting. These court hearings can be expected to be quite contentious, taking up substantial court time.

Finally, it should be noted that the court already has the authority to order an accounting of the support if it believes the circumstances warrant such monitoring.

Thank you for the opportunity to testify.

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Connecticut Bar Association

Testimony of Kate Haakonsen, Member, Executive Committee,
Family Law Section of the Connecticut Bar Association
Concerning House Bill No. 5259,

**AN ACT REQUIRING AN ACCOUNTING OF THE DISBURSEMENT OF CHILD
SUPPORT PAYMENTS**

Judiciary Committee

March 31, 2003

Senator McDonald, Representative Lawlor, members of the Judiciary Committee, thank you for the opportunity to comment on House Bill No. 5259, An Act Requiring an Accounting of the Disbursement of Child Support Payments. My name is Kate W. Haakonsen. I am an attorney who has practiced in the area of divorce and family law for over 24 years. I am here today to speak on behalf of the Family Law Section of the Connecticut Bar Association in opposition to House Bill 5259. The Family Law Section of the CBA consists of over 700 members who have a great interest in bills affecting family law procedures and issues concerning dissolution of marriage.

On behalf of the Family Law Section, I respectfully request that the Judiciary Committee not act on House Bill No. 5259, An Act Requiring An Accounting of the Disbursement of Child Support Payments.

House Bill 5259 would require a custodial parent or guardian receiving court-ordered child support to submit periodic accountings to the court or magistrate with respect to the use of the support payments.

The CBA Family Law Section opposes House Bill 5259 for two reasons. First, our section members see no useful purpose for imposing this requirement on support recipients. Child support in Connecticut is determined by child support guidelines required by federal law (see also, Conn. Gen. Stat. §46b-215b). The Connecticut Child Support Guidelines that courts use to establish and order child support are based on the Income Shares Model, which considers the income of both parents. The principle of the Income Shares Model is that children should receive the same proportion of the parental income as they would have received if the parents lived together. The Commission notes in the preamble to the Guidelines that "because household spending on behalf of children is intertwined with spending on behalf of adults for most expenditure categories, it is difficult to determine the exact proportion allocated to children in individual cases."

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For the payors of support, the desire for an accounting is common and is typically linked to a desire to control the use of the payments to the lifestyle of the support recipient and the mistaken expectation or desire that the funds are to be used solely for the individual expenses of the child such as shoes, clothing, activities and the like. In fact the expenses for which the support is intended include rent, mortgage payments, utilities, insurance payments, car payments, gas, food and other costs associated with maintaining a household that cannot be allocated specifically to children but which are vital to their day-to-day life.

The second reason the Family Law Section opposes House Bill 5259 is that its implementation will be difficult and expensive for both parties and the court. Many support recipients will not be able to prepare an accounting. An unreasonable amount of court time and resources will be expended in administration and litigation over the accountings. It is unduly burdensome on the majority of parents who use child support to provide a home for their children to make all of them account for their use of funds that are intended for exactly that purpose. A support payor who believes his or her children are not being cared for adequately has other remedies available rather than the auditing of the use of support payments. In these difficult fiscal times, neither single parents nor the court system can afford to take on a task of these proportions without a compelling reason to do so.

For these reasons, the Family Law Section of the Connecticut Bar Association respectfully requests that the Judiciary Committee not act on House Bill No. 5259, An Act Requiring An Accounting Of The Disbursement Of Child Support Payments.

I would be happy to answer any questions that you may have.

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DEPARTMENT OF CHILDREN AND FAMILIES
TESTIMONY
JUDICIARY COMMITTEE
MARCH 31, 2003



H.B. No. 5509 AN ACT CONCERNING THE ESTABLISHMENT OF MAKALYA'S HOUSE

The Department of Children and Families offers the following comments regarding H.B. No. 5509 AN ACT CONCERNING THE ESTABLISHMENT OF MAKALYA'S HOUSE.

While this bill would provide an important resource for young women in need of specialized services, no funding has been identified to serve this population. This bill appears to envision a variety of services more commonly found in a residential treatment facility rather than a typical DCF-licensed "group home." Start-up costs for a 6 to 8 bed "group home" could easily exceed \$500,000 with annual operating costs exceeding \$400,000, not including expensive on-site clinical and educational services.

002830

Noreen Laurinaitis
5E Queen Terrace
Southington, CT 06489
860-628-3692

Today, I would like to support Rep. Hamm and proposed House Bills No. 5509, 6567, and 6563. I believe that the way Connecticut laws are currently written and police systems organized they do not protect the health and safety of pre-adults as the death of Makayla Korpinen represents. I believe that my daughter, Alexandra Conrad also represents why today's legal, police, social service, motor vehicle and education systems do not work together. My then 16-year-old daughter left home without permission on April 13, 2002. Yes, she is still alive almost one year of existence without parental supervision. My daughter's freedom began when she used her cell phone to call Southington police and inform them she would not be returning home and would be staying with 'friends'. That phone call and the fact that my daughter was 16 years of age was sufficient information for the Southington police officer not to file a missing persons report or go and search for her. No other police or social service agent went to confirm her safety or where she would be living. To the best of my knowledge, she lives from house to house somewhere in Southington, Connecticut.

Alexandra began to label me as the worst mother in history at a very young age. When she was 11 years old, she and a friend went into her guidance counselor's office to report me for physical abuse. I was reported to the DCF, they could not substantiate her claim. This was the beginning of Alexandra's puberty and also the beginning of psychological and substance abuse problems. Since then she has been out of my control, verbally and physically, on many occasions. At age 14, she found a boyfriend, whose mother was frequently away for the weekend with her boyfriend. I was called to this friend's house one evening, where I found Alexandra passed out on the floor and barely breathing. The ER reported to me that she had a blood alcohol level of point 2, twice the legal limit. I filed a Family with Service Needs Petition. This got Alexandra an interview with a parole officer and a preview of the female juvenile detention center. A Department of Children and Family's caseworker came to the house a few times, but she was unable to get information from Alexandra's IOP program and closed the case. Alexandra continued her rages and disrespect for house rules. For example, one evening at 9pm, when I refused to make supper after she had arrived home late a box of pasta was thrown at my head.

In October of 2001, as I was being diagnosed with a serious medical condition she continued to demand that I drive her to school each day and to her workplace. She would get into my car in the morning so that I could not leave for my employment. I had to sneak out of my house in the mornings so that I would not lose my job. She was so upset with me for the lack of personal transportation to the high school, she convinced another friend, a former Miss Southington, who with her mother's permission hid her from me and police for 12 hours. Upon returning my child, the mother told me she would do this again, anytime she wanted to, that my daughter was 16 and there was nothing I could do about it. This episode prompted a Youth In Crisis Petition. She was

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I have read the proposed bills. The changes they propose represent much of what is needed in our legal and social service systems. I very much support their passage. I hope that Mayakla's house is built. If we can get the Department of Mental Health and Addictive Services to support this concept, I know there are many parents who would volunteer to build these houses. I for one would be there. Thank you for your support.

Noreen Laurinaitis
5E Queen Terrace
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002833



TESTIMONY OF CHARLES F. BUNNELL
CHIEF OF STAFF FOR GOVERNMENT AFFAIRS
THE MOHEGAN TRIBE
COMMITTEE ON JUDICIARY PUBLIC HEARING
MARCH 31, 2003

Good morning, Senator McDonald, Representative Lawlor, and members of the Judiciary Committee. I am Chuck Bunnell, Chief of Staff for Government Affairs of the Mohegan Tribe.

On behalf of the Mohegan Tribe, I appreciate the opportunity to testify in support of Committee Bill 6129 "An Act Concerning Minors in Class III Gaming Facilities."

The Mohegan Tribe is proud of its commitment to being a good neighbor and an active partner in making Connecticut a better place to live. As the owner and operator of the Mohegan Sun, we take very seriously our obligation to protect the thousands of people who visit and work at our casino.

As part of that effort, we have established one of the most comprehensive security systems in the world to monitor our facilities on a twenty-four hour basis. Our security program includes a zero-tolerance policy on minors gaining access to gaming areas or acquiring alcohol in our facility. To achieve that goal, we have a very aggressive system in place to train our staff to recognize and prevent minors from purchasing alcohol or entering the gaming floor.

Security personnel are stationed at every entrance to a gaming area. Identification screening is routinely conducted. Young people found in violation of our policy are escorted by our security from the facility.

Unfortunately, however, the most diligent efforts of our staff are sometimes not enough. Since there is no state law that prohibits their actions, some young people recognize that repeat offenders will not face prosecution of any kind.

As you know, this legislation will solve that problem by expanding Connecticut's criminal statutes to include age restrictions for accessing gaming areas. Much like the laws that are already in place to prevent minors from acquiring cigarettes or alcohol, this bill will enact penalties for those who will not abide by our on-going efforts to limit access by minors to gaming areas.

With passage of this legislation, the Mohegan Tribe is confident that young people will think twice before taking such a risk and we urge your full consideration of this proposal.

Again, I appreciate the opportunity to present testimony on the tribe's behalf and am pleased to answer any questions you may have regarding this important issue.

Thank you.

THE MOHEGAN TRIBE



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letters go back for wrong addresses. Perhaps phone calls are made and maybe families are working and they don't get in touch with them.

But the home visit is really the only thing that can assess what is going on in that home that is keeping that kid from school.

It could be a lack of connectivity to school. It could be undiagnosed special ed needs. It could be family problems. I think it comes from a myriad of issues and that's why this bill asks for school-based truancy prevention.

The intervention piece looks at doing community collaborations. These ideas have come from programs we've research across the country. Nationwide successful truancy programs have collaborations with law enforcement, with their child welfare, with judicial departments. They have parents and students on these collaborations. They have mentoring programs. And they require home visits from the schools to these kids' homes.

So I would just say that the pieces of this bill have been researched. They do reflect nationwide practice and we urge you to support raised S.B. 1056.

And I appreciate you hearing our testimony. I can answer any questions that you might have.

SEN. MCDONALD: Any questions? Thank you very much.

STACY VIOLANTE-COTE: Thank you.

SEN. MCDONALD: Next is Maureen Knight-Price.

UNIDENTIFIED SPEAKER FROM THE AUDIENCE: Not here.

SEN. MCDONALD: Joanne Covey. Okay. Raphie. Oh, there's Raphie, followed by May Terry. No. Raphie's right on time.

RAPHAEL PODOLSKY: Senator McDonald, Representative Lawlor, and members of the committee, my name is Raphael Podolsky. I'm a lawyer with the Legal

HB 6460

HB 5259 HB 5031

HB 5033

Assistance Research Center.

I'm really here to testify on three bills that deal with family law. Those bills are H.B. 6460, H.B. 5259, and H.B. 5031. And I mainly want to express to you the parts of those bills that are of concern to us, that in a sense, we hope you will not do.

H.B. 6460 deals with child support. There are two parts I want to call your attention to. Section 3 has the provision that the committee chose not to move forward last year. Maybe it was two years ago in a different bill. It says that if the rights of a parent -- the parental rights are terminated of a parent, then that parent's going to have to keep on paying child support until the child's adopted.

Given what we know about the framework of the adoption system and the timing, that could be a relatively short period of time or it could be 17-1/2 years. A child may never be adopted.

To me, first of all it's contrary to the concept of terminating parental rights, which is that you no longer have any connection with the child. Second, I think it's just plain mean spirited having taken away a person's child, you're now going to say they're going to support the child anyway.

And third, is actually counterproductive because it will really discourage voluntary terminations and the system works, in part, with parents who know they can't take care of a kid being willing to give the child up and if you're going to tell that parent you give your child up, you're going to pay child support for 18 years. People aren't going to want to do that.

The second thing in the bill I would ask you to take a closer look at is that it has a provision requiring mutual notification of changes in income of more than 10%. The first thing is the normal number we've been using in recent years because the Child Support Guidelines is 15%, but that really is not to me the real problem. I think that it raises more problems than it solves. Because what you're really saying is you want parents to stay in touch

And finally, I'll be very brief. The third bill is H.B. 5031, which deals with sanctions for noncompliance with court orders. It apparently attempts to codify this primarily in the visitation context. To the extent that it's just a codification, it's quite unnecessary and any time you leave something out of a codification, it's not clear what the meaning of leaving it out is.

The second thing is there's a tone that bothers me and the tone is that while it lists these kinds of quasi-punitive things, it fails to list the most obvious things like ordering mediation or counseling or things that will be designed to encourage sort of a consensual resolution.

So I have a feeling that there's a sense here that's trying to use the statute to push courts to be punitive when there's problems with visitation of maybe custody rather than finding other solutions. And to that extent, it's a bad idea.

So I would urge you to take no action on that bill.

Thank you. I could say something about Courchesne, HB 5033 but I think I'm not going to.

REP. FARR: Why not?

RAPHAEL PODOLSKY: Well, I'm sitting there reading it and the more you get into it, the harder it comes to figure out what the differences are between the plain meaning rule and the non-plain meaning rule because so much of it is semantic.

When I first read it, I felt that -- while I have doubts that you could do a bill that overturns it, I thought it was really a foolish decision because it throws even the plaintiff's thing open to legislative history and those of us who have been around this legislative history process for a while, know that what is said on the floor may or may not bear any resemblance to what's actually in the bill.

But --

SEN. MCDONALD: Say it isn't so.

RAPHAEL PODOLSKY: But reading the decision over again, I start to see how it doesn't -- it's not quite -- it's more -- the decision itself is more ambiguous because the plain meaning rule itself is ambiguous. I've always understood the plain meaning rule not to preclude using outside sources to argue that the language in the statute is, in fact, ambiguous. And that may include showing the context of how the statute got adopted or legislative purpose is meaning that it's ambiguous. So ambiguity is a threshold issue, but it's -- I think the court, in some ways, almost misconstrues the plain meaning rule to make it more exaggerated than it really is.

So, I finally decided that I didn't -- that it was perhaps a little bit more gray than I originally thought the situation was.

And so I answered the question because you asked me the question. I had decided not to say anything about it.

SEN. MCDONALD: Thank you. Representative Lawlor.

REP. LAWLOR: Just on that last point, we can apply the plain meaning rule to trying to figure out the meaning of Supreme Court decisions. As I understand it, this particular one, the Courchesne one, if you were a member of the Supreme Court who favors the death penalty, you voted to overturn it in this case and if you're a member of the Supreme Court who is opposed to the death penalty, you voted to uphold it in this case. So I wonder if we can apply the plain meaning rule to an interpretation of what they were trying to do with that decision as it relates to the death penalty.

So if you're for it, you should be against it and if you're against it, you should be for it.

RAPHAEL PODOLSKY: Well, see --

SEN. MCDONALD: You could be legislators.

RAPHAEL PODOLSKY: See, I also think that it's clear

from the decision that the language -- absolutely clear from the decision that the language of the statute is ambiguous. I mean, it obviously lends itself to two very different meanings and therefore, following the plain language, the plain meaning rule, you would, in fact, apply non-text standards because in order to figure out what the statute actually means, you need to look at its history and its context and all these other things.

So, to me it's strange that they would use this decision as a takeoff point for interpreting the plain meaning rule because the plain meaning rule doesn't appear to apply in this particular case.

REP. FARR: The interesting thing about that is they both -- that the statute was plain.

RAPHAEL PODOLSKY: It was plain, but I don't know if means something different.

REP. FARR: And it also -- talk about legislative intent, it was plain to me that the Legislature never thought of the concept. So there was no intent to do it one way or the other. We just -- it never occurred to us what the problem was.

RAPHAEL PODOLSKY: Right. And so what you're really doing is you're trying to figure out with words that are ambiguous in their application to the facts of the case. What is the most sensible, logical, consistent interpretation, which it seems to me -- it's some -- well, in a certain peculiar way, the majority opinion comes down more on the side of that approach, which therefore I think was the right approach, but I have a lot of problem with the way they express it because they seem, at least half the time, to be saying even though the language is crystal clear, we can turn it around. But then on the other hand, they say but we're going to always assume that the primary (inaudible-coughing in the background) the language itself.

So, it really becomes very hard to pin down exactly what -- I mean, I agree with you, to pin down exactly what the decision means.

REP. FARR: I don't think it was a good factual case for them to make this argument.

RAPHAEL PODOLSKY: It was not -- I know there's no way that you could argue that language. It seems to me was unambiguous. It was quite ambiguous and obviously difficult to figure out what was the most plausible way and to have in front of them two sort of logical alternative interpretations and they made a choice.

REP. FARR: I also point out that --

RAPHAEL PODOLSKY: Including the people who are for the death penalty.

REP. FARR: What we're not talking about should be part of the legislative intent on a bill to overturn the bill on plain language.

SEN. MCDONALD: Okay.

REP. LAWLOR: And can I chime in on one more thing?

SEN. MCDONALD: Sure.

REP. LAWLOR: It's especially interesting in light of the fact this is happening in the interpretation of a criminal statute where you would think there would be less, not to mention a case where the death penalty was actually imposed and we're talking about language relating to the imposition of the death penalty. So if there was ever going to be a situation where you wouldn't want to dig beneath the actual language of the statute, this would be it and they did it anyway, which is like unbelievable when you think about it.

RAPHAEL PODOLSKY: Well, except they also talk about the rule of lenity which is not something I was actually familiar with until I read the case, but in which you suggested, it seemed like the various judges were kind of the unnatural side that you would expect them to be on because especially if you're playing around the meaning of the statute, you would normally then not want to impose the death penalty as a result.

REP. LAWLOR: There you go.

SEN. MCDONALD: Thank you very much.

RAPHAEL PODOLSKY: Thank you. As I said, I really -- my primary reason for being here are the three family bills.

Thank you.

SEN. MCDONALD: I appreciate the side discussion between yourself and my esteemed colleagues.

May Terry. Al Turco. Beresford Wilson. Patience is a virtue, sir.

BERESFORD WILSON: That's what they say.

SEN. MCDONALD: Good evening.

BERESFORD WILSON: Good evening. Thank you for your perseverance and your audience.

Good evening to esteemed members of the Judiciary Committee. I'm here to support S.B. 1056, H.B. 6685, and H.B. 6686.

Excuse me, let me introduce myself. My name is Beresford Wilson. I'm a family advocate for a parent support group advocacy organization called AFCAMP, which you heard of earlier today, through earlier testimony.

And I'm also a family advocate for The Center for Children's Advocacy at UConn Law School and I'm an advocate for children's special needs. On the other hand, I'm an advocate for children and families involved with juvenile justice.

The reason I'm supporting these bills is because there's a very important component in one of them, H.B. 6686 speaking about cultural competency and I see that Representative Green had a lot of comments and questions about that component.

And I think that's very important and essential to all these bills that we're talking about. If you

002817

March 31, 2003
Judiciary Committee
Testimony

Re: HB No. 5033 An Act Concerning the Statutory Short Form Power of Attorney and the Rules of Statutory Interpretation (Section 4)

From: Alfred A. Turco, Esq.
561 Mountain Road
West Hartford, CT 06117

My name is Al Turco. I am a practicing attorney – a partner in the law firm of Pepe & Hazard, LLP. I am also an elected member of the West Hartford Town Council, having served a total of five terms.

As a practicing attorney, I am of the opinion that the law and public policy is best served if there is certainty in reliance on the plain meaning of the text of the statutes that govern our lives, including our daily transactions.

As a Town Councilor responsible for legislation at the local level, I am of the opinion that our laws should be administered as written, absent ambiguity.

For these reasons, I support Section 4, HB No. 5033, which seeks to restore plain meaning to the reading of Connecticut statutes and to reserve extra-textual evidence for extraordinary circumstances.

Thank you.

002818

Gail LaFleche

Bill #5033

March 31, 2003

My name is Gail LaFleche and I contacted T.R. Rowe recently about making these changes to Power of Attorney laws because of my family's experience.

In 1995, my father was diagnosed with early onset Alzheimer's disease. His illness quickly progressed, and he lost his short and long term memory, reasoning skills, and many other critical abilities. After a while, he did not recognize close family members, could not drive a car, frequently wandered out of his house, and required 24-hour supervision.

In 1997, his sister had him sign a Power of Attorney and did not tell my mother or me about it. Over a period of time, she used it to transfer his shares in a real estate property that they owned jointly to her, her husband, and other members of her immediate family. The amount transferred was worth several hundreds of thousands of dollars. My father had never transferred any of his shares to her prior to his illness. In addition, she used the Power of Attorney to try to become his Guardian, giving her even greater access to his finances.

As a result of my aunt's actions, my family has been in litigation for over four years, and the litigation has cost my parents over \$250,000. We had to hire a medical expert and go through depositions. The attorney who executed the POA said in his deposition that my father was incompetent when he signed it but the damage had already been done. While my aunt can no longer use her POA, it will take additional litigation to reverse the transactions she initiated. The cost of caring for a person with Alzheimer's is enormous and my father could be ill for many more years, since he is only 69. Therefore, the result of the transferred assets, as well as the legal expenses, has made the impact of his disease even more severe to my family.

While these events occurred in another state, I believe the same events could occur in CT. I have read about many other families who have had similar experiences when a caregiver or relative took advantage of having a POA from a person who has dementia. Having additional controls in place when an individual signs a POA could protect others from experiencing the same events that happened to my family. Perhaps if this law had been passed when my aunt tried to get my father to sign his POA, the attorney would have thought twice before executing it. In addition, the law could protect attorneys from being sued because a mentally incompetent individual signed a Power of Attorney.

With more and more people being diagnosed with Alzheimer's and other diseases that cause dementia, it is critical that we protect them and their families.

CBA

CONNECTICUT BAR ASSOCIATION

Testimony of Wesley W. Horton
on behalf of the Connecticut Bar Association Opposing
Section 4 of House Bill No. 5033, An Act Concerning
the Statutory Short Form Power of Attorney and the Rules of
Statutory Interpretation
Judiciary Committee
March 31, 2003

Senator McDonald, Representative Lawlor and members of the Judiciary Committee,
thank you for the opportunity to appear before the committee to comment on House Bill No.
5033, An Act Concerning the Statutory Short Form Power of Attorney and the Rules of Statutory
Interpretation.

My name is Wes Horton and I am speaking this afternoon on behalf of the Connecticut
Bar Association. **The CBA is opposed to Section 4 of House Bill 5033 and respectfully**
requests that the Judiciary Committee reject the provision, which states:

The meaning of a statute shall be ascertained from the text of the statute itself and, if the
meaning of such text is plain and unambiguous and does not yield absurd or unworkable
results, extratextual evidence of the meaning of the statute shall not be considered.

I am an attorney in private practice in Hartford and a principal in the firm Horton Shields
& Cormier, where I concentrate mostly in appellate matters. I am chairman of the CBA's
Committee on Professional Ethics. Each year I present a seminar at the CBA's annual meeting
concerning recent decisions of the Connecticut Supreme and Appellate Courts. I am also the
author of an annual article concerning recent important decisions of the courts in the CBA's
scholarly publication for members, the Connecticut Bar Journal. I also am a historian of the
courts in Connecticut.

The CBA, which consists of a large number of attorneys in private practice and many who work for the government, as well as judges, is very interested in proposed legislation that concerns statutory interpretation, separation of powers between the three branches of government and judicial independence. It seems clear that Section 4 is a response to the Connecticut Supreme Court's recent ruling in State v. Courchesne, 262 Conn. 537 (2003), where the court decided no longer to follow the plain meaning rule. The CBA urges the Judiciary Committee to reject this bill for reasons of policy and also because it violates the separation of powers article of the Connecticut Constitution (Article Second).

In Courchesne, the court interpreted the meaning of the state's capital felony statute, Conn. Gen. Stat. § 53a-54b(8). The defendant in the case had stabbed a pregnant woman to death. Her child was later delivered and lived for 42 days, dying from a deprivation of oxygen to the brain. The defendant was convicted of capital felony for the murder of two persons in the course of a single transaction. The court held that the state, in order to prove the aggravating factor that the defendant committed the offense in an especially heinous, cruel or depraved manner, need only do so with respect to one of the murder victims.

In its analysis, a 5-2 majority of the court applied many of the ordinary principles of statutory construction, long set forth and recognized by the court in its prior decisions. In doing so, the court seeks to determine the meaning of the statutory language as applied to the facts of the case, including whether the language actually does apply. The court looks to the words of the statute itself, the legislative history and circumstances surrounding its enactment, the legislative policy it was designed to implement, and its relationship to existing legislation and common law principles governing the same general subject matter.

What is unique about the majority decision in Courchesne, is that the court, in its analysis, did not limit itself to the plain meaning rule when construing the language of the statute. The rule holds that where the statutory language is plain and unambiguous, the court must stop its interpretive process; there is no need to refer to any extratextual source for its meaning. In Courchesne, the court employed a “purposive and contextual” method of interpreting a statute. The court relied, as it had on many occasions prior to the decision in Courchesne, on sources beyond the specific text of the statute at issue to determine the meaning of the language as intended by the legislature. However, the court in Courchesne was clear to point out that the language of a statute is the most important factor in determining the meaning of a statute.

At its core, section 4 of H.B. 5033 is an attempt to intercede in and regulate a matter of judicial philosophy that has been at the center of a vigorous debate within the judiciary since the founding of the nation. Some of the greatest minds ever to sit on the bench, such as Felix Frankfurter and Learned Hand, have endlessly debated how best to determine what the law is. In all events, however, there can be no question that determining what the law is is the essence of the judicial function. As a result, the proposed bill clearly implicates the separation of powers, as the Legislature would be infringing on a judicial duty, indeed, the defining judicial duty. Article Second of the Connecticut Constitution, which explicitly establishes the separation of powers, states:

Distribution of Powers. Delegation of regulatory authority. Disapproval of administrative regulations. 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.

This provision has been discussed most recently in State v. McCahill, 261 Conn. 492, 510 (2002) ("As we previously have noted, one of the greatest achievements of the 1818 constitution was the separation of the powers of government into three departments"), citing Adams v. Rubinow, 157 Conn. 150, 153 (1968).

The proposed bill violates the separation of powers because it dictates how the judiciary should read and interpret statutes. Put another way, the Legislature would be influencing the means by which the court is to carry out its primary function of declaring what the law is, which would clearly be an infringement of that power. The judicial function of declaring what the law is was most famously established in the historic case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall for the U.S. Supreme Court established that "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177. This sentiment was echoed in the debates of the 1818 Connecticut Constitutional Convention, where the independence of the judiciary was one of the most important factors in the adoption of Connecticut's first constitution. Wesley W. Horton, "Annotated Debates of the 1818 Constitutional Convention," 65 Connecticut Bar Journal SI 1, 32 (Jan. 1991); Wesley W. Horton, The Connecticut State Constitution (Greenwood Press 1993), pp. 8-9. In fact, the Marbury rule was not first announced in America by Chief Justice Marshall. It was announced by judges in Connecticut 18 years earlier. Symsbury Case, 1 Kirby 444, 447 (1785). Subsequently, the Connecticut Supreme Court ruled that the power to declare what the law is or has been is a judicial function. Atwood v. Buckingham, 78 Conn. 423, 428 (1905) ("It is the province of the legislative department to define rights and prescribe remedies: *of the judicial to construe legislative enactments*, determine the rights secured thereby, and apply the remedies prescribed") (emphasis added); Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 144-45

(1930). Just last year the Supreme Court, in a unanimous *en banc* opinion, reaffirmed its long-standing position that a statute is unconstitutional under Article 2 if "it presents a significant interference with the orderly functioning of the Superior Court's judicial role." State v. McCahill, 261 Conn. 492, 506 (2002). While McCahill specifically concerns the Superior Court's powers, Article Second applies in its full force to all the constitutional courts. It is clear that this statute interferes with the judicial role to declare what the law is.

The bill also should be rejected on public policy grounds. A judge's judicial philosophy is entitled to as much respect as a legislator's political philosophy. No one would dream of passing a statute requiring legislators to vote according to a certain political philosophy. Nor should judges be required to vote according to a certain judicial philosophy. In fact, Chief Justice Sullivan and Justice Zarella have, correctly in our view, stated that they do not consider themselves bound by the judicial philosophy stated by the majority in Courchesne, although they do consider themselves bound by the substantive result in that case. If a majority of the justices cannot impose their judicial philosophy on the minority, surely the Legislature should not attempt to impose its judicial philosophy on either the majority or on the minority.¹

¹/ The CBA does not take a position on whether the judicial philosophy of the majority or the judicial philosophy of the dissent is the correct one. The CBA's sole position is that judicial philosophy is for the judges to decide.

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Accordingly, on behalf of the Connecticut Bar Association, I respectfully request that the Judiciary Committee reject section 4 of House Bill No. 5033, An Act Concerning the Statutory Short Form Power of Attorney and the Rules of Statutory Interpretation.

Respectfully submitted:



Wesley W. Horton

On behalf of the Connecticut Bar Association