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Attachments: inherentpowerskansas.pdf; wachtlervcuomo.pdf; courtfunding.pdf

"A court set up by the constitution has the power of self preservation and the power to remove all obstacles to its successful and convenient operation." See Cal. Jur. 3d, Courts, Section 23.

Across the United States, courts have found inherent power under state constitutions to order payment from public funds necessary for operation, even in times of budget cuts, provided the usual means to obtain funding had been exhausted and access to justice was threatened. See, Inherent power of courts to compel appropriation or expenditure of funds for judicial purposes, 59 ALR 3d 569, Judicial Use of the Inherent Power Doctrine To Compel Adequate Judicial Funding, 46 La. L. Rev. 157 (1985) and attached materials.

Some recent options to restore funding:

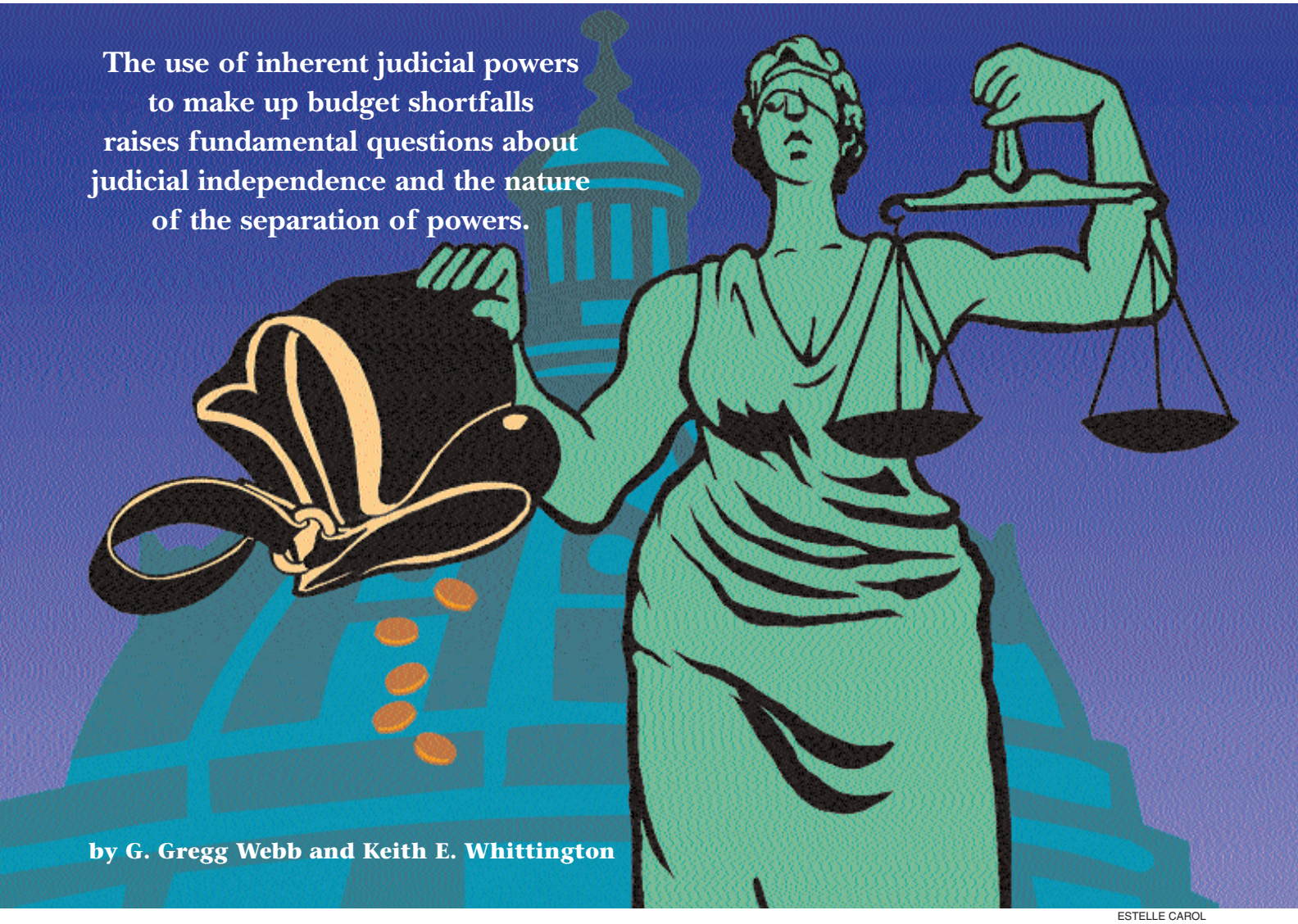
1. In 2002 the Chief Justice in Kansas used inherent powers to impose an emergency surcharge on court filings without legislative approval, which funds were used by the court. See attached article.

2. With NY state on the verge of bankruptcy, Gov. Cuomo recommended a 10% reduction in the 1991-92 State Court budget requested by Chief Justice Wachtler as the minimum needed for administration of justice. Wachtler laid off 500 employees and filed suit against the Governor and legislature under the implied powers doctrine - the judicial branch as a constitutional co-equal branch of government had implied power of self preservation - to have enough funds to carry out its constitutionally mandated duties. Case was settled. Attached article written by one of Cuomo's staff members reviews the law and recommends against such suits. We have sustained much deeper cuts. The court budget is so small compared to the overall budget that this is not an undue intrusion on legislative discretion to tax/spend. The legislature already has many allocations compelled by the constitution.

3. In 2003 the ABA Committee on court funding prepared a report suggesting, among other things, having the Chief Justice request that every attorney in the state write the governor and legislature requesting them to restore court funding. (It also lists a Wachtler suit as an option).

4. Request the Attorney General to write an Opinion that a state budget which severely under funds the third branch is unconstitutional.

JUDICIAL INDEPENDENCE, the power of the PURSE, and inherent JUDICIAL POWERS



The use of inherent judicial powers to make up budget shortfalls raises fundamental questions about judicial independence and the nature of the separation of powers.

by G. Gregg Webb and Keith E. Whittington

ESTELLE CAROL

On March 14, 2002, Chief Justice Kay McFarland of the Kansas Supreme Court ordered an across-the-board increase in court fees in the state.

Money lies at the root of many conflicts between the branches of government. It is at the heart of many policy disputes—as different interests, political parties, and government officials stake out divergent priorities in the raising and spending of public funds—and creates substantial institutional tensions within any system of separated powers. In such systems, the legislature rightfully holds the "power of the purse," given the intimate connection between effective democratic representation and control over government taxation and spending. Indeed, the mother of all legislatures, the British Parliament, largely came into existence in order to expand and legitimate the flow of revenue into government coffers.

As the very example of the birth and growth of Parliament indicates, however, control over the treasury is a powerful political weapon that can be used against other government institutions. In controlling the purse strings, the legislature can reward or punish members of the executive and judicial branches, depending on how they conduct their offices. As James Madison noted in explaining the operation of constitutional checks and balances, "the legislative department alone has access to the pockets of the people."[1]

An effective power of the purse gives the legislature a powerful trump card when disagreements arise between it and the other branches of government, one that is so potent that it can threaten judicial independence. To limit this threat, the American founders wrote into the U.S. Constitution the guarantee that salaries of judges shall not be diminished during their time in office. (Although such a guarantee is common in American state constitutions and endorsed by the United Nations, worldwide it is one of the least-used constitutional provisions for securing judicial independence.[2]) Though important to preserving the independence of individual judges to make controversial decisions, the guarantee of undiminished salaries remains fairly marginal to the central conflicts between courts and legislatures over money and the ability of the judiciary to serve as an effective and independent branch of government. In extreme cases, judges may be denied such basics as an office, an adequate supply of paper, and an up-to-date compendium of statutes.[3] Fortunately, American judges are rarely faced with such deprivation, but the adequacy of resources provided by legislatures to handle judicial business continues to be a contentious issue—especially in the states.

The authors thank Ken Kersch, Howard Gillman, and the anonymous reviewers for their helpful comments.

1. THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter, ed., New York: New American Library, 1961).

2. Linda Camp Keith, *Judicial independence and human rights protection around the world*, 85 JUDICATURE 195, 198 (2002).

3. *See, e.g.*, Jennifer A. Widner, BUILDING THE RULE OF LAW 68, 217, 219 (New York: W.W. Norton, 2001).

A new challenge is emerging in this recurrent struggle between legislatures and judiciaries over resources. During the past three decades, administrative and budget authority over state judicial systems have been concentrated in state supreme courts. As a consequence, tough budgeting decisions increasingly invite direct confrontations between the heads of the legislative and judicial branches of state governments. The possibility of a constitutional standoff now looms in the states as centralized judicial administrations combine their institutional muscle with the doctrine of inherent judicial powers to secure their own funding when state legislatures are either unable or unwilling to authorize adequate appropriations. This convergence of contemporary bureaucratic and fiscal reality with fundamental constitutional principle threatens to dilute traditional notions of the legislative power of the purse.

Kansas has recently provided a glimpse of this possibility. On March 14, 2002, Chief Justice Kay McFarland of the Kansas Supreme Court ordered an across-the-board increase in court fees in the state. This "emergency surcharge" was aimed at making up a $3.5 million shortfall in the judiciary's fiscal year 2003 budget, which was itself dwarfed by the state's broader projected deficit of $680 million for that fiscal year. The supreme court order establishing the surcharge relied upon the judiciary's "inherent power to do that which is necessary to enable it to perform its mandated duties." In an accompanying press release, Chief Justice McFarland explained that, "while there are things the people of Kansas may have to give up in these trying fiscal times, justice cannot and must not be one of them."[4]

This innovative use of inherent judicial powers raises fundamental questions about judicial independence and the nature of the separation of powers. This article examines how states reached this point and raises some questions about the path ahead. It begins by reviewing the doctrine of inherent judicial power, its development over time, and its connection with the centralization of judicial administration. It then takes a closer look at events in Kansas and the broader constitutional questions they raised. It closes with some cautionary notes on the use of such tools to improve the conditions of the judicial branch.

The expanding doctrine

The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions, even when those actions are not specifically authorized by either constitutional text or legislative statute. Inherent judicial power operates as an implicit "necessary and proper" clause to the establishment of the judiciary as an independent and equal branch of government. In its most minimal guise, the doctrine empowers judges to control and manage their own courtrooms—for example, by punishing contempt of court, excluding photographers from the courtroom, or appointing counsel for criminal defendants. In its more muscular form, the doctrine authorizes judges to protect themselves and their functions from the neglect or interference of the other branches of government. It thus operates both as an implication and guarantor of judicial independence.

It is in this more muscular form, as a positive safeguard of judicial independence, that the inherent power doctrine has been extended to budgetary matters. This budgetary power developed, however, from relatively modest efforts at courtroom management. When a trial judge ordered that a jury be sequestered during a murder trial and the county commissioners refused to pay for the jurors' lodgings, the Pennsylvania Supreme Court explained in 1838 that the judge had the authority to draw directly on the public purse to cover such "contingent expenses of the court" and provide for "emergencies" that require "the prompt and efficient action of the court" without the usual deliberation and consent of the relevant legislative body.[5]

Similarly, state supreme courts have backed judges who have claimed the authority to set the salaries of courthouse personnel or who have ordered other institutions to provide, or to provide funding for, temporary facilities for holding court after the regular courthouse was condemned, the operation of a courthouse elevator, chairs and carpeting for a courtroom, and courthouse air conditioning.[6]

Such disputes have prompted state supreme courts to issue particularly high-flown paeans to judicial independence. The Indiana Supreme Court observed in the elevator case, for example:

> Courts are an integral part of the government, and entirely independent; deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the constitution or established in pursuance of the provisions of the constitution, can not be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.[7]

In explaining why county commissioners were required to pay clerical staff in the courthouse at a rate set by the judges rather than at the general rate established for comparable county employees, the Colorado Supreme Court quoted approvingly from the opinion of the trial court that the separation of powers

4. Kansas Supreme Court Order 2002 SC 13, as amended March 22, 2002 (www.kscourts.org/surcharg.htm, last accessed February 6, 2004); State of Kansas Office of Judicial Administration Press Release, March 14, 2002 (www.kscourts.org/fee-news.htm, last accessed February 6, 2004).

5. *Commissioners v. Hall*, 7 Watts 290, 291 (Pa. 1838).

6. *See, e.g., State ex rel. Schneider v. Cunningham*, 39 Mont. 165 (1909); *Wichita County v. Griffin*, 284 S.W.2d 253 (Tex. App. 1955); *Bass v. County of Saline*, 171 Neb. 538 (1960); *Ex Parte Turner*, 40 Ark. 548 (1883); *Commissioners v. Stout*, 136 Ind. 53 (1893); *State ex rel. Kitzmeyer v. Davis*, 26 Nev. 373 (1902); *Pena v. District Court*, 681 P.2d 953 (1984).

7. *Board of Commissioners v. Stout*, 136 Ind. 53, 59-60 (1893).

required that each of the three branches

> not interfere with or encroach on the authority or within the province of the other. . . . In their responsibilities and duties, the courts must have complete independence. It is not only axiomatic, it is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source.[8]

Several features of this traditional use of inherent judicial powers are notable. The amounts at issue usually involve small contingencies rather than the central operation of the courts. The disputes usually begin with local officials. When neither the local judge nor the local fiscal authority relents in the standoff, the matter is appealed up the judicial hierarchy. These traditional fiscal battles are ultimately asymmetric proceedings between a local legislative body and a state's highest court. They become as much a matter of state and local divisions as interbranch divisions, often with state legislatures either unaffected or implicitly behind the state courts.

In such circumstances, supreme courts can serve as relatively neutral arbiters capable of providing satisfactory dispute resolution for two equally situated parties. State supreme courts, which usually have not directly benefited from traditional uses of inherent judicial power by local courts, have proven willing to reduce and void lower-court orders as well as uphold them and are capable of applying external standards and outside accountability to ensure the reasonableness of such judicial requests.[9] The potentially irresolvable conflict of two equal and coordinate branches of government, each holding fast to its respective claims of autonomy and prerogative, is thereby abated by the presence of a common judge—the state supreme court.[10]

The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions.

The doctrine has been put to more ambitious use in recent years. In December 1969, the judges of the Philadelphia Court of Common Pleas submitted a budget request to the city's finance director of nearly $20 million for fiscal year 1970. The mayor ultimately recommended, and the city council approved, a budget of just under $16.5 million. When the court's request for an additional $5 million was refused, the judges ordered the city to appropriate the additional funds. In *Commonwealth ex rel. Carroll v. Tate*, the Pennsylvania Supreme Court eventually awarded the Court of Common Pleas approximately $1.4 million for what was left of the fiscal year.

In a period of general judicial assertiveness vis-à-vis other branches of government, especially in the design of equitable remedies, *Carroll* lifted the doctrine of inherent judicial power from its roots in discrete fiscal disputes over courtroom temperature and clerks' salaries and positioned it as a viable judicial recourse for obtaining multimillion-dollar appropriations and supplanting the normal budget-making process. In order to "protect itself" from the other branches, the *Carroll* court argued, "the [j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer [j]ustice."[11] *Carroll* influentially held that courts were entitled to whatever funds were "reasonably necessary" for the "efficient administration of justice."

Though the court understood that the demand for limited city funds and services was increasing across the board, judicial requests were to trump all others. "The deplorable financial conditions in Philadelphia must yield to the [c]onstitutional mandate that the [j]udiciary shall be free and independent and able to provide an efficient and effective system of [j]ustice," the court reasoned—including the creation of "[n]ew programs, techniques, facilities, and expanded personnel." What was "reasonably necessary" to operate the city courts was ultimately not to be decided in the normal legislative process in the context of the overall budget, but by "[c]ourt review."[12]

Cases such as *Carroll* did not become common, however, in part because many states altered their systems of funding the judicial branch so as to minimize the local conflicts from which the doctrine had emerged. Just as *Carroll* was being handed down, members of the American Bar Association's Commission on Standards of Judicial Administration were arguing that constitutional propriety dictated

8. *Smith v. Miller*, 153 Colo. 35, 40 (1963). For similar examples, *see O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507 (1972); *In re Salary of Juvenile Director*, 87 Wn.2d 232 (Wash. 1976).

9. This was obviously not true in the relatively few instances in which the state supreme court has itself been the initiator of the inherent judicial power claim, such as when the Wisconsin Supreme Court squared off against the state superintendent of public property over who had the authority to appoint and remove the court's janitor. *In re Janitor of the Supreme Court*, 35 Wis. 410 (1874).

10. On the "logic of the triad in conflict resolution," see Martin Shapiro, COURTS (Chicago: Univ. of Chicago Press, 1981). On the fundamental risk of interbranch conflict in a system of separated powers, see Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. AND MARY L. REV. 2093 (2002).

11. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 52 (1971). *See also* William Scott Ferguson, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

12. *Id.* at 56, 57.

that the "judiciary will always be subordinate to the legislature on significant matters of finance. It is for the legislature to determine which 'essential services' the government will provide and to decide the judiciary's share of the common financial shortage."[13] The better solution, they urged, was unitary budgeting, which would link administration and budgeting and allow for more centralized and efficient management of judicial expenditures.

This recommendation was widely accepted, and many state judiciaries shifted away from relying on local funding sources, such as county commissioners, in favor of consolidated budgets approved by state legislatures. Pointing to budget conflicts between county governments and local courts such as the one that gave rise to *Carroll*, the Pennsylvania Supreme Court even ordered the state legislature to take over funding of the state judiciary, though the state has taken few steps to comply with that order, partly out of concern over the tax implications.[14] At the same time, state courts were given greater spending flexibility through lump-sum budgets rather than detailed, itemized budgets—allowing judges to buy their own carpeting without specific legislative approval. The growth of the inherent judicial power doctrine, however, created a "remote danger" that the judicial system might "try to secure its appropriations by mandamus," to the likely "discredit" and embarrassment of both branches.[15] This potential consequence suggested to some that the shift to unitary budgeting would render the inherent judicial powers doctrine "legally and politically impotent."[16]

The New York standoff

The "remote danger" was realized and the constitutional and institutional implications of these developments were made particularly evident in a 1991 funding dispute in the state of New York. In submitting his budget to the legislature, Governor Mario Cuomo recommended a 10 percent cut from Chief Judge Sol Wachtler's $966.4 million request for the state judiciary. As legislators and the governor negotiated, the chief judge told the press, "as far as I'm concerned, that's an unconstitutional budget," because the governor had not passed on the judiciary's full budget request.[17] The legislature eventually compromised with an appropriation of $889.3 million for the judicial branch—more than the governor's recommendation but substantially less than the chief judge's request.

Chief Judge Wachtler reacted to the legislature's action by filing a lawsuit in state court claiming that the judicial branch was entitled to the full amount of its request based on its inherent power to compel funds for its maintenance. Governor Cuomo countered by filing a federal lawsuit seeking to dismiss the chief judge's suit, thereby preventing any change to the legislature's version of the judicial budget. The federal district court demurred. After substantial public and political maneuvering, the chief judge largely relented and a settlement was reached that provided for only a very modest increase, restoring the judicial budget to 1990 levels, just days before the state case was set for argument.[18]

Despite its inglorious end, *Wachtler v. Cuomo* represents an important turn in the development of inherent judicial power in the budget context. Of course, *Wachtler* involved amounts far exceeding anything previously contemplated in such cases. By involving nearly 9 percent of the consolidated budget of the entire state judiciary, the chief judge was no longer seeking to fill specific gaps in the judiciary's budget but rather to provide for the judiciary's general finances. Perhaps more ominously, absent federal intervention, the combination of unitary budgeting and the assertion of inherent judicial power left no place for the disputing institutions to go. The constitutional equality of the three coordinate branches of New York's state government replaced the institutional inequality present in earlier inherent judicial power disputes. Unlike even the *Carroll* situation, all state courts were implicated in the New York suit, as the governor and the press were quick to point out.[19] Constitutional deadlock and informal compromise were the only available options.

Fiscal autonomy in Kansas

The recent economic downturn and attendant budgetary pressures in many of the states have given renewed significance to these doctrinal and institutional developments. Recent fiscal relations between the judicial and legislative branches in Kansas parallel the conditions in Philadelphia and New York that led to their respective inherent-power showdowns. As in Pennsylvania and New York, the Kansas courts have faced serious financial neglect at the hands of their legislative peers. A government-wide funding crunch in Kansas in 2002 brought the situation between the two branches to a head, with fiscal and political stakes comparable to those raised in New York. The Kansas courts, however, adopted an innovative political strategy that proved more successful than that of their predecessors in New York—but that raises its own constitutional difficulties.

Developments in judicial administration and budgeting in Kansas during the past 30 years mirror national trends, including the adoption of state funding of the judiciary through unitary budgeting and the consolidation of administrative responsibility for the state's judicial branch in its supreme court. In 1972, the state's voters ratified a constitutional amendment making the legislature responsible for funding all

13. Geoffrey C. Hazard, Jr., Martin B. McNamara, and Irwin F. Sentilles III, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1292 (1972).

14. *County of Allegheny v. Commonwealth*, 517 Pa. 65 (1987); *Pennsylvania State Association of County Commissioners v. Commonwealth*, 545 Pa. 324 (1996).

15. Hazard et al., *supra* n. 13, at 1300.

16. Carl Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274, 281 (1980).

17. Elizabeth Kolbert, *Wachtler Says Cuomo Cut Judiciary Funds Unconstitutionally*, N.Y. Times, April 11, 1991, at B5.

18. For an overview of the case, see Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 122-135 (1994).

19. *Id.* at 130.

Kansas courts. Five years later, the legislature exercised some of that authority by placing all district courts under the administrative purview of the state supreme court and shifting financing of all court system personnel to the state. (The state has not yet assumed all non-salary operating expenses for the judiciary from the counties.) Since 1978, the judicial branch has been required to submit its budget to the executive branch Division of the Budget, which then produces a single state budget that is submitted to the legislature and becomes the basis for legislative deliberations.

The Kansas Court broke new ground by invoking its inherent power in order to raise its own revenue rather than to mandate appropriations from the legislature.

Judicial complaints of inadequate funding by the state legislature have been common for years. In the years leading up to the 2002 confrontation, the executive routinely reduced the judiciary's requested budget when compiling the state budget to submit to the legislature, imposing hiring freezes on the judiciary in eight of the ten years prior to 2002. (While case filings rose 54.6 percent between 1987 and 1999, the number of judges increased only 5.5 percent and nonjudicial employees only 9 percent during the same period.[20]) Insufficient funding in the regular budget led to a recurrent pattern of annual judicial service cutbacks, salary reductions and furloughs for nonjudicial employees, and supplemental appropriations from the legislature to carry the courts through each fiscal year. In fiscal year 2001, the legislature's initial appropriations left a shortfall in the judiciary's "maintenance budget" (the amount needed to maintain salaries and wages of existing employees) of $1.2 million; in fiscal year 2002, the shortfall increased to approximately $2 million.[21]

The Kansas judiciary invoked its inherent judicial power in the midst of the budget process for fiscal year 2003. In spite of the judiciary's expressed concerns about the shortfalls of previous years, the legislature cut the 2003 maintenance budget by $3.5 million. The state was projecting an overall revenue shortfall of $680 million, rendering any substantial improvement in the judicial budget unlikely. Instead, legislators urged Chief Justice McFarland to seek "innovative means of securing the necessary funding." On March 8, 2002, the chief justice responded by ordering an "emergency surcharge" on existing court fees to be paid into an emergency fund separate from the state treasury and available "only for [j]udicial [b]ranch expenditures" approved by the chief justice.[22]

The chief justice followed form in justifying this exercise of inherent judicial powers. In an earlier 2002 State of the Judiciary message, she reviewed the courts' recent fiscal woes and concluded, "The simple truth is the [j]udicial [b]ranch cannot perform its constitutional and statutory duties with such a shortfall in funding," even though the "courts are the last bulwark of freedom as guaranteed by the Bill of Rights . . . [and a] fully functioning court system is essential to the American way of life." Though "there are things the people of Kansas may have to give up in this fiscal crisis, justice cannot and must not be one of them."[23]

This message also included a renewed call for a change in budget procedures so that the judiciary could submit its budget request directly to the legislature without executive intermediation. The chief justice's justification for this proposal echoed Chief Judge Wachtler's arguments in New York and similarly laid the implicit foundation for autonomous judicial action. A direct budget submission was necessary "to safeguard [the judiciary's] constitutional position from invasion by the [e]xecutive [b]ranch," and though the legislature ultimately made the appropriations, the chief justice blamed the executive branch Division of the Budget for "many of the funding problems the [j]udicial [b]ranch faces each year" by making "drastic cuts before [the judiciary's budget request] is even seen by the [l]egislature." Indeed, given the thoroughness of the judiciary's own budget review process, which ensures that "every request is necessary," and the lack of "expertise . . . as to judicial operations and needs" in the executive branch, "all cuts made [were] arbitrary because there [were] no reasonable cuts left to be made."[24]

In issuing the "emergency surcharge" order, the chief justice did not provide elaborate authority for her action—the order itself made clear that the court relied on its inherent power. The review of the budget situation in the order and the chief justice's other statements implicitly established the grounds for meeting the "reasonable necessity" standard outlined in earlier inherent judicial power cases. The

20. STATE OF THE JUDICIARY: ANNUAL REPORT OF THE CHIEF JUSTICE OF THE KANSAS SUPREME COURT 2 (2002) (www.kscourts.org/2002soj.pdf, last accessed February 8, 2004).

21. Chief Justice Kay McFarland, Judicial Branch Budget Issues: Testimony before the Senate Ways and Means Committee, February 7, 2002 (www.kscourts.org/budgetmf.htm, last accessed February 8, 2004).

22. Kansas Judicial Branch Fiscal Year 2003 Emergency Surcharge, 2002 SC 13 (as amended March 22, 2002) (www.kscourts.org/surcharg.htm, last accessed February 8, 2004).

23. *Supra* n. 20, at 10 (emphasis omitted), 15, 16.

24. *Id.* at 12.

Kansas Supreme Court had itself asserted more than a century before, "It can hardly be supposed that the action of the supreme court may be thwarted, impeded or embarrassed by the unwarranted intermeddling of others without any power in the supreme court to prevent it."[25]

Breaking new ground

In turning to the inherent power doctrine to resolve its budget dispute with the state executive and legislature, the Kansas courts followed in the footsteps of the New York courts from a decade before. The Kansas Court, however, broke new ground by invoking its inherent power in order to raise its own revenue rather than to mandate appropriations from the legislature. This unprecedented step created distinctive constitutional and political repercussions.

Although inherent power had been used to compel legislatures to provide judicially needed resources, judges had previously drawn a bright line between such actions and the raising of revenue. The Michigan Supreme Court, for example, used the taxation example to show why traditional uses of inherent judicial power did not create separation-of-powers problems: "This broad power to assess and declare the needs of administering justice does not usurp the fiscal authority of the legislative department. The courts do not levy taxes, or appropriate public monies. Those things must be done by the legislative bodies."[26]

In another prominent inherent power case, the Pennsylvania Supreme Court had similarly asserted that "[c]ontrol of state *finances* rests with the legislature. . . . The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds."[27]

On the other hand, in 1990 a majority of the justices of the U.S. Supreme Court blurred the line in the context of equitable remedies, recognizing that taxation by judicial order was an "extraordinary event" that potentially could fall within judicial power, leading four justices to object in a concurring opinion that it is "not one of the inherent powers of the court to levy and collect taxes."[28]

The Kansas Supreme Court's "emergency surcharge" steers a careful revenue-raising course. As the Kansas attorney general noted in his opinion supporting the court's power, the surcharge is characterized as neither "a docket fee . . . service or operational charge" nor "a tax . . . deposited into the state general fund," both of which are circumscribed by constitutional and statutory provisions.[29] By withholding the collected funds from the state treasury, the court appears to want to avoid running afoul of the state constitutional requirement that "[n]o money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."[30]

The Kansas judiciary does have some limited statutory authority to set docket fees. However, this would not seem to include the emergency surcharge, unless the statute is "read in light of the inherent authority possessed by the supreme court to take such action as is necessary to maintain its independence as a co-equal branch of government," as the attorney general suggested.[31] The chief justice herself has only ever pointed to the abstract inherent judicial power as the authority for her actions, not any legal context specific to Kansas. The Kansas court's order gives previously uncontemplated meaning to the concept of judicial fiscal independence.

Political implications

The political implications of the court's move are equally groundbreaking. As *Wachtler v. Cuomo* demonstrated, a state judiciary's effort to compel a state legislature to fully fund its budget request invites intransigence and puts the two co-equal branches at loggerheads. The very political and financial calculus that would lead a legislature to underfund the courts in the first place would also lead it to resist judicial efforts to claim a larger share of the state budget and crowd out other constituencies. While courts have been successful in claiming inherent judicial power to order (usually local) institutions to make discrete expenditures, they were notably unsuccessful in their one effort to trump the state legislative budget process.

The Kansas court has effectively sought the same outcome—to mandate its preferred judicial budget—but by means that do not impinge on the legislature's ability to satisfy favored interests in its budgeting. Elected officials clearly risk paying a political price when either raising taxes or denying appropriations. The Kansas court absolved the legislature of facing either option by raising revenue on its own.

Chief Justice McFarland was well-positioned to take the initiative. In Kansas, the justices of the supreme court are chosen by merit selection and subject to periodic, non-competitive retention elections. Since that system was instituted, no justice has ever come close to losing a retention election, and McFarland herself had served on the high court for a quarter century. Although the governor's proposed fiscal year 2003 budget had fallen short of the judiciary's request, the courts were largely exempt from the deep cuts imposed by the governor and the legislature across the rest of the state government. Additional funding for the courts was included in separate budget items that were packaged with several proposed tax increases. More politically salient, and far more expensive,

25. *Chicago, Kansas, and Western Railroad Company v. Commissioners of Chase County*, 42 Kan. 223, 225 (1889).

26. *Wayne Circuit Judges v. Wayne County*, 383 Mich. 10, 22 (1969).

27. *Leahey v. Farrell*, 362 Pa. 52, 56 (1949).

28. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990); *Id.* at 74 (Kennedy concurring, quoting *Heine v. Levee Commissioners*, 86 U.S. 655, 661 (1873)).

29. Kansas Attorney General Opinion No. 2002-17, 2 (www.kscourts.org/ksag/opinions/2002/2002-017.htm, last accessed February 8, 2004).

30. KAN. CONST. art. II, § 24.

31. K.S.A. § 60-2001 (2002); Kansas Attorney General Opinion No. 2002-17, 7. The court itself made no reference to this statute.

32. *Supra* n. 4.

causes than the needs of the court were featured in the legislative struggle over this tax package. Ultimately, the package was rejected by a coalition of dissident conservative Republicans, who had taken a "no new taxes" pledge, and nearly all the Democrats, who accused the Republican majority of fiscal mismanagement and a reliance on regressive tax schemes.

Legislative support

It is unsurprising, then, that legislators generally responded with enthusiasm to the Kansas court's initiative, since it freed them of any responsibility for the political fallout from making an unhappy fiscal choice regarding the judiciary. Far from challenging the judiciary's assertion of authority, as Governor Cuomo had done in New York, the other branches encouraged the court to move forward and sought to bolster its authority. As noted, the attorney general issued an opinion backing the court's innovative use of inherent judicial powers. The chief justice, in ordering the surcharge, reported that "the legislative leadership in both houses and on both sides of the political aisle . . . showed understanding of and concern for the crisis facing the [j]udicial [b]ranch" and had "expressed [support] for the [j]udicial [b]ranch to seek innovative means of securing the necessary funding."[32]

In earlier committee hearings on the judicial budget, one senator suggested, "Why don't you just sue the heck out of us?" The chief justice responded, "Suing won't get you anything soon."[33] The chair of the Senate Ways and Means Committee indicated that the courts would have the first claim to any new revenue, but noted that if "we don't have it, we can't put it in."[34] After the court order imposing the emergency surcharge was issued, the Kansas Senate Judiciary Committee chair exclaimed, "I'm glad to see the courts take some action to meet their financial needs," and declared that the court had the power to do whatever "the court believes it has the power to do."[35] The House Speaker simply announced that the legislators' hands were tied: "Who are we going to appeal to? The supreme court?"[36] And the governor gave the chief justice "high marks" and praised her for taking "bold steps when necessary."[37]

Well-placed policy makers had sent clear signals to the chief justice that they were substantively supportive of her budget stance, and they backed judicial authority when she took an initiative that required no politically costly response from them. Indeed, the Kansas court's turn to judicial user fees is in keeping with broader tendencies in state court budgeting to emphasize court-generated revenues. While such tendencies have raised concerns on the judicial side that legislatures may come to rely on such court fees and give less support to the courts from general tax revenues, it has traditionally been understood that the decision to turn to such revenue streams was by its nature a legislative one.[38]

The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials.

Beyond Kansas

Few courts would be tempted to follow the lead of Judge Wachtler of New York and run headlong into a political struggle with the legislative and executive branches, though his actions followed naturally from the historic development of the inherent judicial powers doctrine when combined with unitary budgeting. Chief Justice McFarland has found what might prove to be a more tempting path, one that is constitutionally bolder but politically less hazardous. Indeed, the "emergency stopgap measure" was so politically successful that it was extended into the next fiscal year. When the Kansas legislature again failed to fully fund the court's budget request, the chief justice reported that the judicial branch "was urged by many legislators to extend the emergency surcharge," though the legislature itself did not take steps to authorize by statute or legislate directly the new court fees.[39] (The executive and legislature did accept the court's proposal to allow the judiciary to submit its budget requests directly to the legislature.)

Kansas was hardly alone in its fiscal struggles—state courts elsewhere have been facing similar pressures in recent years. A special district judge in Oklahoma used his unofficial website to publicize the "Kansas 'surcharge' solution" and urged his colleagues to follow McFarland's "fiscal leadership," although the chief justice of the Oklahoma Supreme Court declined to take such unilat-

continued on page 45

33. Quoted in John Hanna, *Chief Justice Says Tight Funding Will Mean Court Closings*, Associated Press Newswires, February 7, 2002.

34. John Hanna, *Panel Provides Money for Courts Now but Only Sympathy after July 1*, Associated Press Newswires, February 22, 2002.

35. John Hanna, *Supreme Court's Budget Order Alters Balance of Power in Government*, Associated Press Newswires, March 18, 2002.

36. John Hanna, *Supreme Court Goes around Legislature to Solve Budget Problems*, Associated Press Newswires, March 14, 2002.

37. John Hanna, *Chief Justice Faces Retention after Dealing with Budget*, Associated Press Newswires, September 4, 2002.

38. David Bresnick, *Revenue Generation by the Courts*, in Steven W. Hays and Cole Blease Graham, Jr., eds., HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 355-365 (New York: Marcel Decker, 1993); James W. Douglas and Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?* 63 PUB. ADMIN. REV. 441, 450-451 (2003).

39. 2003 SC 51 (www.kscourts.org/surcharg2004.pdf, last accessed February 8, 2004).

Webb, continued from page 19

eral action.[40] Budget battles in Illinois led to an initial standoff, followed by more extended litigation, over judicial pay.[41] State courts, often spared the budget ax in the past, have recently had to deal with significant cuts; the events in Kansas could easily recur.[42]

The American system of separation of powers runs the inherent risk of gridlock. While this is a danger, it can also be regarded as a virtue. By denying any single branch of government the power to act unilaterally, this constitutional framework requires government officials to win the cooperation of others in order to take effective action.

The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials. It has not traditionally been used to place the courts on an independent financial footing or to shelter them from the regular budgetary process. The rhetoric of judicial independence accompanying earlier uses of inherent judicial power harkened back to a pure theory of separation of powers, in which each branch was left free to exercise its own functions without encroachment from the others, but the judicial dependence on the legislature for its financing was a reflection of checks and balances that necessarily impinged on this separation of powers.

The situation in Kansas can be placed on a scale of possible budgetary conflicts between courts and legislatures. The gravest fiscal threats to judicial independence may come when governors and legislatures use budgetary tools to attempt to influence judicial decisions. The use of inherent judicial powers as a safeguard to judicial independence may be most justified in such cases, which fortunately are rare. A less extreme, but more common, threat to judicial independence arises from the competition for limited resources. Chronic budget scarcity, such as arose in Kansas, may pose less of a threat to judicial independence per se than to judicial effectiveness. In such situations, the use of inherent judicial powers may be harder to justify.

To the extent that such fiscal starvation impinges on positive constitutional obligations that a state maintain an effective system of justice, school finance litigation may provide the more appropriate model for judicial action. When finding that states have failed to provide functioning educational systems as required by their constitutions, courts have mandated that legislatures fix the problem but have generally avoided specifying the ultimate solution. In that model, courts have played an important role in holding legislators' feet to the fire to meet their constitutional responsibilities, but have left the problem of how best to raise and distribute adequate revenue to the legislature. Such a process tends to be slow and incremental, but it arguably preserves the respective constitutional responsibilities of the various branches of government while maintaining legislative accountability for budgeting. The requirement of a finding that the states have actually violated constitutional provisions for maintaining a functioning judicial system may also set a higher and more publicly sustainable threshold for judicial action than does the reasonable necessity standard of inherent judicial power cases such as *Carroll*.

The boldness of the rhetoric accompanying traditional invocations of inherent judicial power has been tempered *sub silencio* by the modesty of its practical claims and its effective submission to the checks and balances of the judicial hierarchy and state political institutions. Although relatively small in fiscal terms and understandable in a political context, the innovation in Kansas of using the power to independently raise revenue to fund judicial expenses threatens to undo those historic checks on judicial power. After the Illinois justices ordered the government to pay state judges the salary increases that had been vetoed by the governor, the state comptroller remarked, "I wouldn't say that this is a constitutional crisis. But it is a constitutional clash."[43] Precisely by avoiding an institutional clash, the "Kansas solution" is all the more corrosive of the state's vital constitutional balance. ⚖

40. Oklahoma Family Law Information (www.pryorok.org/legal, accessed July 1, 2003, post later removed); *Jurists Feeling the Pinch of Budget Cuts*, Associated Press Newswires, February 2, 2003.

41. Daniel C. Vock, *High Court to Decide Judicial Pay Raise Issue*, Chi. Daily L. Bull., January 15, 2004.

42. Budget battles also gave rise to the highly unusual order by the Nevada Supreme Court that the legislature raise taxes under simple-majority rule, despite a state constitutional requirement of a two-thirds majority. *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003).

43. Monica Davey, *Justices in Illinois Order Increases in Their Salaries*, N.Y. Times, July 29, 2003, at A12.

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Wachtler v. Cuomo: The Limits of Inherent Power

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Wachtler v. Cuomo: The Limits of Inherent Power

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"We are faced with the paradox that litigation designed to solve a problem makes its solution less likely."[1]

I. Introduction

On December 31, 1990, New York Governor Mario M. Cuomo entered the paneled chambers of the state Court of Appeals, where he began his legal career thirty years earlier as a law clerk, and stepped-up to face Chief Judge Sol Wachtler.[2] The Governor and the Chief Judge were long-time friends and some-time rivals: the Democratic Governor had appointed the Republican jurist Chief Judge in 1985.[3] Governor Cuomo had asked Chief Judge Wachtler to preside over the ceremony marking the Governor's third inauguration. As the Chief Judge administered the oath of office to the Governor, neither man could anticipate that in the coming year they would face each other again in a New York courtroom, not to celebrate democracy, but to test it in the most severe constitutional crisis in New York State's history. The confrontation was spawned by New York's grim fiscal condition, when the Governor, four weeks after his swearing in, announced unprecedented budget cutbacks throughout state government, including the court system.[4] The Chief Judge responded with a lawsuit, which asserted that the judiciary had "inherent power" to compel the executive and leg-

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1. Federal district Judge Jack Weinstein on Cuomo v. Wachtler, No. 91-CV-3874, slip op. at 4 (E.D.N.Y. Oct. 7, 1991); see *also* Wachtler v. Cuomo, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991) (settled Jan. 1992).

2. Sam H. Verhovek, *Cuomo is Sworn in For 3rd Term Without Festivities*, N.Y. TIMES, Jan. 1, 1991, at 31.

3. *See* David Margolick, *The Making of a Chief Judge*, N.Y. TIMES, Jan. 6, 1985, § 4 (Week in Review), at 6.

4. *See infra* notes 96-101 and accompanying text.

islative branches to fund the state court system at a judicially mandated level of almost $1 billion.[5]

The doctrine of inherent powers is one which asserts that the very existence of the courts implies their authority to exercise powers reasonably necessary to the performance of judicial functions.[6] Though the doctrine has been employed by American courts for various purposes since the beginning of the nineteenth century, *Wachtler v. Cuomo*[7] was significant in several ways. It marked the first substantial use of the doctrine by a state's highest court against an equal branch of government.[8] The budget at the center of the conflict approached $1 billion, dwarfing previous inherent power conflicts.[9] The lawsuit represented an unprecedented application of inherent powers to lump-sum funding, as opposed to the discrete line-item expenditures at issue in prior cases.[10] Due to the involvement of New York's Chief Judge and Governor, the case received wide media coverage.[11] The controversy focused public attention on constitutional questions usually covered in the classroom or the courtroom rather than by the newsroom.[12]

Although the legal issues in *Wachtler v. Cuomo* never came to trial, the lawsuit and the controversy it created are worth analyzing for the lessons they provide about the nature and limits of the inherent powers doctrine. It is particularly important to consider the implications of *Wachtler v. Cuomo* at a time when state court budgets around the country are tightly squeezed by fiscal pressures, tempting besieged judges and

5. *See infra* note 99 and accompanying text.

6. For a collection of definitions appearing in case law and commentary, see JOHN C. CRATSLEY, INHERENT POWERS OF THE COURTS 19 (1980). For a discussion of the conceptual basis of the doctrine, see *infra* notes 151-60 and accompanying text.

7. No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991) (settled Jan. 1992).

8. *See* cases cited *infra* notes 14-26.

9. *See* cases cited *infra* notes 14-26.

10. *See* cases cited *infra* notes 14-26.

11. Chief Judge Wachtler resigned in November, 1992. *Chief Judge Resigns Court*, N.Y. TIMES, Nov. 11, 1992, at B1.

12. *See infra* notes 90, 108, 124-25, 206-13 and accompanying text.

court administrators into increased use of inherent powers to address chronic budget shortfalls.[13]

The objective of this Article is to assess the viability of applying the inherent powers doctrine in the context of a state budget conflict. Centering on a case study of *Wachtler v. Cuomo*, this Article will place this exercise of inherent powers in historical perspective by analyzing the theoretical, precedential, doctrinal, and political implications of the use of the doctrine as a tool to compel funding for a state court system. Part II discusses the historic roots and gradual expansion of the inherent powers doctrine. The judicially created doctrinal limitations imposed on the use of the expanding doctrine are introduced in Part III. Part IV presents a detailed review of the political, legal and fiscal developments surrounding Judge Wachtler's lawsuit. In Part V, *Wachtler v. Cuomo* is analyzed in light of the legal, political, and conceptual justifications offered for the exercise of inherent power. Part VI concludes that although the doctrine of inherent powers may retain its vitality as a tool to protect politically vulnerable local courts from local government incursions into the judicial sphere of power, *Wachtler v. Cuomo* demonstrates that its expansion into the statewide budget process is untenable.

II. The Historical Expansion of the Inherent Powers Doctrine

A. *Early Uses of the Doctrine*

The courts have long recognized the use of inherent powers to assert judicial independence. The early applications of the doctrine involved the courts' attempts to exercise control over courthouse facilities and personnel,[14] and over the judicial pro-

13. *See, e.g.*, John A. Clarke, *Asserting the Courts' Independence*, THE COURT MANAGER, Winter 1992, at 9-12; Malcolm M. Lucas, *Is Inadequate Funding Threatening Our System of Justice?*, 74 JUDICATURE 292 (1991).

14. *See* Scott v. Minnehaha County, 152 N.W. 699 (S.D. 1915) (preparation of court calendars); State *ex rel.* Kitzmeyer v. Davis, 68 P. 689 (Nev. 1902) (court can order new furniture and carpet); Board of Comm'rs v. Stout, 35 N.E. 683 (Ind. 1893) (control of courthouse elevator belongs to court); State *ex rel.* S. Howard v. Smith, Auditor, 15 Mo. App. 412, 424 (1884) (power to appoint janitor); *In re* Janitor of Supreme Court, 35 Wis. 410 (1874) (power to appoint janitor); McCalmont v. County of Allegheny, 29 Pa. 417 (1857) (ordering office space for court clerk, ordering forms and stationery within inherent powers).

cess itself, most notably through the power of contempt.[15] From these limited beginnings, the use of the doctrine evolved to keep pace with new developments and challenges affecting the management of the courts. During the 20th century, the courts have frequently exercised the power to issue rules of practice and procedure,[16] rules governing the practice of law,[17] rules of courtroom decorum,[18] protective orders against the press,[19] provisions for jury expenses,[20] and appointments of counsel for criminal defendants.[21] These exercises of inherent power were largely limited to judicial housekeeping or to assert control over adjudicative proceedings and administration, posing neither threats to a coordinate branch nor any serious fiscal consequences.[22] None of these applications of inherent power were particularly objectionable on constitutional or political grounds.

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15. *See In re* Cooper, 32 Vt. 253, 257 (1858). "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute but arising from necessity; implied, because it is necessary to the existence of all the powers." *Id. See also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (dictum). In *Hudson*, the Court commented that "inherent powers are those which cannot be dispensed with in a court because they are necessary to the exercise of all others . . . . [O]ur courts no doubt possess powers not immediately derived from statute . . . ." *Id.*

16. State v. Gary, 247 S.E.2d 420 (W. Va. 1978); Rose v. Palm Beach City, 361 So. 2d 135 (Fla. 1978); People v. Jackson, 371 N.E.2d 602 (Ill. 1977); Albermont Petroleum, Ltd. v. C.D. Cunningham, 9 Cal. Rptr. 45 (Ct. App. 1960); State *ex rel.* Conway v. Superior Court, 131 P.2d 983 (Ariz. 1942); Kolkman v. People, 300 P. 575 (1931); Walton v. Walton, 278 P. 780 (Colo. 1929).

17. Collins v. Godrey, 87 N.E.2d 838 (Mass. 1989); State Bar v. Guardian Abstract Title Co., 575 P.2d 943 (N.M. 1978); *In re* Manoual, 247 S.E.2d 230 (N.C. 1977).

18. Illinois v. Allen, 397 U.S. 337 (1970).

19. Rosato v. Superior Court, 124 Cal. Rptr. 427 (Ct. App. 1975), *cert. denied*, 427 U.S. 912 (1976); United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974); Younger v. Smith, 106 Cal. Rptr. 225 (Ct. App. 1973).

20. Rose v. Palm Beach City, 361 So. 2d 135 (Fla. 1978).

21. Kovarik v. County of Banner, 224 N.W.2d 761 (Neb. 1975); People *ex rel.* Conn v. Randolph, 219 N.E.2d 337 (Ill. 1966).

22. *See, e.g.*, O'Coins, Inc. v. Treasurer of Worcester, 287 N.E.2d 608, 611 (Mass. 1972) (Court's authority "is not limited to adjudication, but includes certain ancillary functions, such as rulemaking and judicial administration, which are essential if the courts are to carry out their constitutional mandate."); *see also* Geoffrey Hazard, Jr. et al., *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1288 (1972) ("Most of the reported decisions have involved marginal appropriations for ancillary personnel and facilities rather than basic fiscal under-writing.").

B. *Modern Expansion of the Doctrine to Court Funding*

During the last thirty years, the doctrine has been extended into areas of more significant fiscal consequence, and the conflict between the branches has sharpened. The typical modern dispute has involved the power of the courts to fill support positions and to compel the local legislature to fund them at adequate salaries.[23] The rhetoric of the cases justified these exercises of inherent power as necessary to preserve the independence of the judicial branch. The judiciary, observed one court, "is the only branch excluded from participation in the formulation and adoption of the government budget. Such exclusion makes the courts vulnerable to improper checks in the form of reward or retaliation."[24] Thus, the judiciary must "be able to ensure its own survival when insufficient funds are provided by other branches."[25]

The application of the doctrine in these cases was not as broad as its language suggests. The actual court orders compelled funding for fairly small, discrete, line-item expenditures such as salaries and equipment.[26] Notwithstanding the dicta, the doctrine was not being used as a basic budget mechanism in this line of cases. Furthermore, in virtually every reported case since the 19th century the doctrine was being asserted by a state court against a local government body. The interbranch conflict was played out between a superior and inferior division of government, and did not represent the confrontation between equals as was implied by the expansive verbiage of the opinions.

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23. *See, e.g.*, Judges for the Third Judicial Circuit v. County of Wayne, 172 N.W.2d 436 (Mich. 1969) (power to set salaries of a group of probation officers and law clerks), *modified on reh'g*, 190 N.W.2d 228 (Mich. 1971), *cert. denied*, 405 U.S. 923 (1972) (power to set salaries of a group of probation officers and law clerks); Smith v. Miller, 384 P.2d 738 (Colo. 1963) (judicial authority to set salaries of court clerks); Noble County Council v. State, 125 N.E.2d 709 (Ind. 1955) (power to appoint probation officer).

24. *In re* Salary of the Juvenile Director, 552 P.2d 163, 170 (Wash. 1976).

25. *Id.* at 171; *see also Smith*, 384 P.2d at 741 ("It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government should be compelled to depend upon the vagaries of an extrinsic will." (quoting conclusion of trial court)).

26. *Juvenile Director*, 552 P.2d 163 (Wash. 1976) ($125 per month increase in salary for director of juvenile services); O'Coins, Inc. v. City of Worcester, 287 N.E.2d 608 (Mass. 1972) ($86 for tape recorder and tapes); State *ex rel.* Reynolds v. County Court, 105 N.W.2d 876 (Wis. 1960) ($250 for an air conditioner).

C. *The Outer Bounds of the Doctrine:* Commonwealth *ex rel.* Carroll v. Tate

The furthest expansion of the doctrine occurred in *Commonwealth ex rel. Carroll v. Tate*.[27] The dispute in *Tate* concerned the 1970-71 budget request submitted by the Philadelphia Court of Common Pleas. The Mayor trimmed a number of items from the $19.7 million request, reducing it to $16.5 million, and the city council approved the reduced amount.[28] The court sought mandamus to compel the payment of the additional funds.[29] The Pennsylvania Supreme Court, in affirming (with modifications) a lower court opinion ordering restoration of approximately $2.5 million to the budget, argued that fiscal autonomy was a requisite for judicial independence:

> [T]he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.[30]

In determining whether the exercise of inherent power to compel funding was justified, the court rejected consideration of the fiscal condition of the locality as a factor.[31]

Tate was significant for two reasons. First, it marked an expansion of the inherent powers doctrine into broader fiscal matters than in previous cases. Substantial budget items for an entire municipal court system were in dispute, rather than the isolated expenditures of a particular judge, which had typified prior inherent powers cases. Second, the traditional exercises of inherent power served to protect the institutional control of the court, but not at the expense of a coordinate branch. Although some of the earlier cases required specific outlays, the expenditure of a few dollars for a janitor or court stenographer did not seriously impinge upon the institutional taxing or

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27. 274 A.2d 193 (Pa.), *cert. denied*, 402 U.S. 974 (1971).

28. *Id.* at 195.

29. *Id.* at 193; see also Comment, *State Court Assertion of Power to Determine and Demand Its Own Budget*, 120 U. PA. L. REV. 1187 (1972) for a discussion of the case.

30. *Carroll*, 274 A.2d at 197.

31. *Id.* at 199.

spending power of the legislative or executive branches.[32] By contrast, *Tate*'s decision to allocate a significant amount of public resources to the courts went to the heart of the city council's institutional power. Thus, *Tate* marked the first "offensive" use of inherent power; its exercise preserved the status of the courts by diminishing the power of the legislature.

In spite of the distinctions, there were two fundamental ways in which *Tate* was consistent with prior and subsequent inherent powers case law which arguably made this "offensive" use acceptable. First, as in virtually every other inherent powers case, the ultimate confrontation in *Tate* occurred not between coequal partners in state government, but between a state supreme court and a local government unit.[33] *Tate* and the inherent powers case law should thus be viewed as a power struggle between state and local government, rather than as a true separation of powers conflict.[34]

Second, the offense in *Tate*, which spurred the use of inherent powers, was that the legislature had eliminated specific expenditure items from the court's budget. The gravamen of *Tate* and its progeny was judicial resentment at being told *how* to spend the courts' money, rather than discontent over *how much* total spending was to be allocated.

III. Controlling the Expansion of Inherent Powers: Judicial Limitations and the Growth of State Financing

In the wake of *Tate*, commentators predicted (with varying degrees of approval) that courts, which had traditionally been more of a spectator than a player, had found a tool by which they could circumvent the budget process.[35] At a time of in-

32. See Hazard et al., *supra* note 22, at 1288, for a discussion of this point.

33. *See* cases cited *supra* notes 14-26 and accompanying text.

34. *See* Hazard et al., *supra* note 22, at 1288.

35. *See* Hazard et al., *supra* note 22; Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983); John C. Taggart, Note, *Judicial Power – The Inherent Power of the Courts to Compel Funding for Their Own Needs – In Re* Juvenile Director, 87 Wn.2d [sic] 232, 552 P.2d 163 (1976), 53 WASH. L. REV. 331 (1978); John F. Burke, *The Inherent Power of the Courts*, 57 JUDICATURE 247 (1974); William S. Ferguson, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); James T. Brennan, *Judicial Fiscal Independence*, 23 U. FLA. L. REV. 277 (1971); Jim R. Carrigan, *Inherent Powers and Finance*, 7 TRIAL 22 (Nov./Dec. 1971).

creasing fiscal difficulties for municipalities around the country, the use of inherent powers as a negotiating instrument or legal weapon could prove to be a tempting way to address chronic, broad-based budget problems. However, until *Wachtler v. Cuomo*, inherent powers disputes actually remained confined to discrete budget items rather than to broad budget-making; and to state-local government conflicts rather than to primal clashes between coequal branches at the state level.

There are several reasons why it took twenty years before there was an attempt to expand the doctrine to the next level. First, as the post-*Tate* case law developed and top-level court administrators reacted to *Tate*, the courts placed a series of self-imposed limitations on the exercise of inherent powers.[36] These doctrinal limits include a requirement of prior approval, the standard of reasonable necessity, the exhaustion of established procedures, and, in some cases, appointment of an outside judge.[37] As state supreme courts recognized ever broader applications of the doctrine, they sought to impose these limits as a means by which to regulate the exercise of inherent power by the lower courts.[38] Second, the development of unitary financing and lump-sum budgeting reduced the opportunities for inherent powers conflicts at the local level.[39]

A. *Judicially Imposed Doctrinal Limitations on Inherent Powers*

1. *The Requirement of Prior Approval*

An important limitation imposed on a court seeking to exercise its inherent power is the prior approval of either a state court administrator, or the supreme court itself, as a prerequisite to the exercise. Several states have embodied this requirement in an administrative order or court rule.[40]

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36. *See infra* notes 40-48 and accompanying text.

37. *Id.*

38. *Id.*

39. *See infra* notes 49-55 and accompanying text.

40. *See, e.g.*, MASS. SUP. JD. CT. R. 1:05 (requiring approval of chief judge); MICH. SUP. CT. ADMIN. ORDER no. 1971-6, 386 Mich. xxix (1971) ("[N]o judge of a subordinate court may . . . order the expenditure of public funds for any judicially required purpose until such judge has submitted his proposed writ or order to the constitutional office of Court Administrator, and has obtained due approval . . . .").

Prior approval has two important consequences. First, it gives the state supreme court ultimate control over the exercise of inherent powers. Second, the approval requirement helps facilitate solutions between the court units and the local legislative units by placing the state court administrator in a position to mediate the dispute outside of the judicial process.[41] Removing the dispute from the heated arena of local politics helps cool the passions that might otherwise lead to an injudicious use of the expanded doctrine.

2. *The Reasonable and Necessary Standard*

The second doctrinal requirement is that the funding sought should be "reasonably necessary" to the functioning of the court.[42] This vague, verbal formula is subject to manipulation and is incapable of a precise definition.[43] Despite its drawbacks, this formula functioned as a minimum, uniform guideline for budget development. Local judges and legislators brought *ad hoc* standards and varying degrees of skill to the budget making process; the decentralization of the budget process simply did not lend itself to expert budget development. By imposing the "reasonable and necessary" standard, the supreme courts created a makeshift surrogate for the uniform standards of a centralized finance system.[44]

A related purpose of the standard was to force the court seeking to exercise inherent powers to document its needs in order to add credibility to its action and reduce the chance that

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41. *See* CRATSLEY, *supra* note 6, at 8 (citing CARL BARR, JUDICIAL ACTIVISM IN STATE COURTS: THE INHERENT POWERS DOCTRINE).

42. Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971), *cert. denied*, 402 U.S. 974 (1971) (A court's "wants and needs must be proved by it to be reasonably necessary for its proper functioning and administration.").

43. Clerk of Court's Compensation v. Lyon County Comm'rs, 241 N.W.2d 781, 782 (Minn. 1976) ("The test is not relative needs or judicial wants, but practical necessity in performing judicial functions."); *In re* Salary of the Juvenile Director, 552 P.2d 163, 174 (Wash. 1976) (setting a strict standard of "clear, cogent, and convincing proof" to show reasonable necessity).

44. It is clear from the inclusion in supreme court administrative rules of the reasonable and necessary standard that the standard was aimed at imposing some uniformity on local court budget activity. *See infra* note 53 and accompanying text. The concern over inconsistent local approaches to court budget policies has been one of the driving forces behind court unification. *See generally* NAT'L INST. OF JUSTICE RESEARCH REPORT, STRUCTURING JUSTICE: THE IMPLICATIONS OF COURT UNIFICATION REFORMS (1984).

the exercise of inherent powers would be viewed as arbitrary.[45] Although the cases rarely acknowledge that the exercise of inherent powers may implicate public trust in the judiciary, the "reasonably necessary" requirement seems motivated in part by such considerations.[46]

3. *The Requirement of Administrative Exhaustion*

One of the most basic of the court-imposed limits is the requirement that inherent powers may only be used when established means for fulfilling a court's needs have failed.[47] Therefore, invoking inherent powers is an act of last resort. Courts must, at a minimum, follow prescribed procedures for legislative approval of budget items and cannot simply substitute inherent powers for the normal legislative budget process.

4. *Appointment of an Outside Judge*

The appearance of judicial impartiality is threatened when the judge who issues a funding order under the mantle of inherent powers then reviews his own order in a subsequent legal action. As a result, courts will sometimes require that a judge who is unaffected by the inherent powers order hear the challenge to the order.[48]

B. *The Growth of Modern Finance Mechanisms*

Several nonjudicial developments have also affected the use of inherent powers. First, with the advent of the modern expansion of inherent powers that limited the budgetary discretion of local governments, localities began to support state take-

45. *See Juvenile Director*, 552 P.2d at 174 (discussing the proper standard). In that case, the court stated that "it is incumbent upon the courts, when they must use their inherent power to compel funding, to do so in a manner which clearly communicates and demonstrates to the public the grounds for the court's action." *Id.*

46. *Id.*

47. *See, e.g.*, Clerk of Court's Compensation v. Lyon County Comm'rs, 241 N.W.2d 781 (Minn. 1976) (inherent power could not be exercised to establish clerk's salary where clerk failed to appeal figure set by county as required); Leahy v. Farrell, 66 A.2d 577 (Pa. 1949) (inherent power not justified where lower court failed to submit salary increase to county board as required by statute); Hillis v. Sullivan, 137 P. 932 (Mont. 1913).

48. *See, e.g.*, McCorkle v. Judges of Chatham County, 392 S.E.2d 707, 709 (Ga. 1990).

overs of court financing.[49] As the use of unitary budgeting expanded, the battleground for local, inherent powers disputes contracted.[50] In addition, the introduction of lump-sum budgeting gave judges and court administrators greater flexibility in creating and managing their budgets. Under lump-sum budgeting, there is no longer a need for a judge to go hat in hand to a legislative body for a tape recorder[51] or an air-conditioner.[52]

C. *The Implications of Centralizing Financing and State Supreme Court Control of the Doctrine: Setting the Stage for* Wachtler v. Cuomo

Taken together, the court-imposed limitations and the budget innovations have largely removed inherent powers disputes from the province of local government and have encouraged reconciliation of conflicts. As this process progressed, some commentators predicted that inherent powers would become less important as a budgeting tool for the courts.[53] A few observers recognized that the removal of the budgeting process to the state level and the assumption by the state's highest courts of the role of guardian of the inherent power may have raised the stakes of an inherent powers conflict even while reducing the incidence of disputes.[54]

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49. *See* CRATSLEY, *supra* note 6, at 3 (discussing Carl Barr, *Judicial Activism in State Courts: The Inherent Powers Doctrine*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, 129 (Mary C. Porter & G. Alan Tarr eds., 1982)).

50. In New York State, for example, the 1962 consolidation of the court system meant that the local courts were no longer dependent on the 62 county governments, thus reducing a significant number of potential fiscal flash points — or at least shifting the battleground to the state level. *See infra* notes 54, 184 and accompanying text.

51. O'Coins, Inc. v. Treasurer of Worcester, 287 N.E.2d 608 (Mass. 1972).

52. State *ex rel.* Reynolds v. County Court, 105 N.W.2d 876 (Wis. 1960).

53. *See, e.g.*, Barr, *supra* note 49, at 146.

54. A group of prescient commentators who recognized the implications of these events was Geoffrey Hazard and his co-authors, who wrote 20 years before *Wachtler v. Cuomo* that:

> a remote danger in unitary budgeting, but one which cannot be ignored, is that the judicial system will take the inherent powers doctrine seriously and try to secure its appropriation by mandamus. At this level the legislature would find its vital interests and prerogatives threatened . . . . [T]he ultimate outcome of such a conflict is impossible to predict but certainly it would discredit both branches of government and embarrass judicial financing for some time.

Hazard et al., *supra* note 22, at 1300.

Prior to *Wachtler v. Cuomo*, there were no significant inherent power conflicts between coequal state branches of government.[55] As the fiscal problems of the cities during the 1960s and 1970s (which spawned the modern expansion of the inherent powers doctrine) became the burden of the states in the 1980s, the locus of inherent power conflicts shifted. With both the budget process and control of inherent powers residing at the state level, an attempt to expand the doctrine beyond its previous bounds in a direct confrontation between constitutionally equal branches of state government was inevitable.

IV. *Wachtler v. Cuomo*: A Chronicle of Constitutional Crisis

A. *Judicial Funding and the New York Budget Process*

The majority of states treat the judicial branch like any other state agency in the preparation of the budget:[56] judiciary budget requests are submitted to executive budget officials who review and revise the requests, and incorporate the revised requests into the final budget submitted to the legislature.[57] The remaining states either permit the judiciary to submit its budget request directly to the legislature, or require the judiciary to submit its request to the executive branch, which must then transmit the request to the legislature without revision but subject to the recommendations of the executive.[58] New York follows the latter procedure in which the executive acts as a "conduit" for the judicial budget request; New York is fairly unusual in that the conduit procedure is mandated by a consti-

55. There were several cases involving insignificant sums, none of which precipitated any head-to-head conflict between the branches over fundamental powers. *See In re* Appointment of Clerk of Court of Appeals, 297 S.W.2d 764 (Ky. 1957) (power to appoint clerk); State *ex rel.* Cunningham, 101 P. 962 (Mont. 1909) (power to set stenographer's salary); State *ex rel.* Kitzmeyer v. Davis, 68 P. 689, 690 (Nev. 1902) (power to order new furniture and carpet for supreme court); *In re* Janitor of Supreme Court, 35 Wis. 410 (1874).

In 1978, the West Virginia Legislature decreased funding for the judicial budget several times. The Supreme Court of Appeals ordered the full budget reinstated. The case did not involve inherent powers; it turned on a constitutional provision prohibiting the legislature from decreasing judicial budget items. State *ex rel.* Bagley v. Blankenship, 246 S.E.2d 99 (W. Va. 1978).

56. CARL BARR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 25 (1975).

57. *Id.*

58. *Id.* at 29.

tutional provision.[59] The constitution further provides that the legislature may strike, reduce, or add items to the judiciary budget request subject to the veto of the Governor.[60]

Pursuant to its constitutional powers, the New York State Legislature had in fact consistently reduced the judiciary request in each of the fiscal years from 1982-1990 by between $10 and $50 million, even while the actual level of appropriations rose by over $400 million.[61] The Governor's acquiescence in these reductions in the judiciary budget request became an increasing source of tension between the Chief Judge and the Governor to the point that observers looked to "their annual squabble over the state judiciary budget" as a way to "enliven Albany's dreary year end political scene."[62]

In 1982, the year Cuomo took office, the appropriation for the judiciary was $480.1 million. This figure increased by $415 million or 86% during the following nine fiscal years.[63] Yet, the judiciary still found its resources stretched with these increases falling an average of 4% short of its own budget requests.[64] Since 1985, the year when "crack cocaine" first began to appear in New York, the number of felony indictments and superior court informations in Supreme and County Courts statewide increased by 57%.[65] Felony filings in the criminal terms of New York County supreme courts increased by 73%.[66] Municipal

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59. N.Y. CONST. art. VII, § 1 provides that:

> Itemized estimates of the financial needs of the legislature, certified by the presiding officer of each house, and of the judiciary, approved by the court of appeals and certified by the chief judge of the court of appeals, shall be transmitted to the Governor not later than the first day of December in each year for inclusion in the budget without revision but with such recommendations as he may deem proper. Copies of the itemized estimates of the financial needs of the judiciary also shall forthwith be transmitted to the appropriate committees of the legislature.

Id.

60. *Id.* § 4.

61. Wachtler v. Cuomo, No. 6034/91 (Sup. Ct. Albany County 1991 filed Sept. 27, 1991).

62. Elizabeth Kolbert, *Cuomo at Odds with Top Judge on Budget Plea*, N.Y. TIMES, Dec. 8, 1989, at B3.

63. *Wachtler*, at 12.

64. *Id.*

65. *Id.* at 14.

66. *Id.*

courts around the state were experiencing similar increases.[67] New York City Criminal Court calendars commonly contained 250 cases daily, as approximately 330,000 cases were filed in 1989.[68] Noncriminal cases also surged during the late 1980s, including a 223% increase in family court cases in New York City, and civil filings increasing 25%.[69] As caseloads rose swiftly, judicial staffing resources increased only minimally, and nonjudicial personnel remained understaffed, particularly in the trial courts where 850 positions remained unfilled due to budget constraints entering the 1991-92 fiscal year.[70] The Chief Judge had repeatedly pressed the legislature and the Governor for more money over the years, characterizing court funding as a "bones and sinew budget,"[71] and privately complaining of cavalier treatment by the Governor.[72] The resulting backlogs and delays set the stage as the Office of Court Administration began planning for the 1991-92 budget process in the fall of 1990.

B. *The 1991-92 Executive Budget Proposal*

On December 1, 1990, the Chief Judge transmitted to the Governor and legislature a judiciary budget request for $966.4 million, an increase of $70 million, or 8% over the previous year's appropriation.[73] The Governor incorporated this request in his Executive Budget without revision on January 31st[74] and included the entire request within the appropriations bill submitted to the legislature.[75] However, in the Governor's financial plan, which contained the Governor's recommended levels of expenditures and revenues, the Governor recommended a reduction of 10% from the judiciary's request, resulting in a $25

67. *Id.*

68. *Id.*

69. *Id.* at 15.

70. *Id.* at 13.

71. William Glaberson, *Cuomo Urged to Increase Court Budget*, N.Y. TIMES, Jan. 29, 1990, at B1.

72. Frank Lynn, *Cuomo's Fiscal Battle With Judge Pits Dollars and Dignity*, N.Y. TIMES, Mar. 19, 1990, at B3.

73. *Wachtler*, at 7, 13.

74. 1991-92 N.Y.S. Executive Budget at 555-83.

75. S. 1751, A. 3051; *Wachtler*, at 12.

million (2.8%) proposed reduction from the previous year's appropriation.[76]

The Governor's 2.8% proposed reduction in the judiciary budget was in line with other spending cuts compelled by what the Governor characterized as the state's worst financial crisis since the Great Depression.[77] The 1991-92 Executive Budget anticipated a $6 billion gap between revenue forecasts and spending projections.[78] The $29.15 billion state spending plan included proposals for the largest spending cuts and tax increases in the state's history.[79] The cuts went to the heart of some of the state's most powerful political constituencies. Governor Cuomo acknowledged that the budget would generate "a lot of complaining and a lot of screaming" from interest groups but insisted that the state's basic strengths would remain intact.[80] One of the first to respond was Chief Judge Wachtler, who warned the Governor that "what you recommend will not leave this state strong—it will leave it vulnerable in a very fundamental way."[81]

C. *The Chief Judge Drops a Bombshell*

Although the New York State Constitution imposes an April 1 deadline for the approval of the state budget, the fiscal crisis of the late 1980s complicated negotiations between the Governor and legislature over spending cuts and revenue increases, resulting in a series of missed budget deadlines.[82] By the time the April 1 deadline had passed in 1991, negotiators still had not resolved major budget issues.

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76. *Wachtler*, at 11. This distinction between the Executive Budget and financial plan would later form one focal point of the confrontation and intertwine with the inherent powers arguments.

77. Sam H. Verhovek, *Cuomo Proposing Steep Budget Cuts and Tax Increases*, N.Y. TIMES, Feb. 1, 1991, at A1.

78. *Id.*

79. Including a $1 billion cut in school aid, a 50% cut in aid to localities, the abolishment of dozens of state agencies, the elimination of 18,000 state jobs (10% of the work force), a $400 million loss in aid to New York City, and a host of new taxes, including a 50% increase in tuition at state and city universities. *Id.*

80. *Id.*

81. *Id.*

82. Sarah Lyall, *Budget in Albany is Political Pact*, N.Y. TIMES, Apr. 2, 1993, at B1.

The question of the judiciary budget remained a background issue until mid-April when Chief Judge Wachtler, in a Manhattan speech, dropped his first bombshell. Noting that the Governor had failed to include the judiciary's own budget estimate in his financial plan, the Chief Judge announced, "[a]s far as I'm concerned, that's an unconstitutional budget."[83] By including a revised estimate in the financial plan, the Chief Judge charged that the Governor was not just "fiddling with the financial plan – he's fiddling with the Constitution."[84] The Chief Judge noted that several other court systems had successfully sued their states to force them to fully finance the judiciary,[85] which was the first indication that he thought the Governor's actions might come within the inherent powers doctrine.

Off the record, judiciary officials were "hinting darkly" about lawsuits.[86] Governor Cuomo remained unperturbed by the Chief Judge's remarks. "I have no doubts as to [the budget's] constitutionality despite the Chief Judge's opinions," the Governor, who takes pride in his own legal acumen, told the New York Times.[87] Seizing on a theme that would recur throughout the confrontation, the Governor tried to cast the Chief Judge as the voice of just one more special interest group vying for a bigger slice of a shrinking budget pie. "He's like all the other people who speak in their political capacity. He's trying to get as much as he can for his particular segment."[88]

The Chief Judge's approach was met with an equally cool reception in the legislature, where the Chair of the Assembly Judiciary Committee dismissed the constitutional accusations as a "sort of 'how many angels can dance on the head of a pin' kind of argument. The fact of the matter is the court system is

83. Elizabeth Kolbert, *Wachtler Says Cuomo Cut Judiciary Funds Unconstitutionally*, N.Y. TIMES, Apr. 11, 1991, at B5.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* After graduating at the top of his St. John's law school class in 1956, Cuomo clerked for the Court of Appeals for two years. Prior to embarking on a career in politics, Cuomo developed a reputation as a tough litigator and creative appellate attorney. *See generally* ROBERT S. MCELVAINE, MARIO CUOMO - A BIOGRAPHY, 133-46, 167-92 (1988).

88. Kolbert, *supra* note 83, at B5.

not going to get the total budget they requested, and I think they realize that."[89]

In the court of public opinion, the editorial writers awarded round one of the budget battle to the Governor.[90] The New York Times accused Wachtler of "picking a constitutional fight" which "foment[ed] needless turmoil," and suggested that fears of collapse in the justice system were "overstated," involving consequences to public convenience, not safety.[91] These responses did nothing to improve the Chief Judge's negotiating position, and he was to suffer a more damaging loss in the next round.

D. *A Budget Is Approved*

On May 31, 1991, the state legislature approved a final appropriation for the judicial branch of $889.3 million.[92] The amount represented a decrease of $77 million from the judiciary's original budget request, and an increase over the Governor's recommendation by $19 million. Compared to the previous year's appropriation, the judiciary absorbed an actual decrease of about $6.5 million, or .7% of the 1990 budget.[93] In response, the Chief Judge again raised the possibility of an inherent powers lawsuit, suggesting that the "enormity" of the cuts would justify legal action. "Courts throughout the country have consistently held that the legislative and executive branches have the obligation of adequately funding the courts."[94] Chief Judge Wachtler emphasized that an inherent powers suit was "something that must be exercised with enormous restraint. But we should not confuse judicial restraint with judicial abdication."[95]

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89. *Id.*

90. *This Court Crisis Isn't Necessary*, N.Y. TIMES, Apr. 15, 1991, at A16.

91. *Id.*

92. *Wachtler*, at 10.

93. The 1990-91 appropriation for the judiciary was $895.8 million. *Wachtler*, at 12.

94. Gary Spencer, *Legislature Appropriates $899 Million For Judiciary*, N.Y. L.J., June 4, 1991, at 1.

95. *Id.*

E. *The Legal and Political Battles*

The situation remained quiet until September 1991 when the Chief Judge made good on his threat and filed a lawsuit against the Governor and legislative leaders in the New York State Supreme Court. Chief Judge Wachtler charged that the Governor had violated his constitutional obligation to incorporate the judiciary budget request in the Executive Budget, and that the Governor and legislature had failed to fund the courts adequately.[96] He preceded the filing of the suit with an announcement that the budget would require 500 layoffs in the court system and a cutback in the hours of operation of small claims courts.

Chief Judge Wachtler accompanied these announcements with a release of a letter to the Governor and the legislative leaders complaining about the budget's treatment of the court system.[97] It appeared that the reaction to his April comments[98] had convinced the Chief Judge that his constitutional argument and inherent powers exercise would be met with skepticism unless he could win the hearts and minds of the public (and the media) by pointing to the dramatic effects of the budget shortfall. Thus, he ordered the cutbacks, and publicly released the letter on September 5, 1991, announced the lawsuit on September 25, fired the 500 court workers the following day, and filed the lawsuit the day after the layoffs, all of which was accompanied by press conferences and releases.[99]

The lawsuit took Albany observers by surprise. They had viewed the Chief Judge's threats primarily as a bargaining tactic designed to maximize his leverage during the spring budget negotiations.[100] In fact, the Chief Judge may actually have been looking ahead to the next budget cycle when he filed the lawsuit; in comments to reporters he conceded that he decided to file the suit after receiving warnings from the Governor's

96. *Wachtler*, at 25-26.

97. Elizabeth Kolbert, *Fiscal Cuts Forcing Layoffs, Chief Judge Says*, N.Y. TIMES, Sept. 6, 1991, at B3.

98. *See supra* notes 86-91 and accompanying text.

99. Sam H. Verhovek, *Chief State Judge is Suing Cuomo to Get More Money For Courts*, N.Y. TIMES, Sept. 26, 1991, at A1.

100. *Id.*

budget office that the upcoming budget would contain no judiciary increase.[101]

The Governor responded with a public relations offensive of his own, returning to the themes that had worked earlier in the year.[102] In a statement released on the day the lawsuit was filed, Governor Cuomo again accused the judiciary of looking out for its own interests while turning a blind eye to other needs in the state. He made the point that the state's limited resources meant that any increase for the courts would have to come out of someone else's pocket: "[By] this complaint, the judges of our State say that they are entitled to whatever they feel they need for themselves and their courts, no matter whose taxes go up; no matter what poor people, sick people or children are denied; no matter who is laid off."[103]

The day after the suit was filed, Governor Cuomo and Chief Judge Wachtler continued their "take no prisoners" brand of public relations warfare. The Governor held a press conference to sharply criticize the suit. He labeled it "zany," and said it set a "dangerous precedent."[104] He questioned the objectivity of judges hearing a case in which their own interests were at stake: "Having sat at the table of accusation, after they finish making the charge, they jump up, leap on the bench, turn around and say 'I was right.' Fascinating, even for New York."[105]

Chief Judge Wachtler returned fire, charging the Governor with a "total unfamiliarity with the law" and suggested that the Governor should "spend more time governing, more time finding ways to properly fund the courts, and spend less time holding press conferences."[106]

The editorial writers were dismayed by the confrontation. The New York Times ran an editorial captioned "Wachtler v. Cuomo = Two Losers," and took both men to task for the level of

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101. *Id.*

102. *See supra* note 88 and accompanying text.

103. *Judge Wachtler Files his Suit to Get Courts More Money*, N.Y. TIMES, Sept. 27, 1991, at B3.

104. Kevin Sack, *Cuomo Denounces Judge's Lawsuit on Budget*, N.Y. TIMES, Sept. 28, 1991, at 22.

105. *Id.*

106. *Id.*

bitterness marking the conflict.[107] On the merits of the issue, the Times saw no change from its earlier conclusion that the legal issues were beside the point; the real question was the "judiciary's fair share" in a time of "plunging revenues and rising needs" throughout the state.[108] The Times remained skeptical that a few million dollars from a budget of $900 million would make the difference between survival and collapse of the court system. Picking up on a point that the Governor was emphasizing, the Times suggested that the suit raised "disturbing conflict of interest questions" for the courts.[109] Even if the Chief Judge recused himself, should the case come before the Court of Appeals, "how could any other New York judge credibly try a case whose outcome would determine resources available for his own courtroom?"[110] None of the commentary in the major papers gave any serious recognition to the inherent powers doctrine or precedent.

While the two men continued to lob daily volleys in the public relations battle, the Governor opened up a second front in the legal conflict with a countersuit filed before Federal Judge Jack Weinstein in the Eastern District of New York.[111] The Governor sought dismissal of the state court suit, relying on Civil War era civil rights provisions to argue that voters would be disenfranchised if their elected officials' budget making decisions could be overridden by unelected judges.[112] The complaint also repeated the Governor's public argument that the state courts could not fairly decide a case in which they had a strong institutional interest.[113]

Judge Weinstein declined to dismiss the suit, but suggested in a written opinion that the courtroom was not the best place

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107. *Wachtler v. Cuomo = Two Losers*, N.Y. TIMES, Sept. 27, 1991, at A28.

108. *Id.*

109. *Id.*

110. *Id.*

111. Kevin Sack, *Cuomo Challenges His Chief Judge's Lawsuit*, N.Y. TIMES, Oct. 8, 1991, at B1.

112. Gary Spencer, *New Cuts Sought from Court Budget, Cuomo Cites Need to Close Latest Deficit*, N.Y. L.J., Nov. 1, 1991, at 2. The theory of Cuomo's suit was that, under 28 U.S.C. § 1443, Wachtler's suit had the effect of denying New Yorkers their vote for legislators who had adopted the budget and that the Wachtler suit violated the Equal Protection Clause by elevating judicial desires "over the demands of all other people of the state." *Id.*

113. Sack, *supra* note 104, at 22.

to resolve the budget dispute. He admonished the two "titans of New York" to avoid "an unseemly conflict" by negotiating a resolution.[114] "Is it not time now, at the threshold, to stop, to reason, to withdraw from what will become a public spectacle with no benefit to the people whom both the talented Governor and the learned Chief Judge so desperately want to serve?,"[115] questioned Weinstein. "We are faced with the paradox that litigation designed to solve a problem makes its solution less likely."[116]

To help achieve an out-of-court resolution, Weinstein asked former Secretary of State Cyrus Vance to mediate the dispute.[117] Vance found negotiating this conflict to be as frustrating as his efforts to bring peace to the Balkans,[118] for as soon as court recessed, the war of words began anew. The Governor tried to "remind the world that ["the unseemly conflict"][119] was started by the Chief Judge":

> It was the judges who charged into court, using their power and their forum as a giant sledgehammer to demand from the rest of the society that they be accommodated above all other people as though they weren't just judges, they were some kind of Brahmains [sic] who were specially selected.[120]

After being told by a reporter of the Governor's comments, the Chief Judge reportedly reacted with an obscenity before responding that the "conflict was started when [the Governor] submitted our budget in an unconstitutional fashion, causing the closing of our courts."[121] The Chief Judge dismissed the Governor's comments as "populist rhetoric" and announced that he would accept the mediation effort.[122] However, the Governor rejected Vance's mediation effort, suggesting that neither the

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114. Cuomo v. Wachtler, No. 91-CV-3874, slip op. at 2 (E.D.N.Y. Oct. 7, 1991).

115. *Id.* at 4.

116. *Id.*

117. *Id.*

118. *See* David Binder, *Vance, Leaving Sees Hope for Bosnia Plan Despite Fighting*, N.Y. TIMES, Apr. 14, 1993, at A8.

119. Sack, *supra* note 111, at B1.

120. *Id.*

121. *Id.*

122. *Id.*

constitution nor the state's fiscal condition were amenable to negotiation.[123]

The Weinstein comments provided fresh ammunition for the editorial writers who caricatured the Governor and the Chief Judge as "schoolyard gladiators," and repeated the contention that "this dispute simply doesn't belong in court."[124] The Times dismissed the legal arguments and insisted again that "the dispute remains more political than legal."[125]

As work on the legal briefs continued in October 1991 (with the Governor telling reporters he was up late every night researching the law for his countersuit)[126] the out-of-court maneuvering intensified, with both sides threatening investigations of the other's spending practices. By the end of October, it appeared that the Chief Judge was wavering in his resolve to continue the lawsuit.[127] He reportedly was willing to accept as little as $11 million in increased funding along with a "pledge" that the courts may directly submit their budget request to the legislature.[128] However, he stood firm on the principle driving the suit, contending that even if he lost the lawsuit, "I would have made the point that we are not another state agency — we are a separate and co-equal branch of government."[129]

F. *New York's Fiscal Picture Darkens*

In November 1991, the pressure on the Chief Judge to agree to a settlement increased sharply when state budget officials announced their estimate of a mid-year budget gap of nearly $700 million.[130] The Governor moved to drop his federal countersuit and to abandon his effort to remove the primary suit to federal court, citing the need for expedited discovery of judicial spending in the state case in order to propose additional cuts in the current year and in the spending plan for the 1992-

123. *Id.*

124. *A Hot Feud, Through Cooler Eyes*, N.Y. TIMES Oct. 9, 1991, at A24.

125. *Id.*

126. Sam H. Verhovek, *Wachtler v. Cuomo: Duel of Ex-Friends*, N.Y. TIMES, Oct. 29, 1991, at B1.

127. *Id.*

128. *Id.*

129. *Id.*

130. Sarah Bartlett, *Fathoming the Gaps*, N.Y. TIMES, Nov. 3, 1991, § 1, at 1.

93 budget.[131] The Governor undoubtedly calculated that opening the judiciary's books to public scrutiny would be a more potent weapon to force dismissal than the federal countersuit. Judiciary officials attempted to turn the strategy around by suggesting that they were equally eager to begin discovery of spending in the Governor's office.[132] By late November 1991, however, the Governor's budget office announced that the mid-year budget gap had risen to $875 million.[133] Governor Cuomo ordered additional deep cuts throughout state government including a further cut of $26 million in the current-year budget for the judiciary.[134]

The Chief Judge responded by announcing that the additional cuts would force the closing of all civil courts and half of the state's criminal courts by January 1, 1992.[135] The rhetoric reached a fever pitch. In a statement, Chief Judge Wachtler predicted that "the closing of so many criminal courts would lead unavoidably to the release of hundreds, even thousands, of criminal defendants because of jail overcrowding and speedy trial mandates."[136] The Chief Judge went on to accuse the governor of "vindictiveness" because of the lawsuit.[137] The Governor's press secretary responded that it was "absurd" to suggest that a 3.4% cut would cause the closure of most of the state's courts: "Perhaps there's new management needed in the courts if they can't manage a 3% cut."[138]

Two days later the Office of Court Administration released its budget request for the upcoming fiscal year. The request proposed a $61 million increase over current (1991-92) court funding, which was enough to restore most of the previous cuts including the lay-offs and add sixteen judges.[139] The request was significant because it actually sought less money for the

131. Gary Spencer, *Cuomo Drops Effort to Shift Funding Suit, Wachtler Challenge to Return to State Court*, N.Y. L.J., Nov. 15, 1991, at 1.

132. *Id.*

133. *Wachtler Says New Budget Cuts May Lead to Release of Suspects*, N.Y. TIMES, Nov. 29, 1991, at B4.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Kevin Sack, *Court Propose New Fees to Pay for A Budget Rise*, N.Y. TIMES, Nov. 29, 1991, at 25.

next fiscal year (1992-93) than the Chief Judge was seeking for the current (1991-92) fiscal year through the lawsuit. In a departure from previous years, the budget request presented the legislature with a variety of cost-saving and fee options to pay for the increase. The proposals included a 1% levy on civil judgments and a fifty dollar fee for filing motions.[140]

Representatives of the legal community, usually staunch opponents of such proposals, reflected the depth of concern over the current budget gridlock by acknowledging that the fees might be necessary to get the courts moving again.[141] The new budget request thus seemed to represent a tacit acknowledgement that the legal and political battle over the 1991-92 budget was draining the court's institutional effectiveness and damaging its credibility, and was a harbinger of the settlement to come.

The judiciary's reputation suffered one more blow when Chief Judge Wachtler, in a December 13, 1991 letter to the state's judges, told them that he intended to seek pay increases for the 1,100 state judges despite the budget cuts and layoffs.[142] This split the court's own constituency when the politically powerful Court Officers' Association denounced the move.[143] Although the letter seemed to be nothing more than a morale booster for the judges, because it made no mention of when the Chief Judge would seek the increase, the Governor's spokesperson was quick to pounce on the misstep. "His startling request for raises for judges at this time of hardship for the hardworking people of the middle class, and those in poverty, does more to impair his credibility than we ever could."[144] On the legal front, the Governor chose to file his motion to dismiss Chief Judge Wachtler's lawsuit arguing that the New York State Constitution precluded the use of inherent powers to compel a state judicial budget.[145]

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140. *Id.*

141. *Id.* The representatives included the New York State Bar Association. *Id.*

142. Robert D. McFadden, *Wachtler in Letter Vows to Seek Raises for Judges*, N.Y. TIMES, Dec. 27, 1991, at B5.

143. *Id.*

144. *Id.*

145. Motion to Dismiss, Wachtler v. Cuomo, No. 6034/91 (Sup. Ct. Albany County filed Dec. 24, 1991).

G. *Settlement*

With the 1992-93 budget release just weeks away, intense negotiations over the 1992-93 judiciary budget were being brokered by legislative staff. The Governor was prepared to propose significant new cuts in the judiciary spending plan for the new year.[146] The combination of pressures created by budget realities, the upcoming hearing on the motion to dismiss, and the constant battering in the press finally moved the Chief Judge to cut both his fiscal and public relation losses ending the year-long conflict.

At 4:30 p.m. on January 16, 1992, the Chief Judge called the Governor with an offer to resolve the crisis.[147] The Chief Judge proposed that if the Governor would agree to restore the judiciary budget for the upcoming fiscal year to the expenditure level of the previous fiscal year, he would drop the suit and open his books to an outside auditor.[148] An hour later, the Governor called back and told the Chief Judge, "It's done."[149] A year of political and legal skirmishes came to an end just days prior to the first arguments on the merits of the case and the release of the 1992-93 budget plan.[150]

V. Analysis of *Wachtler v. Cuomo*

Wachtler v. Cuomo broke new ground in the development of the inherent powers doctrine. The suit represents the only attempt to date to test the doctrine's viability in a direct confrontation between coequal branches of state government over the lump-sum budget of a state judiciary. To evaluate the efficacy of this or similar attempts, this section will address the theoretical, doctrinal, precedential and political implications of *Wachtler v. Cuomo*.

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146. The proposed cuts were in excess of $130 million. Gary Spencer, *Wachtler, Cuomo Settle Funding Suit*, N.Y. L.J., Jan. 17, 1992, at 2.

147. *Id.*

148. *Id.* at 1.

149. *Id.* at 2.

150. For an evaluation of the settlement, see *infra* notes 187-92 and accompanying text.

A. Wachtler v. Cuomo *and the Theoretical Justification for Inherent Power*

The doctrine of inherent powers holds that a branch of government may exercise the power necessary to protect itself in the performance of its institutional duties.[151] The source of the power is said to be neither constitutional nor statutory; it is an intrinsic characteristic of the institution.[152] The doctrine finds its primary theoretical basis in the separation of powers. The functional differentiation between the branches of government is designed, in Madison's words, to prevent "the accumulation of all powers, legislative, executive, and judiciary, in the same hands," for this concentration would be "the very definition of tyranny."[153] This separation is enforced by the concept of checks and balances which provides "great security against a gradual concentration of the several powers in the same department [by] giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[154] By permitting one branch to "resist encroachments" by the other branches, the inherent powers doctrine serves as a balancing mechanism of the constitutional framework.

The paradox of the inherent powers doctrine is that the very exercise of inherent power by a branch of government violates the separation of powers in order to preserve the branch's status as an equal and independent unit of government.[155] When, for example, a court compels funding for the salary of a clerk or legal secretary, it is exercising the appropriation power which belongs to the legislative branch. This violation is not

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151. *See* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971), *cert. denied*, 402 U.S. 974 (1971); see generally CRATSLEY & CARRIGAN, *supra* note 6, at 18, and cases therein.

152. *See, e.g.*, *In re* Integration of Nebraska State Bar Ass'n, 275 N.W. 265, 267 (Neb. 1937) ("The term 'inherent power of the judiciary' means that [power] which is essential to the existence, dignity, and functions of the court from the very fact that it is a court."); *In re* Surcharge of County Comm'rs, 12 Pa. D. & C. 471, 477 (Lackawanna County Comm. Pl 1928). In this case, the court held: "Such powers from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant nor in any sense upon legislative will." *Id.*

153. THE FEDERALIST No. 47 (James Madison).

154. THE FEDERALIST No. 51 (James Madison).

155. See Ferguson, *supra* note 35, at 986-87 for a discussion of this point.

troublesome for several reasons. First, it has been recognized since Madison's time that the separation of powers is not a rigid demarcation, but one which tends to blur at the edges. The branches of government are not meant to be "wholly unconnected with each other."[156] The branches should be "connected and blended as to give each a constitutional control over the other."[157] There is no fundamental objection where the exercise by one branch of another branch's powers helps to protect the constitutional status of each. This is the essence of checks and balances.

Second, this kind of action, while protecting the judicial capacity to carry out institutional functions, does not strike at the power of a coordinate branch in any vital way. Simply because the judiciary's power is *augmented* does not mean that the legislature's power is correspondingly *diminished*. Where the exercise of the power is by a superior governmental unit, as in the typical case in which a state supreme court compels funding from a locality, the concern over a separation of powers violation by the judiciary is remote. The concern underlying the concept of separation of powers is concentration of power in one source. This concern is simply not implicated in any real way when a court exercises its inherent power to protect itself *without* diminishing the sphere of a coordinate and equal branch.

Conversely, the point at which the exercise of the power can no longer be characterized as an action which merely protects one branch but instead diminishes the rights and powers of a coordinate and equal branch marks the conceptual boundary of inherent power. It is at this point where the judiciary ceases to act as a check on the other branches and begins to encroach on their dominion. When the exercise of inherent powers crosses this line it becomes a cure that does more damage to the separation of powers doctrine than the malady it was intended to address.

Wachtler v. Cuomo is on the wrong side of this line. The power to tax and the power to appropriate are vested in the legislature.[158] Financial support for the courts can only come from

156. THE FEDERALIST No. 48 (James Madison).

157. *Id.*

158. Though the wording and provisions of state constitutions differ, all state legislatures possess these powers, subject only to constitutional limitations such as

tax revenues in the form of an allocation of appropriations.[159] When a state court compels a state legislature to fund the judiciary at a level beyond that which the legislature has determined can be supported by the fisc, the court, in essence, is mandating either an exercise of the taxing power or a reallocation of appropriations, or both. This exercise of inherent power would redress the injury to the judiciary only by upsetting the fundamental alignment of the branches, and thus is neither an acceptable nor legitimate use of the inherent powers doctrine. Chief Judge Wachtler's attempt to compel $77 million in additional funding from an already balanced budget usurped core taxing and appropriation powers of the legislature. The suit thus cannot be justified as an exercise of inherent power because it would do far more to damage than to preserve the separation of powers.[160]

B. Wachtler v. Cuomo *and the Doctrinal Limitations on Inherent Power*

1. *The Requirement of Prior Approval*

Courts have developed a number of doctrinal limitations on the exercise of inherent power even as they have broadened its scope.[161] The most important of these is the requirement that a lower court receive the prior approval of the state supreme court or central court administrator for any inherent power exercise.[162] The review process results in a more objective evaluation of the proposed action when the decision to invoke inherent powers is removed from the local judge, who stands to gain the

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executive veto. For the provisions of specific constitutions, see generally LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE (1983).

159. *See id.*

160. Some of the cases are beginning to explicitly recognize this danger. *See* McCorkle v. Judges of the Superior Court, 392 S.E.2d 707, 708 (Ga. 1990). Inherent power:

> does not give the judicial branch the right to invade the province of another branch of government. As a principle flowing from the separation of powers doctrine, it arms the judicial branch with authority to prevent another branch from invading the province. The inherent power is not a sword but a shield."

Id.

161. *See supra* notes 40-48 and accompanying text.

162. *See supra* notes 40-41 and accompanying text.

most from the exercise, and from the arena of local politics. This tends to screen out injudicious use of the power and to encourage conciliation between the local parties. These constraints are lost when the supreme court *itself chooses* to exercise its inherent power. There is no disinterested entity to review the high court's decision. Without this escape valve the decision is mired in the highly charged context of an inter-branch budget battle, an environment unlikely to produce an objective evaluation of the exercise of inherent power.[163] Thus, in a situation like *Wachtler v. Cuomo* where the state's highest court is involved in a significant inter-branch conflict, the most important of the safeguards imposed by the state's highest courts to control the use of inherent power is rendered meaningless. This is exacerbated in a state like New York where inherent powers precedent is sparse,[164] and which has no guidelines or court rules to regulate the initiation of inherent power suits.

2. *The Reasonable and Necessary Standard*

The second doctrinal limitation that has emerged in the case law is the requirement that the funding sought by the exercise of inherent power is "reasonable and necessary" for the functioning of the court.[165] This somewhat murky standard has been used to evaluate whether specific line-item expenditures are important enough to compel their funding. It responds to the problem of local judges who make their own budgets without the oversight or expertise of professional budget experts, sometimes resulting in questionable budget requests.[166] The standard served, in effect, as surrogate for professional budgeting guidelines. It was not designed for and has never been ap-

163. The political stakes in an inter-branch conflict at the constitutional level can be extraordinarily high. In New York, during the time of the lawsuit, it was widely assumed that the Chief Judge was preparing to run for Governor against Mario Cuomo and that Chief Judge Wachtler's assertiveness on the budget may have been motivated by his political ambitions. *See* Sam H. Verhovek, *Friends of Judge: GOP Answer to Cuomo*, N.Y. TIMES, Nov. 8, 1992, at 48; Lynn, *supra* note 72, at B3. This suggests that the inherent powers doctrine can be as subject to abuse as a political weapon on the state level as on the local level.

164. *See infra* notes 176-180 and accompanying text.

165. *See supra* notes 42-46 and accompanying text.

166. *See* Schmelzel v. Board of County Comm'rs, 100 P. 106 (Idaho 1909) (haircuts and shaves for jurors not considered necessary for functioning of judicial process.)

plied to a lump-sum appropriation request developed by court administration experts through a rigorous budget process. Presumably, modern court administrators in a unified system would not submit any request which was not demonstrably reasonable and necessary according to established fiscal standards. The court request developed in the modern budget process is, by definition, reasonable and necessary or the court would not have made the request.

The reasonable and necessary standard is thus no help as a device to screen out improper uses of inherent powers. At the level of sophisticated statewide budgeting it has the opposite effect of turning every budget request into one which would provide grounds for an exercise of inherent power. Where, as in New York, the state constitution explicitly recognizes the legislature's right to reduce the judiciary's budget,[167] conflict is almost guaranteed by the use of the "reasonable and necessary" standard. If a lump-sum budget request by the state judiciary can always be defended as reasonable and necessary and the legislature exercises its constitutional power to reduce that request, then the use of inherent powers is always justified. What began as a standard designed to limit the use of inherent powers becomes, under the *Wachtler v. Cuomo* scenario, a device which encourages separation of powers conflicts.

3. *The Requirement of Administrative Exhaustion*

The third limitation imposed by case law is that the established means of seeking funding must be utilized before a court can exercise its inherent power.[168] This fundamental constraint is designed to ensure that courts do not substitute inherent powers for statutory procedures. However, as with the other restrictions, it has little bite at the state level where the budget process is statutorily or constitutionally mandated. If the established budgetary procedures that fail to produce the desired funding are constitutionally mandated, as in New York,[169] then the exercise of inherent power not only presents a clash with a coordinate and coequal branch over the force of a statute, but

167. N.Y. CONST. art. VII, § 4.

168. *See supra* note 47 and accompanying text.

169. BARR, *supra* note 56, at 26-27.

also creates significant tension with the constitution itself.[170] Since the ultimate goal of the inherent powers doctrine is to redress imbalances in the framework of separation of powers, a use of the doctrine which engenders constitutional discord undermines the purpose of inherent powers.

4. *Appointment of an Outside Judge*

A fourth and final device is utilized by state supreme courts to regulate inherent powers cases. Although not a formal part of the doctrine, it has been the practice of state supreme courts to appoint a judge from outside the local judicial district where the dispute arose to hear the case at the trial level.[171] Like the prior approval mechanism, this practice brings a disinterested decision-maker into the dispute providing a more objective review of the case and increasing public confidence in the process. These constraints are sacrificed in a state budget conflict. The specter of a judge hearing a case in which he or she has a direct interest in the result is not easily masked when every judge in the court system has a stake in the outcome of an inherent powers conflict over global funding for the judiciary.[172] Furthermore, it is entirely likely that the case will wind its way up to the state's high court – the same court whose Chief Judge has brought the case. The difficulties with the real or apparent conflicts of interest point up the unsuitability of utilizing inherent power as a judicial financing tool at the state level, as *Wachtler v. Cuomo* attempted to do.

C. Wachtler v. Cuomo *and Inherent Powers Precedent*

1. *The National Case Law*

Wachtler v. Cuomo marks a departure from inherent powers precedent in a number of ways. Most significantly, it was the first serious inherent powers challenge between coequal

170. *See supra* notes 59-60; *see infra* notes 181-84 and accompanying text.

171. *See supra* note 48 and accompanying text; see also Ferguson, *supra* note 35, at 564 n.16 and Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 231, nn.86-96 (1993) for a discussion and cases on the impartiality problem in judicial review of funding orders.

172. *See* Governor Cuomo's comments, *supra* note 105 and accompanying text; editorial comments, *supra* note 110 and accompanying text; and general discussion of public confidence, *infra* notes 193-215 and accompanying text.

branches of state government as opposed to the state-local conflicts that have characterized the cases thus far.[173] Additionally, it is the first case to assert an inherent power to overturn a lump-sum budget rather than specific expenditures.[174] Finally, the magnitude of the budget at issue — approaching $1 billion — sets *Wachtler v. Cuomo* apart from previous exercises of inherent power, which tended to be limited to small expenditures.[175] Thus, although the dicta of inherent powers cases is sweeping, the holdings have in fact been quite narrow and do not provide firm support for expansion of the doctrine to conflict on the level of *Wachtler v. Cuomo*.

2. *The New York Case Law on Inherent Power*

The history of the use of inherent powers in New York is less developed than in many jurisdictions. No major inherent powers case has come out of New York; the majority of the inherent powers cases in New York involve court control of the adjudicatory process.[176] The few New York cases involving the power to compel funding are limited in their reach. The strongest case is *In re McCoy v. Mayor of the City of New York*[177] In *McCoy*, the city of New York refused to provide any funding for a newly created housing part of the civil court. The local court administrators sued the city to compel funding. The court held that the city had to provide the requested funds.[178] However, the holding appeared to rest on the fact that the state legislature had authorized the creation of the housing part and that the city by refusing to fund it was "flout[ing] a legislative mandate."[179] There was no significant discussion of inherent powers

173. *See* cases cited *supra* notes 14-26; *see supra* notes 27-55.

174. *See* cases cited *supra* notes 14-26; *see supra* notes 27-55.

175. *See* cases cited *supra* notes 14-26; *see supra* notes 27-55.

176. *See, e.g., In re* Bar Ass'n of N.Y., 222 A.D. 580, 227 N.Y.S. 1 (1st Dep't 1928) (power to conduct investigation); Benjamin Franklin Fed. Sav. Ass'n v. PJT Enters., Inc., 149 Misc. 2d 688, 566 N.Y.S.2d 478 (Sup. Ct. Cortland County 1991) (power to punish for contempt); Bankers Trust Co. v. Braten, 101 Misc. 2d 227, 420 N.Y.S.2d 584 (Sup. Ct. N.Y. County 1979) (power to assign cases); People v. Bell, 95 Misc. 2d 360, 407 N.Y.S.2d 944 (Crim. Ct. Queens County 1978) (power to control calendar).

177. 73 Misc. 2d 508, 347 N.Y.S.2d 83 (Sup. Ct. N.Y. County), *modified and aff'd*, 41 A.D.2d 929, 344 N.Y.S.2d 986 (1st Dep't 1973).

178. *Id.* at 513, 347 N.Y.S.2d at 88.

179. *Id.* at 510, 347 N.Y.S.2d at 86.

doctrine in this or any other New York case, thus leaving the status of the doctrine uncertain at best.[180]

3. *Inherent Powers and the New York Constitution*

In addition to the indefinite recognition of inherent powers in New York case law, the New York Constitution implicitly rejects the use of judicial inherent power to compel funding when the funding is the result of constitutional procedure:

> Insofar as the expense of the courts is borne by the state or paid by the state in the first instance, *the final determination* of the itemized estimates of the annual financial needs of the courts *shall be made by the legislature and the governor* [in accordance with the prescribed procedures].[181]

Taken in concert with the procedures that permit the legislature to alter the judiciary budget[182] and the Governor to veto that budget in whole or in part,[183] the constitution explicitly contemplates reduction of the state judiciary budget without judicial recourse.[184] A line of New York cases subsequent to the reorganization of the courts under these provisions recognizes that the existence of explicitly governing statutory or constitutional provisions preempts judicial intervention in matters involving the appropriation power.[185] Thus, it is not clear whether

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180. A comprehensive review of the development and status of inherent powers doctrine in New York is beyond the scope of this paper. There is extraordinarily little attention in either the cases or the commentary to inherent powers in New York. The topic is ripe for further research. The only point sought to be made here is that the doctrine is simply not well established in New York.

181. N.Y. CONST. art. VI, § 29 (emphasis added). In addition, article VII, § 7 provides that "[n]o money shall ever be paid out of the state treasury . . . except in pursuance of an appropriation by law . . . ." N.Y. CONST. art. VII, § 7. For a detailed description of constitutional procedures, see *infra* notes 59-60 and accompanying text.

182. N.Y. CONST. art. VII, § 4.

183. N.Y. CONST. art. IV, § 7.

184. *See* N.Y. Leg. Doc. Nos. 36, 24 (1958). The Temporary Commission on the Courts, which drafted article VI, said of § 29 that "all budget requests are as the name implies *requests* and will be finally determined by the appropriating agencies as, in their wisdom, they deem right. No court is to continue to have mandate power over its own budget" (emphasis in original). *See also* JOINT LEGIS. COMM'N ON COURT REORG., Ninth Interim Report, N.Y. Leg. Doc. No. 46 at 17-18 (1964) ("paramount" authority over the Judiciary's budget rests with the Governor and legislature).

185. *See* Cohn v. Borchard Affil., 25 N.Y.2d 237, 252, 250 N.E.2d 690, 697, 303 N.Y.S.2d 633, 643 (1969) (holding that a statute did not infringe on the judiciary's

New York constitutional law or case law supports the use of inherent power as asserted in *Wachtler v. Cuomo*.[186]

D. *A Political Evaluation of* Wachtler v. Cuomo

The weakness of the theoretical justifications for *Wachtler v. Cuomo* and the paucity of New York law on the issue of inherent powers suggest that the suit may primarily have been a political tool to leverage additional funding in future budget negotiations. It is not clear that the suit was successful even on these terms. Furthermore, to the extent that the handling of the suit undermined public confidence in the judiciary and injured the judiciary's relationships with the other branches the damage resulting from *Wachtler v. Cuomo* may have outweighed any potential gains.

1. *The Settlement and the Fiscal Outcome for the Courts*

The stated objectives of the suit were to alter the way in which the Governor submitted the judiciary's budget to the leg-

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inherent power to control calendars). In *Cohn* the court stated: "It is one thing to be of the view that the power . . . should be in the Court. It is quite another to say that it is there in the face of clear evidence that the Constitution chose not to lodge it there." *Id.* (quoting David Siegel, *Supplementary Practice Commentary*, N.Y. CIV. PRAC. L. & R., Book 7B at 307-08 (McKinney 1968); *see also* County of Oneida v. Berle, 49 N.Y.2d 515, 522, 404 N.E.2d 133, 137, 427 N.Y.S.2d 407, 411 (1980) ("In budgetary matters, the essential process is detailed by the Constitution, and the role of each branch distinctly treated."); Saxton v. Carey, 44 N.Y.2d 545, 549, 378 N.E.2d 95, 97-98, 406 N.Y.S.2d 732, 734 (1978). In referring to article VI, the court in *Saxton* stated that "[t]he power of the judiciary is as subject to such limitations as is that of its coordinate branches of government, for the specter of judicial tyranny is no more palatable to a free people than is the threat of an uncontrolled executive or legislative branch . . . . Under our system of government, the creation and enactment of the state budget is a matter delegated essentially to the Governor and the Legislature." *Id*; *see also* People v. Ohrenstien, 77 N.Y.2d 38, 46, 565 N.E.2d 493, 496, 563 N.Y.S.2d 744, 747 (1990) ("Under the State Constitution, the Legislature alone has the power to authorize expenditures from the State treasury . . . ."); *In re* Smiley, 36 N.Y.2d 433, 438, 441-42, 330 N.E.2d 53, 56, 58, 369 N.Y.S.2d 87, 91, 94 (1975). In *Smiley* the court stated: "Nor under the State Constitution may the courts of this state arrogate the power to appropriate and provide funds . . . . The absence of appropriated funds and legislation to raise taxes under our state constitutional system . . . is not a judicially fillable gap." *Id.*

186. Unsurprisingly, the legal memoranda of the Chief Judge rely heavily on cases from other jurisdictions. *See* Plaintiff's Mem. of Law in Opposition to Defendant's Motions to Dismiss at 10-14, Wachtler v. Cuomo No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991) (citing 14 non-New York inherent power cases, and just four New York inherent power funding cases).

islature, and to compel an additional $77 million in funding for the judiciary.[187] Neither goal was achieved by the settlement proposed and agreed to by the Chief Judge. The Governor did not change the way in which the budget was submitted. Furthermore, the courts did not receive the additional funding they sought to compel, and, in fact, received a substantial *further* cut in funding due to the mid-1991 budget deficit.[188]

The courts did receive a small increase for the 1992-93 fiscal year, but only enough to restore the budget to the 1990 level.[189] This amount was still $55 million less than the Office of Court Administration had estimated it would need for the 1992-93 fiscal year.[190] In addition, the court system would now be subject to an outside audit, a move the Chief Judge had resisted.[191] Although judicial officials sought to put the best face on the settlement,[192] the reality was that the courts ended 1991 worse off than they started and would be no better off in the next budget year.

2. *The Effect of* Wachtler v. Cuomo *on Public Confidence in the Courts*

a. *Publicizing the Plight of the Courts*

From the commencement of *Wachtler v. Cuomo* it was clear that the Chief Judge was making his case on behalf of the courts not only in a legal setting, but to the public at large.[193] Even the complaint read much like a press release, detailing the alleged mistreatment of the courts at the hands of the legislature and the Governor, recounting "the ever-increasing workload of the Judicial Branch" and describing its effects on the administration of justice.[194] Articles by court officials and prominent New York lawyers appeared in the legal press echoing the message and explaining why the use of inherent powers

187. *Wachtler*, at 12, 25-26.
188. Spencer, *supra* note 146, at 2.
189. *Id.*
190. *See supra* note 139 and accompanying text.
191. Spencer, *supra* note 146, at 2.
192. *Id.*
193. *See supra* notes 94-95, 136 and accompanying text.
194. *Wachtler*, at 24.

was an appropriate legal exercise.[195] The major papers ran features on the deteriorating conditions of the courts as part of their overall coverage of the dispute.[196] The lawsuit presented the Chief Judge with an unparalleled opportunity to place the plight of the courts in the public eye, in the hopes of building support for enhancement of the judicial budget.

Although *Wachtler v. Cuomo* was successful in publicizing the difficulties faced by the courts, there is no evidence that the campaign mounted by the Chief Judge translated into public support for the judiciary. There are several reasons why public confidence in the courts may actually have eroded in the wake of the suit. It is a political axiom that the greater the number of interests injured by fiscal constraints, the smaller the likelihood that any particular budget cut will be perceived by the public as unfair.[197] When the "pain" is spread more or less evenly, the public will perceive the entire budget plan as a fair and necessary, albeit unwelcome exercise.[198] For the executive faced with the unpleasant task of selling the public on a budget which slashes services, the spectacle of various interest groups each clamoring for a larger piece of a shrinking budget pie actually helps implement the overall budget strategy by persuading the public of the fairness of the plan.[199] When the Chief Judge mounted his campaign to restore a judiciary cut of less than one percent, he handed the Governor a better opportunity to advance this strategy than the Governor could have created himself. This explains the zeal with which the Governor seemed to welcome the chance to engage the Chief Judge over the law-

195. Sidney H. Stein & Eric M. Schmidt, *Can the Judiciary Compel the Legislature to Increase Funding for the Courts?*, N.Y. L.J., Apr. 25, 1991, at 1; *Is Governor Cuomo's Budget Unconstitutional?*, N.Y. L.J., Apr. 22, 1991, at 1.

196. Virginia Breen, *Small Claims, Big Spats; Budget Cuts Slowing Justice to a Crawl*, NEWSDAY, Oct. 2, 1991, at 2.

197. This strategy was evident in President Clinton's first budget proposal. David E. Rosenbaum, *Clinton's Hope: Hostility; Oddly Enough If Everybody Finds Fault In The Deficit Plan, The Better Its Chances*, N.Y. TIMES, Feb. 14, 1993, § 1, at 1 ("Representative Dan Rostenkowski, the Chairman of the House Ways and Means Committee, has told the White House that it is politically crucial to create such a large universe of sacrifice that it is difficult for people to say they should be outside of it.").

198. *Id.*

199. *Id.*

suit,[200] and is one reason why public sympathy for the courts did not materialize.[201]

b. *Diminishing the Stature of the Courts and the Political Leadership*

The judiciary's authority is uniquely dependent on public confidence.[202] The image painted by the news reports and editorials[203] of a judiciary demanding priority allocations of scarce budget resources ahead of competing social needs, cannot help but diminish the stature of the courts in the public mind.[204] Furthermore, when a court determines that its needs are paramount to other social concerns, and then orders the executive to meet its needs it undermines the quality of impartiality upon which public trust in the courts is based.[205] The editorials expressed particular dismay over the potential conflict, indicating that the image of a court acting as prosecutor, judge, jury and executioner struck a deep nerve.[206]

It may also be hard for the public to accept particular arguments made to justify the exercise of inherent powers. For example, it is often asserted that the courts are a virtually helpless bystander in the budget negotiation process.[207] Can this be true today, when the bar associations and court employee unions — which have a direct stake in the judicial budget — are among the most powerful players in the political arena? And since the overwhelming majority of legislators are

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200. *See supra* notes 87-88 and accompanying text.

201. *See supra* notes 90, 107-108, 124-25 and accompanying text.

202. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction."); *see also* Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2814 (1992). In *Casey* the Supreme Court noted that the Court "cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy . . . ."

203. *See supra* notes 90, 107-08, 125 and accompanying text.

204. *See In re* Salary of the Juvenile Director, 552 P.2d 165, 172 (Wash. 1976) ("The unreasoned assertion of power to determine and demand their own budget is a threat to the image of and public support for the courts.").

205. *Id.* at 173 ("By in effect initiating and trying its own lawsuits, the judiciary's image of impartiality and the concomitant willingness of the public to accept its decisions as those of a fair and disinterested tribunal may be severely damaged.").

206. *See supra* note 108 and accompanying text.

207. *See supra* notes 24-25 and accompanying text.

practicing attorneys,[208] it cannot be argued that the legislature fails to understand the needs of the courts. One might suppose that lawyers lobbying other lawyers on the needs of the courts would evoke more sympathy than would lobbying on subjects further removed from their experience. The legislature's decision to reduce funding for the courts may well have a special aura of credibility with the public *precisely* because of the legislators' familiarity with and understanding of the court system.

The primary factual argument made by Chief Judge Wachtler could not withstand public scrutiny. The Chief Judge repeatedly claimed that the judiciary budget had been consistently cut by the Governor and the legislature.[209] In fact, the budget had increased by $415 million (86%) since the Governor assumed office, and the actual cut at issue in the lawsuit was under 1%.[210] Only the judiciary's *requests* had been trimmed, as the legislature was constitutionally entitled to do.[211]

It was not just the courts that suffered a loss of public confidence as a result of *Wachtler v. Cuomo*. The credibility of the political leadership as a whole suffered when the executive branch called on the entire state to make sacrifices in the name of fiscal recovery,[212] while the judicial branch engaged in extraordinary conduct to avoid such sacrifices.

c. *The Dangers of Success*

Had the suit ultimately been successful in compelling the funding of the judiciary budget, the negative effect on public confidence in the courts could have been greater. The court is ill-equipped to make broad judgments about the allocation of resources to competing interests; its success in compelling funding undermines rational budget decisions by a representative body.[213] Furthermore, if the court's action results in a tax in-

208. Lawyers make up the largest group of state legislators nationwide. Elizabeth Kolbert, *Lawmaking for States Evolves into Full Time Job*, N.Y. TIMES, June 4, 1989, at 26.

209. *See Wachtler*, at 10-13.

210. *See supra* note 63 and accompanying text.

211. *See supra* notes 59-60 and accompanying text.

212. *See supra* notes 103, 113, 144 and accompanying text.

213. *See In re* Salary of the Juvenile Director, 552 P.2d 163, 172 (Wash. 1976) ("By its nature litigation based on inherent judicial power to finance its own func-

crease or cuts in other programs in order to raise the level of judicial funding, active public animosity toward the judiciary would surely emerge.[214] The damage to public confidence is further exacerbated if the executive or legislature refuses to enforce the order to compel funding. The court's essential dependence on the other branches would be revealed, perhaps crippling the court's authority in a substantial way.[215] Thus, whether the court wins, loses or settles the case, but perhaps especially if it is won, the court seeking to exercise its inherent power at the state level may be risking much more in terms of public confidence than it stands to gain by adding a few — or even a great many — dollars to its budget. The loss of public trust and the increase in inter-branch tension may impair the functioning of the court in a more fundamental way than a lean budget appropriation. The budget money will rise and ebb with the currents of the economy; the public trust, once lost, is not so easily regained. *Wachtler v. Cuomo* suggests that a court considering the exercise of inherent power must think hard about the effects of its action on its relationship with the public, for such concerns may be more determinative of the efficacy of the exercise than a carefully parsed legal and theoretical analysis.

VI. Conclusion: The Implications of *Wachtler v. Cuomo* for the Future of Inherent Powers

Wachtler v. Cuomo provides evidence for the conclusion that the doctrine of inherent power cannot and should not be pushed beyond its conceptual, precedential, and practical limits. As a conceptual matter, a use of the doctrine that undermines rather than strengthens the separation of powers is unsupportable.

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tions ignores the political allocation of available monetary resources by representatives of the people elected in a carefully monitored process.").

214. *Id.* ("[S]uch actions may threaten, rather than strengthen, judicial independence since involvement in the budgetary process imposes upon the courts at least partial responsibility for increased taxes and diminished funding of other public services.").

215. The executive might indeed relish the opportunity to display the court's impotence after a bruising interbranch conflict; as President Jackson is reputed to have said of one disagreeable Supreme Court holding, "John Marshall has made his decision; now let him enforce it." E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 194 (1919).

Viewed in historical perspective, the critical use of the doctrine as applied to funding is when court budgeting lay in the hands of local legislators and judges with little expertise in modern court management. It serves as a useful tool for local courts to protect themselves from becoming overly subservient to local politicians. But when unitary financing and lump-sum budgeting replace a fragmented process of line-item appropriations, the doctrine of inherent powers outlives its usefulness. Furthermore, the judicially created limitations on inherent powers that control the use of the power by local courts are ineffective when the doctrine is applied by a state supreme court in a conflict with its constitutional partners. Finally, by using inherent power as a weapon to coerce a co-equal branch of government to fund the courts at a judicially mandated level, the courts undermine the public confidence and interbranch cooperation on which they ultimately depend.

All of the significant boundaries of the doctrine are violated by the judiciary's use of inherent power as an alternative to the state budget process. The attempt by *Wachtler v. Cuomo* to assert inherent power as a response to chronic budget problems at the state level ignores the roots and limits of the doctrine. The traditional use of the doctrine as a means of protecting the sovereignty of local courts against attacks by other local government entities will survive *Wachtler*. Although attempts to assert the doctrine beyond its historical and theoretical borders will undoubtedly persist as long as the states are pressed by tight fiscal constraints, it is unlikely that these exercises will be successful. Even the court which wins funding through an inherent power suit stands to lose power, prestige, and effectiveness while inflicting damage on its coordinate branches and creating a substantively irrational state budget. The ultimate implication of *Wachtler v. Cuomo* is that all parties emerge as losers in an inherent powers conflict of this nature, no matter what the legal outcome of the exercise.

COURT FUNDING

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On Judicial Independence

by

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INTRODUCTION

While courts account for only very small percentages of the total state and federal budgets, they do constitute significant expenditures. Like other aspects of our federal system of government, there is a great deal of variability across state and local jurisdictions in the sources of funding, the budgeting process, and the amounts expended. In addition, comparisons of court appropriations across jurisdictions can be misleading because some expenses, such as indigent defense, may not be included in the court budget. It is also important to keep in mind that court funding is only one part of funding the justice system. In 1990 it was estimated that courts accounted for only 12% of state and local justice system expenditures, which also include expenses for police, prosecutors, public defenders and corrections. However, while budgeted independently, the courts' workload can be seriously affected by budgetary increases granted to other parts of the justice system, such as prosecutors and police.

There is significant potential for court funding to affect judicial independence in a variety of ways. The amount of money granted, the budget process, the flexibility allowed in expensing the budget, and even the withholding of appropriations in response to court decisions are all legitimate concerns for those committed to the rule of law and an independent judiciary on which it depends. In times of economic crisis, the very operation of the courts and access to justice may be threatened.

The American Bar Association has devoted significant attention to court funding. The 1988 Dash report on "Criminal Justice in Crisis" noted a need for increased resources and the Special Committee on Funding the Justice System published the findings of several surveys of funding in the states. These have included "Funding the Justice System – A Call to Action (1992), "Saving Our System: A National Overview of the Crisis in America's System of Justice

(1993), "Striving for Solutions. An Overview of Crisis Points in America's System of Justice" (1995) and "Agenda for Justice – ABA Perspectives on Criminal and Civil Justice Issues" (1996), which concluded that there would be funding problems for the foreseeable future. In addition, a number of ABA entities have focused on the funding needs for specific areas such as the Standing Committee on Legal Aid and Indigent Defendants. The American Bar Association was also one of three co-sponsors (along with the National Center for State Courts and the National Conference of State Legislators) of the 1995 National Interbranch Conference on Funding the Courts. An earlier version of this overview of state court funding was prepared to provide background information to the Standing Committee on Judicial Independence and the ABA Commission on the 21st Century Judiciary. The paper will cover the basics of court funding, outside influences on court expenses, alternative revenue sources, state fiscal crisis and the courts, judicial independence and accountability, and the potential for reform.

THE BASICS OF COURT FUNDING

In the last half of the twentieth century courts became large institutions. While they are estimated to constitute less that 3-4% of state budgets (with variability among the states) and two-tenths of one percent of the federal budget, they still account for the expenditure of considerable public dollars. State court expenses are estimated to be $12-$15 billion dollars. Large urban trial courts can have operating budgets of around $100 million, with the typical trial court costing several million dollars annually. Remembering that these budgets often exclude important expenditures critical to the operation of the courts (e.g. indigent defense), and that 70-90% of expenses are estimated to be attributable to personnel-related expenses (most of it

judicial salaries), it should not be surprising that court budgets have become the focus of some legislative and executive attention, particularly in times of economic strain.

Courts in the states are funded from state, county and municipal governments, depending on the state. While appellate courts have been state funded, traditionally trial courts were funded locally. Over the years, however, there has been a trend toward state funding for the trials courts as well; the American Bar Association called for state financing of trial courts in its 1974 Standards of Judicial Administration. In most states, trial courts are currently funded from a combination of state and local funds, with judicial salaries the most likely expense to be funded at the state level.

As part of the court unification movement, reformers pushed for state funding as a way to equalize justice within the states and to improve efficiency by simplifying and centralizing budgeting. It was also seen as a way to relieve local pressure to raise funds and thereby avoid the appearance of improper influence on judicial decisions. Opponents argued that a decrease in local control would result in a decline in responsiveness and would stifle innovation. However, towards the end of the twentieth century local jurisdictions were themselves increasingly supportive of state funding as costs increased and local revenues came under pressure. The actual effects of state level funding appear to be limited, with the arguments of neither the proponents nor opponents being fully realized. Overall funding does not appear to increase with state funding, though the flexibility to move funds across jurisdictions has improved. It is likely that funding for the courts in most states will remain a shared responsibility between state and local governments.

As of the end of 2001, state funding of trial courts was limited to judicial salaries in twelve states; in nine states the state government covered 90 – 100% of trial court expenses. In

the remaining 60% of the states, the role of state funding increases with the level of court (with general jurisdiction most likely to be funded), or expense item (with judicial salaries and automation as examples of items most likely to be state funded). The item least likely to be state funded is facilities, which are often shared with other state agencies. There is also variability as to the items covered by the judicial branch budget. For example, indigent defense may be the responsibility of the judicial or executive branch or a combination of both. Federalism is alive and well when it comes to the funding of state courts.

As a separate and co-equal branch of government, the judiciary might expect significant control over their own budget. Here too, however, there is considerable variability among the states as to the degree to which the court budget is subject to the legislature's power of the purse and the executive's control over the state budget. Such division of budgetary control tends to contribute to tension between the branches. Similar conflicts can develop at the local level where the county board or city council controls funding and where the clerk's responsibilities are to both judicial and legislative functions.

At the state level, governors can amend the judicial branch budget in eighteen states, and with few exceptions this is done routinely. In only fourteen states is the judicial appropriations bill filed as a separate bill. But it remains subject to alteration by the legislature in all states. While courts generally do receive some consideration as a separate branch of government, there has been increased pressure to treat the judicial budget as that of a state agency competing for the same scarce resources. Budgetary independence for the courts ranges from pro forma acceptance of the court budget to domination by the other branches. The level of restriction also varies. Some court budgets prepared by the executive branch include detailed line items and limit transferability of funds among the items. Thus in many states it is not just the total dollars for

which courts depend on other branches. At the same time, it should be noted that "a frequent observation [at the national conference on funding the state courts] was that the judiciary demands resources without really clarifying their operational needs or adequately explaining what appear to many as arcane procedures." A recent survey confirms the importance of providing such information. Court administrators, executive budget officers and legislative budget officers all agree that "providing supporting documentation" is the most effective strategy for courts to use during the appropriations process.

INFLUENCES ON COURT EXPENSES

It has often been noted that courts do not have control over their own workload, being constitutionally required to accept cases brought to them. But those cases are themselves influenced by a number of diverse sources. Of course there are simply the variations in the amount of criminal behavior and lawsuits, both of which are affected by general economic conditions and a host of social variables. In addition, however, there are decisions made by all the branches of the state and federal governments that also directly affect the work of the courts and their resultant funding needs.

As more behaviors are defined as criminal, more cases come to court. And the standards for criminal or civil liability may change. For example, as legislatures decrease the alcohol level that defines driving under the influence, cases of drunk driving are likely to increase. There are also unfunded mandates such as turning child support enforcement over to the courts. In addition, as federal dollars flow to the states to increase the number of police, and in some cases prosecutors, in the ever-popular omnibus crime bills, courts are the recipients of increased cases with no match in funding. Appellate courts also impose burdens on trial courts, such as requiring

interpreters for increasing numbers of immigrants, or lawyers for indigent defendants even if a suspended sentence is imposed and imprisonment is a remote possibility, as recently determined by the United States Supreme Court (Alabama v Shelton, 535 U.S. 654, 2002).

In recent years courts have also taken on a host of new services, either voluntarily or by legislative mandate. These include alternative dispute resolution mechanisms, pro se options, alternatives to incarceration, and social service delivery and treatment programs. All of these have been developed to provide justice in a changing society. But they also all entail additional costs. It is particularly in family and juvenile courts that the post-adjudication role of the courts has been increasing rapidly into social service areas that raise costs at the same time that their expanded role may put the courts in conflict with social service agencies of the executive branch. It should be noted, however, that such increased court expenditures might also result in broad savings for the state budget as a whole. For example, two studies by the California Judicial Council concluded that specialized drug courts have saved millions of dollars for the state by reducing incarceration and recidivism.

ALTERNATIVE SOURCES OF REVENUE

Funds for courts come predominantly from the general fund via direct appropriations. Fines and fees for court costs provide additional sources of revenues. However, the monies generated from both fees and fines return to the general fund, and are not directly available to the courts for their use. Pressure on the courts to raise revenues through fines and fees generate their own problems. As a source of revenue, fines entail problems of collection, particularly from those with limited means, and they may skew sentencing in a way that raises concerns about the fairness of the courts. Fees, while attributing costs to those who use the courts, may have the

unintended consequence of limiting access to justice. In addition, courts do not typically have the power to assess fees or fines, which is within the purview of the state legislature (or more local legislative body). The current state economic crisis is exerting pressure to increase fees and fines; in some states increases are already being implemented.

Some courts have been making creative use of volunteers to fill needs without expense, and others have obtained private and public grants for particular projects or improvements. Limited federal funding is also available for selected programs, although it tends to focus on innovations and, while beneficial, is not applicable to continuing expenses.

THE ECONOMY AND THE COURTS

The general state of the economy affects government revenues and therefore the funds that are available to all branches of government. As a result of the continuing economic downturn, state revenues have declined dramatically from the boom years of the late 1990's when personal consumption and capital gains boosted state revenues. In addition, many states are being forced to operate within the limits imposed by the permanent tax cuts enacted in response to the temporary revenue gains of the mid to late 1990's. Cost overruns, especially for Medicaid, have only exacerbated the situation, as have unfunded federal mandates such as "No Child Left Behind" and homeland security. According to the National Governors Association, states currently face their worst budget crisis since World War II.

The National Conference of State Legislators reports that in FY2003, revenues failed to meet projections in 37 states. By July 2003, 43 of the 49 states with balanced budget requirements had met that obligation. In addition to spending cuts and fee increases, states have drawn heavily on their reserves. There are now simply fewer dollars available to fund public

services, including the courts. Looking to FY 2004, 41 states face a cumulative budget gap of $78.4 billion. This follows three years of budget shortfalls that resulted in a cumulative budget gap of $200 billion.

In previous economic downturns, states have decreased spending and raised taxes, but this time around it appears there is a reluctance to raise taxes, and in some cases, such as Oregon, a rejection by voters. Rather states have relied on increased taxes on items such as cigarettes, alcohol, health insurance premiums and telephone service. While these raise some revenues in the short term, they are likely to depress consumption and thus revenues in the long term. Add to this the fact that in 44 of the 45 states with personal or corporate income taxes, state tax revenues are tied to federal tax law. Recent changes in the federal tax laws will have a negative impact on state tax revenues unless states move to "decouple" the state codes from the new federal law.

Since state fiscal recovery lags behind economic recovery by a year or more, the state fiscal crisis appears to be a long-term problem. Unlike the federal government, which can borrow to pay for current expenditures, states are required to have balanced budgets. With a hesitancy to raises taxes, the thrust has been to decrease spending. To meet balanced budget requirements, states are taking severe measures. For example, Oregon is shortening their school year and Kentucky is implementing early release for non-violent offenders. In Arizona a severe cut in probation officer positions coupled with a requirement of a 60-1 ratio of offenders to officers, has resulted in sending more offenders to prison, some of them living in tents.

Although the courts account for only a very small proportion of the state budgets, and did not share in the burst of increased spending in the 90's that went largely to education, healthcare and corrections, the courts are being forced to share in the cutbacks and to compete with other

essential services for scarce resources. While the courts' status as a co-equal branch of government may have served as a buffer from cuts in the past, such is no longer the case.

A November 2001 survey of state court administrators by the Council of State Court Administrators (COSCA) suggested that overall court budgets had not yet been dramatically affected. State court administrators (including those from Puerto Rico and Guam) were asked about the adequacy of their current budgets and whether they expected budget changes that year and the next. Of the 38 respondents, 11 (29%) described their budgets as inadequate and only 4 expected budget restrictions of more than 5% that year (20 expected no change or an increase) and only 2 expected more than a 5% decrease the next year (with 18 expecting no change or an increase). Projected budget reductions were expected to have its greatest impact on funding for court staff, administrative staff, training and technology. Subsequent experience confirms the accuracy of those predictions.

In June 2002 COSCA distributed a follow-up survey asking about expectations for FY 2002-2004, what actions administrators had taken in response to current cuts, and what they contemplate for the future. In addition, the court administrators were asked to report what consequences budget restrictions/reductions have had in terms of the operation of the courts. The results of this survey demonstrate a worsening condition and expectations of increasingly inadequate resources. 36% of the state court administrators rate their FY2002 appropriations inadequate and 45% expect inadequate funding in FY2003. Although 60% of the states report increased court appropriations from FY2001 to FY2002, only 38% expect an increase for FY2003 and 45% of the states expect budget restrictions in FY2003. Due to cuts in funding, 62% of the states have imposed hiring freezes or delays in hiring for FY2003. A majority of the states have also cut purchases (60%), enhancement of electronic communications (57%), and out

of state travel for training programs (69%). 43% of the jurisdictions also report the imposition of new court fees. Their concerns were clearly justified as FY 2003 has required severe measures by the courts.

States have variously been forced to halt civil trials, suspend jury trials, eliminate drug treatment courts, condense jurisdictions, force unpaid furloughs on court employees, leave judicial positions unfilled, suspend pay for counsel for the indigent, close courthouses and cut staff, in some cases dramatically. In addition, some courts are seeking to increase filing fees in both trial and appellate courts. These measures have the potential to significantly affect the quality of justice and its availability to the public.

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

There is a special concern that the state of the economy will provide legislators and governors with an excuse to decrease funding to the courts in reaction to judicial decisions. Legislative use of appropriations to express disapproval of court decisions is not a new phenomenon. The most extreme example in recent years (later rescinded) was the California legislature slashing the court budget after the California Supreme Court upheld the imposition of terms limits on state legislators.

In recent years there have been newsworthy examples of actual and threatened cuts in court budgets in Alabama, Massachusetts and North Carolina. In May 2002, Alabama Chief Justice Roy Moore suspended civil and criminal trials, although the order was rescinded when emergency funds were made available. The moratorium became national news when it resulted in a delay in the trial of the last defendant in the 1963 Birmingham church bombing case. Tension with the other branches provided the context for particularly bitter exchanges between

the courts and the other branches. The Alabama chief justice had been feuding with the governor and the legislature had demanded documentation for how the courts spend their money. There has also been continuing conflict over funding for public schools, an issue that has been a source of conflict in numerous states as courts have determined that equal funding of public schools is constitutionally required and legislatures have balked at the increased costs. It was this issue that provided the subtext for the judicial impeachment proceedings in New Hampshire in 2001 as well.

In 2001 the Massachusetts courts received $40 million less than requested and were told to expect more cuts the next year. In addition to continuing conflicts over patronage appointments, legislators opposed the Supreme Judicial Court's ruling that the Clean Elections Law (passed by the voters) must be funded. Threats to the budget became so extreme that the Massachusetts Bar Association organized a "Court Funding Lobby Day" at the legislature to protect funding for interpreters, court reporters and guardians ad litem. There has also been an effort to limit the length of terms the justices serve.

In North Carolina a partisan conflict over the drawing of legislative districts erupted with the courts (whose judges were elected on partisan ballots) at the center of the quarrel. A judge rejected the legislative map drawn by the Democratically controlled legislature and oversaw the drawing of a new map deemed more amenable to the Republican party. The North Carolina Supreme Court, with a majority of Republican members, affirmed his decisions. The Senate responded by decreasing the number of supreme court clerks and eliminating some judicial districts, including the one in which the offending judge sits, thereby requiring him to travel around the state holding court. At least one Democratic Senator acknowledged that the cuts were related to the judge's decision in the redistricting case when he was quoted as saying

> There are still some feelings that this is one branch of government that tried to take over another branch. I don't think it's retaliation, but there was a feeling that we needed to stand up and not get rolled over (June 2002).

In none of these cases were decreases in funding the only tool employed by legislatures to punish the courts whose behavior they found unacceptable. However, the appropriation of funds is a legislative obligation and it can be and on occasion has been used to react to court behavior. In times of economic difficulty, when decreased funding is faced by all public agencies, courts may be particularly vulnerable.

The courts can of course use their inherent powers to respond to funding shortfalls that affect their ability to function. The most publicized example of such an effort was the lawsuit filed by New York Chief Judge Wachtler in 1991 challenging Governor Cuomo's reduction of the court budget by 10%. The case was eventually settled with no additional funds provided to the courts. In practice inherent power actions are usually directed against local rather than state governments.

In some states special procedures have been adopted to resolve such disputes. For example, Missouri has a judicial finance commission, which is empowered to resolve budget disputes between the circuit courts and their county governing bodies. The judicial finance commission, which includes judges and county officials, receives petitions for review from the governing body if it deems the circuit court's budget estimate to be unreasonable. Commission decisions are subject to review by the Missouri Supreme Court upon petition (Missouri Revised Statutes 50.640, 50.641, 50.642, and 477.600).

All too often judicial salaries are the focus of conflicts among the branches of government, even without a budget crisis. Current efforts by states to balance their budgets have

brought this item into focus. In Illinois, as part of a budget balancing effort, the governor vetoed a cost-of-living increase for the state's legislators, judges and leaders of the executive. Relying on a 1990 legislative resolution establishing annual cost-of-living increases, and the constitutional prohibition on diminishing judicial salaries during their terms of office, judges filed a lawsuit to force payment. In addition, the Illinois Supreme Court ordered the comptroller to pay the judges their cost-of-living increases and threatened him with contempt if he did not comply. Although the supreme court vacated its order, allowing the case in court to proceed, the considerable negative publicity about the issue did not disappear. When there were only rumors of a lawsuit circulating, an Illinois legislator was quoted as stating that "I don't think that would be a wise move on their part. Those folks in the General Assembly will tend to remember that." Only time will tell what the short and long-term outcome of this conflict will be. But it already serves as an example of how the state of the economy and state fiscal health can directly affect relations between the judiciary and the other branches of government.

The checks and balances built into our constitutional framework make conflicts between the branches of government inevitable. The budget process, with its division of responsibility, is particularly ripe for interbranch tension, and courts are not immune to the pressure on all public agencies to be accountable for the expenditure of tax dollars. Courts are understandably protective of their independence, but they also have a responsibility to demonstrate that they are operating in the best interests of the public. At the National Interbranch Conference on Funding the Courts it was charged that courts "rely too much on their independence and too little on what they are doing to manage more effectively and efficiently."

Courts have a responsibility to accompany requests for funding with reasonable arguments supporting their needs. They can also be expected to manage their funds effectively.

Fiscal management is a year round activity and should not be limited to budget time. It is also reasonable to expect courts to establish performance standards to which they hold themselves accountable.

With the professionalization of court administration, many courts have made strides in improving their cost-effectiveness. For example, the application of Total Quality Management (TQM) to courts has resulted in continuous review of procedures. Still, it must be recognized that the professional managers and enhanced automation that improve efficiency have also resulted in increased expenditures.

Still pressures for the courts to increase revenues have negative implications. In response to Massachusetts Governor Romney's proposal that "judges' fees and fine collections be tied to the money in their operating budgets," Chief Justice Marshall asserted the need to maintain judicial independence noting that tying the courts finances to judges' sentencing determinations would raise serious concerns. While judicial accountability is appropriate, vigilance will be required to insure that it does not come at the expense of the judicial independence that is central to the rule of law.

POTENTIAL REFORMS AND FUTURE ACTION

The judicial branch and the bar can both play a role in insuring adequate funding for the courts. Virtually every serious discussion of the tensions involved in court funding make reference to the need for enhancing relations between the courts and the other branches of government. Continuing communications between the branches is regularly cited as extremely important to avoiding major conflicts over court funding. At the same time, that very communication has been judged to be seriously inadequate. The ABA Standing Committee on

Judicial Independence has continued to assert the benefits of improved interbranch communication and to urge the adoption of programs designed for that purpose. "Justice in Jeopardy," the Report of the American Bar Association Commission on the 21st Century, similarly affirms the importance of enhancing interbranch relations.

Courts can also be more effective in their requests for additional funds. It is important that such requests are tied to clearly defined objectives and that in any given year such requests are limited to the highest priority projects. In addition, courts can support their requests by demonstrating that they have been fiscally responsible in the management of funds that have been allocated to them. In response to an inquiry about the best strategies for courts to adopt in the appropriations process, officials from all three branches of government point to "supporting documentation" as the most effective approach and recognize it as consistent with appropriate efforts by the judiciary to remain "above politics."

Bar associations and courts can both seek changes that will improve court funding in a variety of ways. For example, they can seek to establish "lump-sum" rather than "line-item" allocation of funds to courts. The former allows the courts the flexibility to allocate funds internally as needs evolve during the budget cycle. In addition, it would be an incentive to good fiscal management for courts to be allowed to carry over some unspent funds across fiscal years. In states where the court budget must first be submitted to the executive branch, where it is subject to revision, it would be beneficial to seek direct submission to the legislature.

Bar associations and courts may also want to consider the value and feasibility of establishing a formal mechanism to resolve budgetary disputes along the lines of the Missouri model. To avoid the conflicts that continue to emerge over judicial salaries, and to promote an independent and qualified judiciary, twenty states have judicial salary commissions, half of them

advisory. In nine states, the recommendations of the commission are legally binding unless rejected or modified by the legislature. In Washington State the judicial compensation commission's decisions are determinative. The ABA commission report recommends the creation of judicial salary commissions and the Standing Committee on Judicial Independence is proposing that states establish independent commissions to determine judicial salaries. An ancillary benefit of such commissions is the removal of judicial salaries from consideration of the court budget in the appropriations process.

Bar associations can also be vigilant in making clear to legislatures that increased allocations for enforcement, both civil and criminal, will increase the work of courts and thereby may require some increased funding. Courts and bar associations should also regularly monitor legislative developments that directly affect the courts, making clear that merely defining more behaviors as criminal or subject to civil liability will inevitably put greater pressures on the courts and may require additional funding. That would lay the ground work for determining whether it would be appropriate to pursue the kind of action undertaken by the Massachusetts Bar Association with its Court Funding Lobbying Day.

The chief justice of the Florida Supreme Court recently asked every lawyer to contact their state legislators to seek the restoration of cuts to the judiciary's budget. Direct action by the chief justice may in fact be effective in other ways as well. In a study of the court appropriations process, legislative, executive and judicial officials all agree that the chief justice personally lobbying the governor and individual legislators is the courts' most effective budget strategy. Court administrators are seen as effective in lobbying legislative committees for court funding. Such direct efforts may be particularly important in an era in which there is significant turnover among state officeholders. The largest turnover in forty years occurred in the 2000 state

legislative elections, with 24% of the seats won by newcomers. In addition, almost half the states (24) elected new governors in 2000. As the ones responsible for drafting budget proposals and approving and authorizing expenditures in the context of a fiscal crisis, it is reasonable to assume that they would benefit from learning about the needs of the judicial branch of government.

CONCLUSION

Like so many aspects of our government, the existing pattern of court funding reflects both support for local control and the variability inherent in a federal system. While the core issues in court funding cut across jurisdictions, the precise practices vary greatly. It is likely that court funding will remain a shared responsibility of state and local institutions of government and that courts will be expected to justify the funds that they request. While the current economic crisis poses particular threats to the state courts, the need for arguing the case for sufficient funding and support for the courts will remain on-going.

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