

COMITY OR CONFRONTATION: BUDGETING INDEPENDENCE OF THE AMERICAN JUDICIARY

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Abstract

While many American court systems have constitutional funding protections for judicial salaries, the judiciary is often in the position of bargaining for funding for staff, services, technology, facilities, supplies, and other goods to adequately fund the constitutional mission of adjudication. Courts have looked to two principal strategies in securing funding. First, courts have tried to improve the relationship with the other branches through long-term connections and demonstrations of sound judicial governance. Courts have sought to improve their strategic planning, incorporating novel uses of data including performance measures, with the collateral hope of enhancing budget justifications. Courts have also tested political strategies for self-advocacy, including elevating judicial officers as spokespersons for the judicial branch, mobilizing stakeholders, and lobbying key officials. Second, courts have invoked the inherent powers of the judiciary as a separate and co-equal branch to compel funding that is reasonably necessary to administration of justice. Judicial leaders have typically disfavored this technique, which presents its own risks of trespassing on legislative power and impairing longer-term strategies for building bridges and understanding between the branches, except in patterns of legislative neglect or hostility towards judicial independence.

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I. INTRODUCTION

Following the 2008 financial collapse, and in other moments of austerity, legislatures feeling the fallout expected all state agencies to make sacrifices, swinging a “meat ax” into the fiscal planning of government administrators.¹ The courts were not spared. In 2013, the American federal courts were faced with an automatic 5% spending reduction through statutory budget sequestration, amounting to \$350 million dollars, halfway through the fiscal year.² Some district courts were forced to schedule their criminal dockets around dates when federal public defenders were furloughed.³ The New Hampshire judiciary first furloughed and then laid off 13% of its staff in 2011 due to budget cuts from the state legislature.⁴

If the “meat ax” is frightening, sometimes the “scalpel” offers questionable relief, with legislatures or executive officials singling out the judicial organ for special attention.⁵ Several years ago, the Kansas legislature responded to an opinion by the state Supreme Court, interpreting the state constitution to obligate adequate funding of the education system, by removing the court’s power to supervise lower court judges⁶. The legislature followed up with a measure threatening the budget of the judiciary if the Kansas Supreme Court found this administrative reform unconstitutional. The showdown ended only when legislature reversed course after the Supreme Court held as anticipated.⁷

These budget fights suggest an intractable tension between an independent judiciary and elected legislatures shepherding resources on behalf of the taxpayers. Where the executive branch is responsible for overseeing judicial budgets and submitting funding requests to the legislature, there is an additional layer

¹ For the metaphor, see Catie Edmondson, “How to Enforce a Debt Deal: Through ‘Meat-Ax’ Cuts Nobody Wants,” *New York Times*, June 1, 2023.

² “Facing Fiscal Crises, Judicial Conference Charted Steady Courts,” United States Courts, published November 17, 2022.

³ *Ibid.*

⁴ *Crisis in Court Funding: Second Hearing before the ABA Task Force on Preservation of the Justice System*, Concord, N.H. (May 26, 2011) (Testimony of New Hampshire Supreme Court Chief Justice Linda Dalianis).

⁵ For the scalpel metaphor, see Jim Puzanghera, “Bipartisan Agreement on Budget Cuts: Scalpel is Better than Ax,” *Los Angeles Times*, February 28, 2013.

⁶ Lincoln Caplan, “The Political War Against the Kansas Supreme Court,” *The New Yorker*, February 5, 2016.

⁷ *Ibid.*

of scrutiny implicating separation of powers. The courts derive their power from constitutions, which create obligatory judicial functions that operate independently from the other branches. Other constitutional language, such as “open courts” provisions, may suggest an entitlement of the public to a fair and impartial public adjudication of their rights.⁸

Overzealous, or punitive, interventions in judicial budgets threaten these functions of an independent judicial branch. The legislature is assigned the power of the purse and keeps funding recipients accountable to the taxpayers, screening programs for wasteful spending, as well as fraud and abuse. The judiciary demands independence while also promising to remain accountable. The two must negotiate, in good faith and with respect for the constitutional role of the courts, to determine what funding is adequate to ensure the continuity of core judicial functions.

In the wake of recession budget cuts, and in austerity battles preceding it, the American courts put their heads together to compile persuasive strategies for dealing with legislatures in appropriations processes.⁹ They understood that making good on promised accountability by demonstrating a commitment by the courts to efficient governance and stewardship of court resources was key to earning continuing legislative support.¹⁰ Courts also focused on improving communications with the other branches, seeking to develop more enduring channels and discover what messages and methods of delivery are most effective.¹¹ However, courts occasionally took a more muscular approach, insisting on their inherent powers and framing their budget requests as constitutional demands attached to the doctrine of separation of powers.¹²

This Article will share the experience and lessons learned from American court systems in securing adequate budgets to carry out their functions as the

⁸ Judith Resnik, “Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture,” *Saint Louis University Law Journal* 56, no. 4 (Summer 2012): 923.

⁹ See, e.g., Conference of Chief Justices, Resolution 22: State Judicial Branch Budgets in Times of Fiscal Crisis, Adopted at 27th Midyear Meeting, January 21, 2004.

¹⁰ “Principles for Judicial Administration,” National Center for State Courts Williamsburg: NCSC, 2012.

¹¹ “Funding Justice: Strategies and Messages for Restoring Court Funding,” Williamsburg: NCSC, 2012. Web, <https://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/Funding%20Justice.pdf>.

¹² *Matter of Maron v Silver*, 925 N.E.2d 899 (N.Y. 2010).

Third Branch. First, this Article will summarize strategies adopted in dealing with legislative and executive officials in the annual appropriations process. Both legislatures and courts have the goal of enhancing judicial accountability, and these strategies seek to build firm partnerships on that basis with a coordinate branch. Second, this Article will review examples of courts invoking inherent powers to break impasse and explore the significant risks for the courts in applying these strategies.

1.1. Background

1.1.1. Source of Judicial Power

In the United States, judicial power is distributed between the federal courts and the state courts. Article III, section 1 of the U.S. Constitution provides that “the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”¹³ Tenure of judges both on the Supreme Court and the lower courts is for life during good behavior, and compensation cannot be reduced during a judge’s term in office.¹⁴

Article III, section 2 limits the subject matter jurisdiction of the federal courts to “cases and controversies” arising under the Constitution, federal law and treaties, suits involving the federal government, cases involving diversity of state citizenship or a US citizen and foreign parties, suits between states, cases involving ambassadors and consuls, and admiralty cases.¹⁵ The Supreme Court has original jurisdiction only over cases involving state parties and ambassadors or other public ministers.¹⁶ The Supreme Court has appellate jurisdiction over other cases brought in the lower courts.¹⁷

The US Constitution does not expressly grant judicial review of congressional acts to the federal courts. However, in the early republic the Supreme Court held that the judiciary has an inherent power, derived from the principle of limited

¹³ U.S. Constitution, art. III, § 1.

¹⁴ U.S. Constitution, art. III, § 1.

¹⁵ U.S. Constitution, art. III, § 2.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

government powers implied in the Constitution, to declare laws passed by Congress unconstitutional. In the words of Justice John Marshall, “It is emphatically the province and duty of the Judicial Department to say what the law is.”¹⁸

The state enjoys concurrent jurisdiction with the federal courts, except where the federal courts have exclusive jurisdiction. The U.S. Supreme Court noted in *Gulf Offshore Co. v. Mobil Oil Co.*, “The general principle of state court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state.”¹⁹ Meanwhile, the federal courts, based on their powers in Article III, can decide state law causes of action where there is diversity jurisdiction.²⁰ The vast majority of cases are heard in the state courts.²¹

The powers of the state courts are articulated in each of 50 state constitutions. For instance, the Virginia Constitution declares, “The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish.”²² The Virginia Constitution then defines, among other things, the original and appellate jurisdiction of the Supreme Court, manner of selection and qualification of judges, removal and disqualification of judges, the authority of the Chief Justice as administrative head of the judiciary, and the power of the Supreme Court to establish court rules.²³

Constitutional commitments outside the articles defining judicial power create additional responsibilities for courts. The Sixth Amendment guarantee to a speedy and public trial by jury specifies a form and theoretical time limit for adjudication.²⁴ The right to counsel guarantee requires the provision of legal

¹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁹ *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 (1981).

²⁰ 28 U.S.C. § 1332.

²¹ “Federal and State Caseload Trends: 2012-2021,” Court Statistics Project, National Center for State Courts, accessed September 25, 2023.

²² Virginia Constitution, art. VI, § 1.

²³ Virginia Constitution, art. VI, § 2-12.

²⁴ U.S. Constitution, Amendment VI.

services to indigent defendants.²⁵ Although not found in the US Constitution, forty-one state constitutions contain an “open courts” or “right to remedy” provision that has variously been read to require physical access to courts, to restrict certain types of court fees, and to restrict the legislature from re-defining common law causes of action.²⁶

The Supreme Court’s doctrines defining Fourteenth Amendment due process, right to counsel, speedy and public trial, and other fundamental procedural rights inevitably affect the workload and funding needs not only of the federal courts but also the state courts.²⁷ Statutes defining jurisdiction, the scope of substantive law, and rules of civil and criminal procedure also have major downstream effects on the docket.²⁸

1.1.2. Administration of the Federal Courts

Prior to 1939, administrative control of the federal judiciary was within the Department of Justice.²⁹ Following several Depression-era budget conflicts, Chief Justice Charles Evan Hughes worked with stakeholders from the judiciary, the American Bar Association, and the Department of Justice to draft legislation transferring administrative functions to a new Administrative Office of the United States Courts (AOUSC) under the supervision of the Judicial Conference of the United States.³⁰ 28 U.S.C § 601 provides that the Director is appointed by the Chief Justice of the United States with consultation from the Judicial Conference.³¹ The Director is responsible for administrative matters applying to all federal courts, collecting and reporting data, disbursing appropriations, overseeing management of facilities, and generally stewarding court resources.³²

²⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁶ Judith Resnik, “Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture,” *St. Louis University Law Journal*, 56, no. 4 (Summer 2012): 978.

²⁷ For an illustration of how right to counsel intersects with judicial administration, see Conrad Wilson, “Head of Oregon Supreme Court calls for immediate fix to ongoing lack of public defenders,” *Oregon Public Broadcasting*, July 7, 2022.

²⁸ The struggle between branches over the procedural rulemaking in the courts invites still more separation of powers controversy. For discussion, see Charles Gardner Geyh, “Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress,” *New York University Law Review* 71, no. 5 (November 1996): 1165.

²⁹ “The Executive Role in Judicial Administration,” *Federal Judicial Center*, accessed September 25, 2023.

³⁰ *Ibid.*

³¹ 28 U.S.C § 601.

³² 28 U.S.C § 604.

The Judicial Conference of the United States supervises the USAOC as the policymaking arm of the federal judiciary.³³

The AOUSC prepares a budget estimate for the federal judiciary, which is approved by the Judicial Conference of the United States and accompanied by budget justifications.³⁴ The Judicial Conference then presents the budget to the executive Office of Management and the Budget.³⁵ The President may comment on the judiciary's proposed budget but is prohibited by statute from changing any items in the proposal before submitting it to Congress.³⁶ Congressional appropriations committees will consider the budget, and the Director of the AOUSC, as well as often judicial officers including Supreme Court justices, will generally explain budget justifications and the constitutional role of the judiciary in committee hearings.³⁷

Although the federal judiciary suffered a 5% reduction in 2013 as part of an across-the-board spending cut, Congress has generally appreciated the funding needs and constitutional obligations of the federal courts and increased appropriations between 1.2% and 5.9% in all fiscal years between 2014 and 2023.³⁸ In fiscal year 2023, the federal courts requested \$8.6 billion, approximately 0.2% of the total federal budget.³⁹ Approximately two thirds of the increase in the fiscal year 2024 budget request beyond the previous year is dedicated to inflation adjusted salary increases.⁴⁰

1.1.3. Administration of the State Courts

State constitutions and statutes assign responsibilities for judicial administration and budgeting. Historically, trial courts have been funded substantially from local revenue. However, the trend since the latter half of the twentieth century has been to place budget authority at the state level, under

³³ 28 U.S.C § 331.

³⁴ "Introduction to the Federal Budget Process," Congressional Research Service, updated January 10, 2023.

³⁵ "The Judiciary Fiscal Year 2024 Congressional Budget Summary," Administrative Office of the United States Courts, 2023.

³⁶ "Understanding the Federal Courts," Administrative Office of the United States Courts, Washington, AOUSC: 25.

³⁷ *Ibid.*

³⁸ "Federal Court Funding," American Bar Association, Last Modified June 1, 2023.

³⁹ "Judiciary Budget Request FY 2023," Congressional Research Service, updated April 25, 2022.

⁴⁰ Administrative Office of the United States Courts, *The Judiciary Fiscal Year 2024 Congressional Budget Summary*.

a state Administrative Office of the Courts, appropriating funds from general government revenue for the courts via the state legislature. For instance, in California, one of the country's largest court systems, the majority of trial court budgets are sourced from state taxpayers using a Workload-based Allocation and Funding Methodology, which analyzes a court's workload based on volume, type, and complexity of cases.⁴¹ The goal of transferring funding authority to the state was to better equalize funding across the trial courts, as some counties were better positioned to fund the trial courts than others.⁴² Funding for some programs comes from separate funding sources.

Numerous judicial advocacy and bar organizations have recommended that judicial budgets be submitted directly to the legislature without alteration by the Governor. In 2004, the American Bar Association Commission (ABA) Commission on State Court Funding urged states to permit the judiciary to submit its budget request directly to the legislature.⁴³ At the time, the Commission observed that in 18 states the Governor had authority to alter the judicial budget, and in only 14 was the judicial budget required to be considered separately from the budget for executive agencies.⁴⁴ The National Center for State Courts (NCSC) in *Principles for Judicial Administration* similarly suggested, "State and local legislative bodies should require that the judiciary's budget be presented directly to them by judicial leadership without prior approval of the executive."⁴⁵ Both commented on the judicial appropriations process, and ultimately the independence of the branch, being hampered by executive officials lacking appreciation for the specific funding justifications or separate constitutional role of the judiciary.⁴⁶

The budget for the California judiciary is mediated by the executive branch and governed under the state's constitutional balanced budget amendment.⁴⁷ The California Judicial Council begins the process by compiling budget information

⁴¹ Merrill Balassone, "The Trial Court Funding Formula, Explained," Judicial Branch of California, published July 27, 2017.

⁴² *Ibid.*

⁴³ Joseph Nadeau, "Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding," *Judges' Journal* (Summer 2004): 16-17.

⁴⁴ *Ibid.*

⁴⁵ National Center for State Courts, *Principles for Judicial Administration*: 13-14.

⁴⁶ *Ibid.* Nadeau, "Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding."

⁴⁷ "The Branch Budget Process," Judicial Branch of California, accessed September 25, 2023.

for the state Department of Finance, based on data collected from the court system, which forwards a budget recommendation to the Governor.⁴⁸ The state constitution requires the governor to submit a balanced budget by January 10, negotiation and revision occurs until May, and the legislature must adopt a balanced budget by June 15.⁴⁹ Meanwhile, in New York, Article VII, section 1 of the state constitution provides that the financial requests of the legislature and the judiciary are submitted to the Governor, and the Governor must include these requests in the budget submitted to the legislature without revision.⁵⁰ However, like in the budget for the federal courts, the governor may offer recommendations.⁵¹

II. DISCUSSION

2.1. Strategies for Collaborating with Coordinate Branches in Budgeting

The judiciary has twin goals of independence and accountability.⁵² Independence requires that the coordinate branches of government respect the constitutional role of the judiciary to interpret and apply the law to cases and controversies. The courts have a constitutional mission to provide a fair, speedy, and impartial adjudication of legal rights and some adequate level of funding is surely incidental to this mission.

Meanwhile, accountability insists that the judiciary must self-govern in a way that reflects its public purpose. The legislature has its own constitutional role to generate revenue, authorize spending in accordance with public purposes, and achieve fiscal sustainability.⁵³ If the courts were able to demand a blank check

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ New York Constitution, art. VII, § 1.

⁵¹ Ibid.

⁵² The Strategic Plan for California's Judicial Branch provides that both "protecting the independence of the branch is crucial in a democracy" and "accountability is a duty of public service." See: "The Strategic Plan for California's Judicial Branch," Judicial Council of California, July 19, 2019. The Strategic Plan for the Federal Judiciary names independence and transparency among the core values of the judicial branch. Judicial Conference of the United States, *Strategic Plan for the Federal Judiciary* (Washington: Judicial Conference of the United States, 2020), 2.

⁵³ U.S. Constitution, art. I, § 8. See also, e.g., Virginia Constitution, art. IV, § 11 ("No bill which . . . makes, continues, or revives any appropriation of public or trust money or property . . . shall be passed except by the affirmative vote of a majority of all the members elected to each house . . ."); Jeffrey Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers," *Maryland Law Review* 52, no. 1 (1993): 224 ("Courts concede that the power over the purse has been granted to state legislatures by state constitutions. Therefore, when courts claim such power as inherent, they intrude into a fundamental responsibility of another branch of government.").

from the legislature for any spending, no matter how questionably connected to their constitutional mission, the limiting principle of government would be compromised.⁵⁴ The World Bank has noted, “excessive financial independence of the judiciary could be used by some judiciary to shield themselves against legitimate reform efforts and reasonable expectation regarding performance.”⁵⁵

The question is then whether to fund the courts but how much is adequate and how to prioritize funding.⁵⁶ Answering that question requires negotiation at least between the legislature and the judiciary. Where the executive lacks authority to mediate the judicial budget, executive agencies are still involved in judicial accountability in setting financial reporting requirements that apply universally to public entities, as well as in prosecuting criminal misuse of funds.⁵⁷

Courts and bar associations have urged in times of fiscal crisis that independence requires the legislature adequately fund the judiciary. The American Bar Association adopted a resolution in 2011 pleading for “state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately, provide that funding as a governmental priority, and develop principles that would provide for stable and predictable levels of funding of those justice systems.”⁵⁸ But the resolution also calls on courts to remember their public service role and “identify and engage in best practices to insure the protection of the citizens within their jurisdictions, efficient use of court resources, and financial accountability.”⁵⁹

While American courts seek to distance themselves from the political branches, a posture that stems from their guarded independence, the budgeting process requires the courts to enter the political arena and advocate for

⁵⁴ “National Center for State Courts and Justice at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding”: 2.

⁵⁵ Federica Viapiana, “Pressure on Judges: How the Budgeting System Can Impact on Judge’s Autonomy,” *Laws* 7, no. 4 (2018): 3.

⁵⁶ Judith Resnik, “Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture,” *St. Louis U. L.J.* 56, no. 4 (2012): 977.

⁵⁷ Bill Chappell, “W.Va Supreme Court Justice Allen Loughry is Charged with 22 Counts, Including Fraud,” NPR, June 20, 2018.

⁵⁸ American Bar Association, “Report to the House of Delegates: Task Force on Preservation of the Justice System,” (Report, 2011), 1.

⁵⁹ *Ibid.*

themselves.⁶⁰ Courts have also sought to boost their signal by identifying and building relationships with key budget actors, educating them early on the work of the judiciary, broadcasting unified messaging from a strong spokesperson, documenting the broader public impact of budget needs, and finding allies who will speak to the important role of the courts.⁶¹ Recent research has tended to suggest that emphasizing the independence and special qualities of the judiciary in dealing with the legislature, although constitutionally relevant, is less persuasive than discussing the business justifications of court resources.⁶²

2.2. Performance Measures

Three of the 20 *Principles for Judicial Administration* developed by the National Center for State Courts involve workload assessments and performance measures.⁶³ Principle 15 suggests, “The court system should be transparent and accountable through the use of performance measures and evaluation at all levels of the organization.”⁶⁴ The Commentary notes, “The right to institutional independence and self-governance necessarily entails the obligation to be open and accountable for the use of public resources. This includes not just finances but also the effectiveness with which resources are used.”⁶⁵

Notably, the purpose of workload measures, performance measures, and budgeting is not principally as a tool for requesting funding from the legislature.⁶⁶ Before a budget becomes a request for funding from executive budget officers or the legislature, it is an internal planning document that commits court resources to specific programs and activities. The judiciary must be able to explain its budget to itself before it can justify it to a legislative committee. However, a

⁶⁰ James Douglas and Roger Hartley, “Making the Case for Court Funding: The Important Role of Lobbying,” *Judges’ Journal* (Summer 2004): 35.

⁶¹ Conference of State Court Administrators, “Position Paper on State Judicial Budgets in Times of Fiscal Crisis,” 2003.

⁶² “National Center for State Courts and Justice at Stake, *Funding Justice: Strategies and Messages for Restoring Court Funding*,” 17-19.

⁶³ “Principles for Judicial Administration,” National Center for State Courts..

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, 15.

⁶⁶ *Ibid.*, 17 (“The legal concept of procedural due process and the administrative aspect of efficiency are components of the manner in which courts process cases and interact with litigants. Caseload management is central to the integration of these components into effective judicial administration. Defining quality outcomes is a difficult task, but with the emergence of the Trial Court Performance Standards (1990), the International Framework for Court Excellence (2008) and the High Performance Court Framework (2010), concepts and values have been developed by which all courts can measure their efficiency and quality via instruments such as CourTools (2005).”).

budget developed with consideration for objective support criteria, and targeted at indicators of improved performance, can be instrumental in budget discussions with the other branches.⁶⁷

Legislative and executive officials are not the only people to whom the courts must justify themselves, and indeed budgeting decisions by state judicial administrators and councils are frequently controversial with the trial courts that they supervise.⁶⁸ Federica Vapiana argues that while performance-based budgeting schemes “increase transparency and reduce the risk of arbitrary resources allocation and influence from the executive, on the other hand, they restrict the judicial autonomy by strengthening the control by court managers on judges’ activities and self-organization.”⁶⁹ Vapiana adds that these budgeting models, which originate from New Public Management concepts of administration that gained popularity in the American state courts before migrating to European judicial administration, work towards the professionalization of the judicial branch.⁷⁰

In the American state courts, Richard Schauffler identifies four factors that led court systems to appreciate performance measures: the increase in criminal caseloads passed downstream by the legislature in anti-drug criminal reforms; public focus on litigation costs; budget constraints as a result of the recession of the 1990s, during which courts often failed to objectively justify their budgets; and underwhelming results in public surveys of public trust and confidence.⁷¹ Judicial leaders in the Conference of Chief Justices, Conference of State Court Administrators, the American Judges Association, and National Association of Court Management, seeking to improve public perception, manage trial court caseloads, and improve their funding justifications, endorsed Trial Court Performance Standards developed in 1990 by the National Center for State Courts.⁷²

⁶⁷ Ibid, 12.

⁶⁸ Viapiana, “Pressure on Judges: How the Budgeting System Can Impact on Judge’s Autonomy,” 5.

⁶⁹ Ibid, 3.

⁷⁰ Ibid, 2.

⁷¹ Richard Y. Schauffler, “Judicial Accountability in the US State Courts: Measuring Court Performance,” *Utrecht Law Review* 3, no. 1 (June 2007): 118.

⁷² Ibid, 119.

Originally, implementation of the cumbersome 68 performance standards sputtered, largely due to issues with data collection capabilities, but interest re-emerged after another wave of financial crises. NCSC developed a new and simplified suite of 10 measures called CourTools.⁷³ The new approach incorporated a “balanced scorecard” allowing administrators to compare competing measures, such as time to disposition and “court user” satisfaction, and ten performance measures.⁷⁴ The measures for trial courts include access and fairness, clearance rates, time to disposition, age of pending caseload, trial date certainty, reliability and integrity of case files, fairness and management of legal financial obligations, effective use of jurors, court employee satisfaction, and cost per case.⁷⁵ An additional set of six measures for appellate courts look at a quality of services survey, time to disposition, clearance rates, age of active pending caseload, court employee satisfaction, and reliability and integrity of case files.⁷⁶

Standard definitions for data measures comparable across courts in and between states are an important feature of the suite.⁷⁷ For example, the time to disposition measure explains how to count time for reopened and reactivated cases.⁷⁸ The time between when a defendant absconds in a simple assault case and the time when the case is reactivated should not be counted in the time to disposition.⁷⁹ The access and fairness survey provides a standard form for data collected from court users about their subjective interactions with court staff, adequacy of technology, feeling they were given a fair hearing, and disability and language accommodations that may have gone unaddressed in the proceeding.⁸⁰ As a condition to usefully implementing performance measures, courts must have robust data collection and quality standards in place.⁸¹

⁷³ *Ibid*, 119-20.

⁷⁴ *Ibid*.

⁷⁵ “Trial Court Performance Measures,” CourTools, National Center for State Courts, accessed September 25, 2023.

⁷⁶ “Appellate Court Performance Measures,” CourTools, National Center for State Courts, accessed September 25, 2023.

⁷⁷ Schauffler, “Judicial Accountability in the US State Courts: Measuring Court Performance,” 123.

⁷⁸ “Measure 3: Time to Disposition,” Trial Court Performance Measures, CourTools, National Center for State Courts, accessed September 25, 2023.

⁷⁹ *Ibid*.

⁸⁰ “Measure 1: Access and Fairness,” Trial Court Performance Measures, CourTools, National Center for State Courts, accessed September 25, 2023.

⁸¹ Schauffler, “Judicial Accountability in the US State Courts: Measuring Court Performance,” 123-24.

NCSC offers five reasons for court administrators at the local and state level to embrace performance measures, mostly focusing on internal strategic planning.⁸² First, performance measures allow court administrators and judges to test their assumptions about what is happening in court, correcting anecdotal accounts and biases. Second, they allow courts to collect information valued by the broadest range of constituents. Third, they support flexible management by allowing courts to work towards target measures rather than strict methods.⁸³

The last two reasons do focus on budgeting and demonstrating public accountability. In explaining why performance measures are useful for “preparing, justifying, and presenting budget requests,” NCSC argues:

Performance assessment’s focus on multiple goals and corresponding measures makes clear that courts use resources to achieve multiple ends. Information on how well the court is doing in different work areas provides essential indicators of whether goals are reasonably being achieved, which ones are being met more fully than others, and which ones are marked by poor or unacceptable performance. As a result, courts can articulate why some activities need tighter management oversight, improved administrative practices, more resources to support promising uses of new technology, or different configurations of personnel.⁸⁴

Most philosophically for separation of powers, NCSC observes, “Formal performance assessment signals a court’s recognition, willingness, and ability to meet its critical institutional responsibilities as part of the third branch of government . . . Since courts use public resources, taxpayers and their elected representatives are legitimately entitled to raise questions about efficiency and effectiveness in the expenditure of court funds.”⁸⁵

Opinion surveys suggest that the public does not instinctively appreciate the need for court funding and are as likely to attribute court backlogs to delay, inefficiencies, frivolous litigation, and arbitrary judicial preference as they are to conclude that there is inadequate funding of the judicial branch.⁸⁶ The courts are

⁸² “Why Measure Performance?” National Center for State Courts, Williamsburg: NCSC, 2005.

⁸³ *Ibid.*, 2.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, 3.

⁸⁶ National Center for State Courts and Justice at Stake, *Funding Justice: Strategies and Messages for Restoring Court Funding*: 3-4.

of course not ignorant of these criticisms. When the US Supreme Court modified the notice pleading standard for civil cases in federal court in *Iqbal*, some of its key considerations were cost and speed of litigation and judicial management of discovery.⁸⁷ Whether requiring plaintiffs to state sufficient facts to support a plausible claim to relief achieves efficiencies for litigants or the court system is a question that demands data, some generated by the courts as grant and filing rates for motions to dismiss, as well as things captured in performance measures like time to disposition.⁸⁸ This presents heavily contested questions about the tradeoffs between access to justice and judicial economy, which are focused on varying data-informed decisions within the control of the judicial branch.⁸⁹

Performance measures can be useful in demonstrating to legislators what impact an investment in technology, training, facilities, or staff is likely to have on improving access to justice, reducing backlogs, or achieving other public goals of the judiciary. For instance, Dan Becker, as Court Administrator for the Utah court system, suggested that CourTools helped him to communicate to legislators the impact of staff cuts due to budget reductions, observing, “As we’ve been losing staff, we’ve been seeing some degradation of the measures from the access survey. It is a very concrete way of illustrating for the appropriations committee what the impact has been.”⁹⁰ The promise of standard measures across states and trial courts is that that court administrators can track trends and identify what strategies worked to improve performance in a sample of courts or a peer court system, allowing them to build that into their strategic plans and budgets, which are then communicated with supporting information to the legislature.⁹¹

⁸⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009).

⁸⁸ Benjamin Spencer, “Pleading and Access to Civil Justice: A Response to *Twiqbal* Apologists,” *UCLA Law Review* 60, no. 6 (August 2013): 1713-1714. For more on the challenges of empirical analysis of the effects of procedural rule changes, and specifically the standard for notice pleading, see David Engstrom, “The *Twiqbal* Puzzle and Empirical Study of Civil Procedure,” *Stanford Law Review* 65, no. 6 (July 2013): 1203.

⁸⁹ See Spencer, “Pleading and Access to Civil Justice: A Response to *Twiqbal* Apologists,” 1737. As I have written previously, *Twombly* and *Iqbal* are part of a series of cases moving civil procedure in a restrictive direction. From summary judgment to pleading, to personal jurisdiction, to class action doctrine, the Court has reinterpreted procedural rules in ways that protect corporate or government defendants against suits by individual plaintiffs.

⁹⁰ Caroline Cournoyer, “Measuring the Efficiency of Courts,” *Governing*, published July 26, 2011.

⁹¹ See Schaffler, “Judicial Accountability in the US State Courts: Measuring Court Performance,” 123. Developing standard definitions, counting rules, and calculations provided the basis for creating a new perception that measurement could be done fairly, accurately, and consistently within and across courts within a given state, and among states. The obvious additional benefit, in the context of diverse state court systems, is that standardizing the precise way the measures are to be taken is the only hope for creating results that can be interpreted and compared in a meaningful way.

Arming court administrators with data both for strategic planning and subsequent communications with legislatures and the public can help the courts accomplish goals of accountability and transparency. This is likely to improve the working relationship with legislatures, address their doubts about cost-effectiveness, and smoothen wrinkles in the appropriations process. Still there are risks to performance-based budgeting and evaluation. When talking about judicial independence, a person can be talking about the independence of the judicial *branch* as co-equal and self-governing, or she can be talking about the insulation of individual judges from external pressure, which can come from their own court hierarchy.⁹² The conventional concern is that judges working towards cost-effectiveness measures of productivity adopted by judicial councils and court administrators can reduce the quality of decisions or impact the behavior of judges in alternative dispute resolution.⁹³

Indeed, making sense of alternative dispute resolution (ADR), which in effect competes with the courts, has been a thorny issue in state courts' attempts to address budget issues. On the one hand, the American Bar Association Commission on the 21st Century Judiciary report *Justice in Jeopardy* highlighted the concern that the courts were experiencing "brain drain" as judges exited the judiciary to become arbitrators or work in private practice on account of low comparative salaries.⁹⁴ On the other, some state court systems and the American Bar Association Task Force on Preservation of the Justice System recommended, as a cost-saving solution, that courts foster ADR, such as through court ordered mediation, as a tool for "enhancing access to conflict resolution," notwithstanding the risks of ADR in cases of unequal bargaining power or which

⁹² Roger Hartley, "State Budget Politics and Judicial Independence: An Emerging Crisis for the Courts as a Political Branch," *The Court Manager* 18 (Winter 2003): 19.

⁹³ See Viapiana, "Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy," 12. Pressures on productivity and efficiency are strongly perceived by Dutch judges, who are complaining a higher caseload caused by the budgetary constraints, a strict schedule of hearings that reduce the time allocated to cases definition and, therefore, reduce attention to the quality of judgment. Judith Resnik voiced early concerns, predating Trial Court Performance Measures. "Managerial Judges," *Harvard Law Review* 96, no. 2 (December 1982): 444. Notably, given that federal judges are protected by life tenure, Resnik identifies peer pressure as an important mechanism weighing on judges, but this pressure revolves around how judges use tools, especially settlement conferences, created by procedural rules promoting case management techniques. *Ibid*, 386.

⁹⁴ American Bar Association, "Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary," 2003: 47.

touch “fundamental social and constitutional conflicts.”⁹⁵ The NCSC *Principles for Judicial Administration* argue, “Increasingly courts, the bar, and the public have recognized that alternative means of dispute resolution could be more timely, more resource efficient, and produce more satisfactory results.”⁹⁶

Arbitration has been controversial in the United States, especially where a feature of lopsided consumer and employer contracts that waive the right to sue or join a class action, raising concerns about the right to “open courts” and access to justice.⁹⁷ Judith Resnik observes, “Because courts have-by law and practice-let go of their monopoly over services and opened entry to other institutions, courts have become competitors for high-end investors with private providers.”⁹⁸ Resnik emphasizes her concerns about eroding concept of a universal right to access open court processes and removal of adjudication from the public sphere to forums that “rely on practices that do not admit of a need to show their processes in order to justify the exercise of authority.”⁹⁹

Performance measures are intended to capture in data the core values of the judiciary, which the federal courts define in their strategic plan as rule of law, equal justice, judicial independence, diversity and respect, accountability, excellence, and service.¹⁰⁰ The Judicial Council of California states in its strategic plan that its guiding principles are public service, independence, quality, and accountability. Performance measures can be indicative of how courts are achieving their values, but they are ultimately statistics that require interpretation, evaluation, and judgment about allocation of resources.¹⁰¹ The “balanced scorecard” approach, reflected in the CourTools framework, is compared by Robert S. Kaplan to “the dials and indicators in an airplane cockpit,” noting that “the complexity

⁹⁵ American Bar Association, “Report to the House of Delegates: Task Force on Preservation of the Justice System”: 14.

⁹⁶ National Center for State Courts, *Principles for Judicial Administration*: 8.

⁹⁷ Judith Resnik, “Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture,” 997.

⁹⁸ *Ibid.*, 976.

⁹⁹ *Ibid.*, 997.

¹⁰⁰ Schauffler, “Judicial Accountability in the US State Courts: Measuring Court Performance,” 120-21; Judicial Conference of the United States, “Strategic Plan for the Federal Judiciary,” 2.

¹⁰¹ Judicial Conference of California, “Strategic Plan for California’s Judicial Branch,” 2.

of managing an organization today requires that managers be able to view performance in several areas simultaneously.”¹⁰²

2.3. Communications Strategies for Support of Budgets

While there is significant scholarship on short-term and long-term strategies for executive agencies to preserve their budgets, study is more limited on how courts, which serve with a different constitutional mandate than executive bodies, can secure consistent funding.¹⁰³ Judicial messaging must consider that the courts have independent constitutional functions separate and distinct from those of the executive. A 2011 Policy Paper from the Conference of State Court Administrators, the authors point out that 75% or more of judicial budgets go towards salaries for judicial officers and staff, which the report describes as mandated spending.¹⁰⁴ In the federal courts, Article III of the US Constitution prohibits the legislature from reducing salaries while judges are in office.¹⁰⁵

Still, legislators may resist representatives of the judiciary’s attempts to describe their budget requests as entitlements, especially if there has been little interim communication, which either sets up a confrontation or re-positioning to other rhetorical strategies.¹⁰⁶ The courts are caught flat-footed if they cannot shift to more granular public service justifications. In a 2001 survey, respondents from the legislature, executive, and legislature ranked providing justification of need and submitting realistic budget requests as the most useful short-term strategies for securing funding.¹⁰⁷ Although the authors note that other research paradoxically suggests that legislators sometimes reward acquisitiveness and that the courts sometimes make overly conservative budget requests.¹⁰⁸ The authors

¹⁰² Schauffler, “Judicial Accountability in the US State Courts: Measuring Court Performance,” 124. Robert S. Kaplan and David P. Norton, “The Balanced Scorecard – Measures that Drives Performance,” *Harvard Business Review* (February 1992).

¹⁰³ James Douglas and Roger Hartley, “Budgeting for State Courts: The Perceptions of Key Officials regarding Determinants of Budget Success.” *The Justice System Journal* 24, no. 3 (2003): 252-53.

¹⁰⁴ Conference of State Court Administrators, “Position Paper on State Judicial Budgets in Times of Fiscal Crisis,” 15.

¹⁰⁵ U.S. Constitution, art. III, § 1.

¹⁰⁶ “Funding Justice: Strategies and Messages for Restoring Court Funding,” National Center for State Courts and Justice at Stake, 12.

¹⁰⁷ James Douglas and Roger Hartley. “Budgeting for State Courts: The Perceptions of Key Officials regarding Determinants of Budget Success,” 256.

¹⁰⁸ *Ibid*, 256-257.

point out that the judiciary is more likely to receive a higher percentage of its initial budget request than executive agencies.¹⁰⁹

The difficult factors for courts to control in the short-term perceived as most significant to budget success were respect by the other branches for an independent judiciary and support of the legislative leadership.¹¹⁰ If there are damaged relationships with the other branches, then there is not much opportunity to fix that during the appropriations process. Courts have attempted to become politically sophisticated in building stronger stakeholder alliances and self-advocacy tools to build longer-term support for their budgets.¹¹¹

One lobbying strategy has involved improving the visibility of the Chief Justice as a spokesperson for the judiciary, such as through personal letter writing, paying visits to state budget officials, or prudently appearing in person at legislative hearings.¹¹² The code of conduct for federal judges permits judges to engage with executive and legislative officials by providing expertise on “matters concerning the law, the legal system, and the administrative justice,” notwithstanding their obligation to refrain from commenting on pending actions.¹¹³ The creation of the Judicial Conference of the United States was itself in part the result of lobbying by Chief Justice William Howard Taft.¹¹⁴

Another 2001 survey of legislators, court administrators, and executive officials suggested that talks between the Chief Justice and/or key legislative members are “moderately or highly useful,” perceived as somewhat more useful than the Chief Justice appearing at legislative hearings.¹¹⁵ The 2011 COSCA Policy Paper suggested that the Administrative Director of the State Courts is likely to be better armed with detailed budget justifications and likely to be more responsive

¹⁰⁹ Ibid.

¹¹⁰ Ibid, 258-259.

¹¹¹ James Douglas and Roger Hartley, “Making the Case for Court Funding: The Important Role of Lobbying,” *Judges’ Journal* (Summer 2004): 35.

¹¹² “Position Paper on State Judicial Budgets in Times of Fiscal Crisis,” Conference of State Court Administrators, 5-9.

¹¹³ See Geyh, “Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress,” 1198.

¹¹⁴ Jonas Anderson, “Judicial Lobbying,” *Washington Law Review* 91, no. 2 (June 2016): 422.

¹¹⁵ James Douglas and Roger Hartley, “State Court Strategies and Politics during the Appropriations Process,” *Public Budgeting and Finance* 21 (Spring 2001) 42-43.

to hearing inquiries, but also spoke highly of the role of the Chief Justice in advocating for the needs of the judiciary.¹¹⁶

The same 2001 survey suggested that making up for the lack of a strong native constituency for the courts by mobilizing community allies is perceived by budget actors as at least a moderately successful strategy.¹¹⁷ Although the most cited groups paying visits were not far from the judiciary, namely bar associations and judicial or court employee associations.¹¹⁸ A strategy guide produced by the National Center for State Courts suggested that the most credible community members for messaging on behalf of the courts include supreme court justices, members of the legislature with a legal background, judges and lawyers from key lawmakers' districts, business leaders, and informed court administrators.¹¹⁹

After the 2008 financial crisis, the American Bar Association issued a resolution asking bar associations to “to document the impact of funding cutbacks to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.”¹²⁰ Impacts that might be persuasive to budget policymakers include the direct costs of litigation and damaged investment potential for businesses and other litigants resulting from lengthy times to disposition.¹²¹ Although, as noted earlier in this article, legislators and the public may hesitate to attribute those impacts to inadequate court funding, blaming instead court procedures and preferences.¹²² Other impacts include the direct costs of pre-trial detention, both for the detainee in custody and the detention system housing him, and constitutional rights issues resulting from any delays in the criminal docket.¹²³ Notably, the federal courts are prohibited by

¹¹⁶ “Position Paper on State Judicial Budgets in Times of Fiscal Crisis,” Conference of State Court Administrators, 7.

¹¹⁷ James Douglas and Roger Hartley, “State Court Strategies and Politics during the Appropriations Process,” 44-46.

¹¹⁸ *Ibid.*

¹¹⁹ National Center for State Courts and Justice at Stake, *Funding Justice: Strategies and Messages for Restoring Court Funding*: 11.

¹²⁰ American Bar Association, *Report to the House of Delegates: Task Force on Preservation of the Justice System*: 1.

¹²¹ “Funding Justice: Strategies and Messages for Restoring Court Funding,” National Center for State Courts and Justice at Stake, 5-6.

¹²² *Ibid.*

¹²³ James Douglas and Roger Hartley, “State Court Strategies and Politics during the Appropriations Process,” 43-44. See also “Position Paper on State Judicial Budgets in Times of Fiscal Crisis,” Conference of State Court Administrators, 17-18.

statute from using appropriated funds on grassroots funding coalitions, including expenditures on direct appeals to the public to contract representatives.¹²⁴

Some lessons relating to lobbying for appropriations while preserving judicial credibility might be applied from the experience of lobbying for procedural rules. Charles Gardner Geyh suggests that the courts tend to enjoy a superior competence and credibility that enhances the lobbying efforts of the judiciary, as compared other subjects of legislation, these being qualities that lobbyists strive to establish.¹²⁵ Geyh describes a recurring problem, which he calls the “competence-credibility paradox” where courts “put their credibility at risk to the extent that their efforts coincide with personal or institutional self-interest,” which is resolved by the judiciary “channeling its interactions with Congress in ways that enable it to share its expertise on matters of institutional or personal self-interest without appearing so self-interested as to compromise its credibility.”¹²⁶ He suggests buffering devices for recommendations to Congress, such as through the use of independent commissions, which some states rely on for proposing upward adjustments to judicial compensation.¹²⁷

2.4. Inherent Judicial Power

Both the courts and the other branches are aware that the judiciary has an additional “weapon” in the power to interpret the state or federal constitution, that the constitution provides for the judiciary as a separate and independent branch of government responsible for adjudication, and that the courts can therefore compel funding reasonably necessary for courts to carry out that assigned role.¹²⁸ The other branches cannot seek to destroy or impede the functioning of the judiciary by neglecting its justified funding needs or holding the budget for its constitutional purpose hostage to impermissible demands.

For varying reasons, the judiciary tends to be hesitant to threaten or use litigation to break a budget impasse. First, as the previous sections have attempted

¹²⁴ Geyh, “Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress,” 1198.

¹²⁵ *Ibid.*, 1222-23.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, 1227-29. See West Virginia Judicial Compensation Commission, “Report of the West Virginia Judicial Compensation Commission,” (Charleston: West Virginia Judicial Compensation Commission, 2022).

¹²⁸ James Douglas and Roger Hartley, “State Court Strategies and Politics during the Appropriations Process,” 43-44.

to show, positive ongoing relations with the other branches promote the security of judicial funding, and a confrontational approach is perceived as likely to poison longer term budget negotiations.¹²⁹ In a 2001 survey, court administrators ranked the usefulness of threatening inherent powers as lower than any other strategy for securing funding, slightly lower even than how useful this option is perceived by legislators and executive officials.¹³⁰

Second, courts might perceive the risk that the other branches will resort to their own retaliatory powers.¹³¹ For instance, legislatures often have the power of defining the jurisdiction of the courts through statutes, and “court-stripping” has been used to prevent the courts from hearing certain types of cases in response to controversial rulings.¹³² If the legislature is sour at being compelled to a honor the judiciary’s budget request, the legislature could shift to exercising what authority it has over jurisdiction and procedural rules.¹³³ Courts might seek to avoid an escalating arms race with embittered coordinate branches, at least when other avenues are available, suggesting using inherent powers only as a last resort for the most egregious or intractable budget hurdles.¹³⁴

There is a long history of local courts invoking inherent powers in funding conflicts with their local executive and legislative bodies, historically responsible for the greatest burden of court funding, seeking the intervention of higher courts.¹³⁵ In *Hosford v. State*, a trial court complained about street noise obstructing proceedings, a result of inadequate facilities for holding trial.¹³⁶ The Mississippi

¹²⁹ James Douglas and Roger Hartley, “State Court Strategies and Politics during the Appropriations Process,” 44.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Schauffer, “Judicial Accountability in the US State Courts: Measuring Court Performance.” Constitutional commentators frustrated with the jurisprudence of the US Supreme Court have lately been very creative in coming up with jurisdiction-stripping solutions to blocking review in the federal courts of Congressional prerogatives. See, e.g., Jon Sprigman, “Stripping the Courts’ Jurisdiction,” *The American Prospect*, May 5, 2021.

¹³³ *Ibid.*

¹³⁴ James Douglas and Roger Hartley, “State Court Strategies and Politics during the Appropriations Process,” 44.

¹³⁵ G. Gregg Webb and Keith E. Whittington, “Judicial Independence, the Power of the Purse, and Inherent Judicial Powers,” *Judicature* 88 (July 2004): 14-15. While the federal courts frequently interpret the Compensation Clause to prevent diminution of judicial compensation, they have not generally extended separation of powers to compel operating expenses. See Jeffrey Jackson, “Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers,” *Maryland Law Review* 52, no. 1 (1993): 226-27. However, the Ninth Circuit has held that lack of funding implicates the Seventh Amendment right to civil jury trials. *Armster v. United States Dist. Court*, 792 F.2d 1423, 1430-31 (9th Cir. 1986) (holding that a three-and-a-half-month suspension pursuant to an Administrative Office memorandum violates the Seventh Amendment).

¹³⁶ *Hosford v. State*, 525 So.2d 789, 794-95 (Miss. 1988).

Supreme Court noted that the record suggested the noise was potentially distracting enough in the Green County Circuit Court to justify mistrials in criminal cases.¹³⁷ The court, adjudicating a dispute between two local actors, overcame reservations about comity between the branches and authorized the trial court judge to preserve the integrity of the judiciary by proceeding against the board of supervisors to acquire needed facility upgrades.¹³⁸ Meanwhile, in *Lavelle v. Koch*, the Supreme Court of Pennsylvania dismissed a complaint in mandamus by the Presiding Judge of the Carbon County Court of Common Pleas seeking to compel the local board of supervisors to fund compensation increases for court employees.¹³⁹ The court resisted finding that recruitment and retention of court employees was impaired by the lack of salary increases, and therefore the court failed in its burden of demonstrating that its funding request was “reasonably necessary” to the administration of justice.¹⁴⁰ The standard appears popular among sister state judiciaries, having been used to compel funding for expenses ranging from an \$86 tape recorder to millions of dollars spread across various spending areas.¹⁴¹

Lavelle suggests the judiciary carries the burden of proving that expenses are “reasonably necessary,” which sister jurisdictions tend to follow through various allocations.¹⁴² There is some risk for embarrassment in these cases, at least when ruling on discretionary salary increases, as judges have an apparent pecuniary that may ordinarily require recusal, only falling under the exception of the rule of necessity.¹⁴³ The judiciary further risks trespassing in the province of legislative authorities by overextending its power to compel funding.¹⁴⁴ The North Carolina Supreme Court has cautioned, “[D]oing what is ‘reasonably necessary for the proper administration of justice’ means doing no more than is reasonably

¹³⁷ *Ibid.*, 797.

¹³⁸ *Ibid.*, 798.

¹³⁹ *Lavelle v. Koch*, 617 A.2d 319, 320-21 (Pa. 1992).

¹⁴⁰ *Ibid.*, 322.

¹⁴¹ Jackson, “Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers”: 233-235.

¹⁴² *Ibid.*, 237.

¹⁴³ See, e.g., *Jorgensen v. Blagojevich*, 811 N.E.2d 652, 660 (Ill. 2004).

¹⁴⁴ See Jackson, “Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers,” 224-25.

necessary. The court's exercise of its inherent power must be responsible—even cautious—and in the 'spirit of mutual cooperation' among the three branches."¹⁴⁵

From the perspective of state level courts and officials, the amounts in controversy in these cases were modest, but persistent conflicts helped motivate the movement towards unified budgeting.¹⁴⁶ With court funding becoming centralized under state administrators, and subject to appropriations from state legislatures, the battleground shifted displacing the role of state high courts from mediators in local disputes to parties advocating for the independence of the branch under their own budget supervision.¹⁴⁷ The judicial branch in this position must bargain with co-equal branches at the highest level. Where there is a breakdown, the state judiciary is put in the somewhat more awkward position of adjudicating its own budget requests.¹⁴⁸

The New York Unified Court System, apparently experiencing repeated cycles of strained relations with the other branches, provides two recent useful cases studies. In *Wachtler v. Cuomo*, the Chief Judge of the New York Court of Appeals sued Governor Mario Cuomo after the governor reduced the judicial budget presented to him by 10%, leading to a later legislative appropriation significantly less than the original request by the judiciary, even though the New York constitution calls for the governor to pass on the judiciary's budget request unrevised to the legislature.¹⁴⁹ The parties traded barbs before the press and public but ultimately settled for a modest increase in the judiciary's budget before the case went to trial.¹⁵⁰

¹⁴⁵ *Matter of Alamance Cnty. Court Facilities*, 405 S.E.2d 125, 132 (N.C. 1991). For more on limitations to the standard of reasonable necessity, and common defenses by legislatures to compelled funding for the judiciary. Regarding public support for the judiciary, as an alternative to compelled funding, Jackson remarks, "It is unclear why users of state courts have not been more effective in mobilizing support for those courts," and notes early efforts of courts to study models for building public support. "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers," 252-53. The author, quoting George Hazard, notes that "No important function of government can be maintained over the long run without public debate, political commitment, and the exercise of community responsibility as expressed by bodies dependent on popular assent."

¹⁴⁶ G. Gregg Webb and Keith E. Whittington, "Judicial Independence, the Power of the Purse, and Inherent Judicial Powers," 15-16.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, 16. New York Constitution, art. VII, § 1.

¹⁵⁰ G. Gregg Webb and Keith E. Whittington, "Judicial Independence, the Power of the Purse, and Inherent Judicial Powers": 16.

Several years later, another Chief Judge of the New Court of Appeals once again sued on behalf of judges by invoking the inherent powers of the judicial branch. In *Matter of Maron v. Silver*, the legislature had not provided a cost-of-living adjustment for judicial salaries for 10 years.¹⁵¹ Although both the legislature and executive agreed in principle that there should be judicial salary increases, the legislature repeatedly refused to pass a spending proposal that did not also increase salaries for themselves, and the Governor shot down proposals that did include legislative salary increases.¹⁵² The judiciary was caught in the middle as a bargaining chip for the salary increases of another branch.

The New York Court of Appeals held,

All parties agree that a salary increase is justified and, yet, those who have the constitutional duty to act have done nothing to further that objective due to disputes unrelated to the merits of any proposed increase. This inaction not only impairs the structural independence of the Judiciary, but also deleteriously affects the public at large, which is entitled to a well-qualified, functioning Judiciary.¹⁵³

Notably, in offering a remedy, the court offered only declarative relief, putting the legislature on notice that judicial salary increases must not be conditioned on legislative salary increases.¹⁵⁴ The court stated, “Of course, whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature. It should keep in mind, however, that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court.”

This is significant because the New York Court of Appeals certifies the budget request of the New York Unified Court System at issue, and the court issuing the decision presumably believed that budget had sound justifications¹⁵⁵. But

¹⁵¹ *Matter of Maron v. Silver*, 925 N.E.2d 899, 904 (N.Y. 2010). While the Compensation Clause of the US Constitution and analogous provisions of state constitutions provide that judicial salaries may not be decreased during their term in office, legislatures are involved in determining whether salary *increases* are justified in the normal appropriations process. For a study on the effects of judicial pay on judicial retention, see James M. Anderson and Eric Helland, “How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench,” *Stanford Law Review* 64, no. 5 (May 2012): 1277-1342.

¹⁵² *Matter of Maron v. Silver*, 925 N.E.2d 899, 904-05 (N.Y. 2010).

¹⁵³ *Ibid.*, 915.

¹⁵⁴ *Ibid.*

¹⁵⁵ “New York Unified Court System Budget Fiscal Year 2024,” New York Unified Court System, 2023.

the court offered the legislature the opportunity to re-consider judicial salaries at least as it relates to the needs of the judiciary, in the spirit of inter-branch co-operation. This did not necessarily foreclose on whether the legislature could reasonably disagree about what salary increases are justified.¹⁵⁶

Another approach could be advantageous for the judiciary in those situations where legislative and executive officials, seeking to advance their partisan political goals, exceed their role by interfering overtly in the judicial province by attaching funding conditions to the outcome of judicial decisions. While not exactly common, the Kansas judiciary provides a useful example of such a bold legislative attempt to curtail case-specific judicial discretion by tying the judiciary's funding to the Supreme Court's decision on the constitutionality of measure reforming judicial administration. In 2014, the Kansas Supreme Court held in *Gannon* that the legislature had failed to equitably fund public education, which provoked strong opposition from Republican Governor Sam Brownback and the Republican-majority legislature.¹⁵⁷ Following *Gannon*, in a manner some observed as punitive, the Kansas legislature passed bills related to judicial administration, removing the authority of the Supreme Court to designate the chief justices of the trial courts and imposing a deadline for courts to reach decisions.¹⁵⁸ The Governor also proposed in his State of the State speech in 2015 to change the method of selection for the Kansas Supreme Court from the merit-based selection system to a system of popular election.¹⁵⁹

Most troublingly, later in 2015 the Kansas legislature in House Bill 2005 included a non-severability provision, which tied the \$278 million judicial budget to the 2014 measure transferring authority of the Supreme Court to designate trial court chief justices, HB 2338, providing "if any provision of this act . . . is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of this act without such stayed, invalid, or unconstitutional provision and the provisions of this act

¹⁵⁶ *Matter of Maron v. Silver*, 925 N.E.2d 899, 917 (N.Y. 2010).

¹⁵⁷ *Gannon v. State*, 319 P.3d 1196, 1204 (Kan. 2014).

¹⁵⁸ Erik Eckholm, "Outrages by Kansas Justices' Rulings, Republicans Seek to Reshape the Court," *New York Times*, April 2, 2016.

¹⁵⁹ Stephen Koranda, "2015 KS State of the State Speech Touches on Taxes, School Funding," NPR, January 16, 2015.

are hereby declared to be null and void and shall have no force and effect.”¹⁶⁰ The Kansas Supreme Court risked triggering this provision with its decision in *Solomon v. State*, which held that the legislature violated separation of powers in HB 2338 by stripping the Supreme Court of its authority to designate trial court judges, observing that “the means of assigning positions responsible to the Supreme Court and charged with effectuating Supreme Court policy must be in the hands of the Supreme Court, not the legislature.”¹⁶¹ The court noted in its opinion that “our holding appears to have practical adverse consequences to the judiciary budget, which the legislature may wish to address, even though those concerns played no part in our analysis.”¹⁶²

A lawsuit seeking to prevent the effect of the non-severability provision was filed by four district court judges.¹⁶³ The plaintiffs argued that the non-severability provision violated the Compensation Clause of the Kansas Constitution, the judiciary’s exclusive power to hear cases, and the constitutional obligation to allocate judicial funding.¹⁶⁴ The issue ultimately became moot, and the parties motioned to dismiss voluntarily, because the Kansas legislature reversed course and repealed the non-severability provision in HB 2005.¹⁶⁵

After retiring, former Chief Justice Lawton Nuss remarked on the interest of peer court systems across the United States in the Kansas judiciary’s conflict with the legislature and Governor Brownback, noting the possibility that sister state legislatures will be eager to adopt strategies to attack the judiciary when they prove successful in neighboring jurisdictions.¹⁶⁶ Since the Kansas standoff, there have been a couple of tit-for-tat retaliatory threats to judicial budgets pressuring decisions. In Alaska, Republican Governor Mike Dunleavy exercised line-item veto authority to reduce the appellate court budget by \$334,700, stating in his objections, “The Legislative and Executive Branch are opposed to State

¹⁶⁰ H.B. 2005 (2015).

¹⁶¹ *Solomon v. State*, 364 P.3d 536, 549 (Kan. 2015).

¹⁶² *Ibid.*, 550.

¹⁶³ “Fairchild v. Kansas,” Brennan Center for Justice, published December 18, 2015.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Lawton Nuss, “Interview of Lawton Nuss by Richard Ross,” Kansas Oral History Project, July 2022.

funded elective abortions; the only branch of the government that insists on State funded elective abortions is the Supreme Court.”¹⁶⁷ The issue arose following the Alaska Supreme Court’s 2019 decision in *State v. Planned Parenthood of the Great Northwest*, which interpreted the equal protection clause of the Alaska Constitution to require Medicaid reimbursement for certain medically necessary abortions.¹⁶⁸ A state superior court judge in 2020 held that this use of line-item veto authority violated separation of powers, declaring that “the separation of powers doctrine simply cannot tolerate a construct in which the funding of the judiciary is based on the popularity of its opinions.”¹⁶⁹ The state did not appeal.¹⁷⁰

Still, in a climate of hostility to judicial independence, the other branches will not always reveal their motivations as so clearly retaliatory, perhaps stating superficially fiscal rationales or altogether neglecting to provide justifications for funding reductions. In these situations, courts may need to satisfy the burden of proving that withheld funding is “reasonably necessary” for courts to fulfill their role. While the judiciary can also further negotiation by providing buttoned-up funding justifications to the legislature using techniques discussed in this Article, these are perhaps unlikely to succeed where the legislature is not acting in good faith, enhancing the argument for a litigation-based approach.

III. CONCLUSION

The judiciary is in a vulnerable position to the other branches in advocating for their own financial security and must be on guard against demands by executive officers or the legislature that offend the separation of powers. One forward-thinking and preventive strategy in addressing this problem is for the judiciary to insulate itself by building trust and confidence with the other branches, educating them on the work of the courts, and showing it that takes seriously goals of public service and accountability. Courts in the United States have attempted to carry out this strategy in part through communicating the

¹⁶⁷ *American Civil Liberties Union v. Dunleavy*, No. 3AN-19-08349CI (3d D. Alaska 2021) at 2.

¹⁶⁸ *State v. Planned Parenthood of the Great NW.*, 436 P.3d 984, 1004-05 (Alaska 2019).

¹⁶⁹ *Ibid.*, 16.

¹⁷⁰ Andrew Kitchenman, “Dunleavy’s Court System Vetoes because of Abortion Funding were Illegal, Judge Says,” Alaska Public Media, October 16, 2020.

court's use objective budget criteria, strategic planning, and performance measures, which carries implications on the decisional autonomy of lower court judges.

Courts have also sometimes invoked their inherent powers to compel the funding of legislative and executive officials. This tends to be disfavored by court leaders and managers, as it may damage the long-term strategy of comity and cooperative partnerships and invite retaliatory measures by the coordinate branches and defeating larger goals that extend beyond appropriations for any individual fiscal year. However, in instances where co-ordinate branches have consistently failed to consider budget requests, or attached conditions that are irrelevant (if not hostile) to determining funding that is reasonably necessary for judicial administration, then courts have sometimes invoked these powers as a trump card.

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