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Opening Statement

Pinching Pennies, Squeezing Justice: State Budget Cuts Threaten Judicial Independence

by Patricia Lee Refo

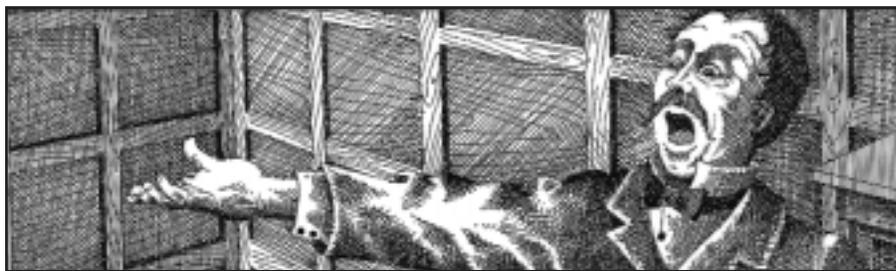
Chair, Section of Litigation

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Opening Statement



Pinching Pennies, Squeezing Justice: State Budget Cuts Threaten Judicial Independence

by Patricia Lee Refo
Chair, Section of Litigation

Attacks on the independence of the judiciary are nothing new. During election cycles in particular, judges are often in the figurative crosshairs of those who—armed with a judicial decision with which they disagree—claim that the independence of the judiciary should be curtailed or even eliminated. Frequently, the attacks are quite direct and include calls for impeachment or, in jurisdictions where judges are elected, turning a particular jurist out of office in the next election. Partisans on both sides of the aisle have assailed judges as “dictators in black robes,” superlegislators, activists, and worse. The organized bar, led by the American Bar Association, has routinely defended the judiciary from these slurs and has worked to educate both legislators and the public on the constitutional importance of an independent judiciary.

Today, however, many of our state justice systems are facing a new and insidious assault on their independence—a sometimes crippling lack of funding for basic court operations. In some states, the courts are truly in crisis, literally closing the doors to the courthouse due to lack of funds. While there have been funding problems for state courts in the past, the current situation is more dire and has the potential both to affect the administration of civil and criminal justice and to threaten the independence of our third branch of government.

Importance of an Independent Judiciary

As Alexander Hamilton wrote in *The Federalist No. 78*, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” For many of us, the concept of “judicial independence” brings to mind

first issues like judicial tenure and merit selection. Our nation’s founders, however, also understood the threat to independence that could come from the fact that the courts must necessarily depend on the other branches of government for their funds. Hamilton famously decried the judiciary as “the weakest of the three departments of power,” noting that “from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.” *Federalist No. 78*. His words about judicial salaries apply equally to all funding of the court systems: “And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.” *Federalist No. 79*. James Madison posed it slightly differently: “It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.” *Federalist No. 51*.

The concern over court funding and its effect on independence derived from the fact that courts can never be financially self-sustaining—fines and filing fees cannot possibly cover the costs of court operations. Funding mechanisms for state courts, however, vary widely. In many states, funding for the court system comes from a combination of state, county, and municipal sources, particularly for the trial courts. Appellate courts, typically, are state funded. In addition to

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these differences in funding sources, state-to-state comparisons are difficult because states have no uniformity about which line items they include in the judiciary budget. In every jurisdiction where the legislature passes a budget for the courts, however, the tension between the judiciary's need for autonomy and its dependence on the other branches for funds is built into the system.

State of the States' Judiciaries

This tension is manifest in the reports prepared by our states' Chief Justices each year about their judiciaries. In preparing this article, I read a host of these reports, which are often available on the court's Website. Typically presented to the legislature and/or the governor, it is often called the "State of the Judiciary Report." The report is the Chief Justice's opportunity to outline the successes, challenges, and accomplishments of the state's judiciary. Some Chief Justices use it to remind (or explain to) legislators about separation of powers and the appropriate role of the judiciary. These reports are a fascinating window on court operations and reforms. If you have not read your own Chief Justices report, I encourage you to do so. Chances are very good that you will learn something about the courts in your state.

In the recent reports I read from Chief Justices, there is a common thread—courts are struggling to cope with an acute lack of resources. State courts across the country, big and small, north and south, share this woe. With state budget deficits ballooning and a still-sluggish economy, governors and state legislatures are looking for all possible ways to cut state spending. Increasingly, they are cutting the budget of the state judiciary, often with dramatic and potentially very significant consequences to the administration of justice in our state courts.

How Bad Is It?

Our Chief Justices are telling us that the funding problem is very serious.

Chief Justice Wallace P. Carson of Oregon implemented a Court Operations Budget Reduction Plan earlier this year to address massive budget cuts. Addressing this "unprecedented" crisis, the plan called for court closures, layoffs, reduction of work hours, and a host of other severe measures. As the plan candidly explained, "The depth of these cuts will limit the system's ability to meet its public mandate to uphold the law and Constitution and to safeguard the state's justice system... Service to the community, and the public's access to the court system will be curtailed." Oregon Judicial Department, Court Operations Budget Reduction Plan: Fact Sheet.

In Arizona, the courts have been forced to eliminate more than 200 positions, mostly among probation officers. Chief Justice Charles E. Jones has warned that further cuts

would undermine the ability of the courts to perform essential constitutional duties. Perhaps more importantly, it will undermine the ability of the courts to maintain a criminal justice system with the capacity to deal with the broad range of public safety and law enforcement issues affecting every person, every family and every neighborhood in this state.

Third Annual State of the Judiciary Address, Mar. 27, 2003, at 5.

In North Carolina, Chief Justice I. Beverly Lake, Jr., has told the legislature that "the citizens of North Carolina have a court system that is severely, I should say very severely, underfunded." The Chief Justice continued, "It is simply no longer possible to do more with less, as we have been doing over the past two years." State of the Judiciary Address, April 7, 2003.

In Maine, Chief Justice Leigh

Ingalls Saufley told the legislature that “state courts in Maine have been lacking in sufficient resources for quite some time.” The State of the Judiciary, at 6. In addition to describing unfilled vacancies and other cuts, Chief Justice Saufley said the Maine courts were “flatly unsafe” because there is not enough money to provide adequate security screening of visitors to the state’s courthouses.

These are not isolated or idiosyncratic examples. Similar crises are affecting states across the country. The results have been, in many instances, quite devastating. Some jurisdictions have temporarily suspended jury trials. Courts have been closed—some permanently, some for a few hours a week, some every Friday. Layoffs, furloughs, and unfilled vacancies abound in court staff positions; judicial vacancies are being used as budget-relieving items. In New Hampshire, as only one example, the judiciary announced that, due to budget constraints, nearly 23 percent of the authorized positions in the supreme, superior and probate courts will remain vacant or be eliminated. News Advisory, August 1, 2003. Funding for continuing judicial education is being slashed or eliminated entirely. Judicial salaries, which have long been a focus of concern for the ABA, have been frozen in a number of states—sometimes for years. This, of course, only widens the already enormous gap between the income of the best established practitioners and the judges before whom they appear.

Faced with these disruptions to their operations, courts are responding by triaging cases. Violent or “person-to-person” criminal cases are being given precedence, along with juvenile matters and other cases involving public safety and welfare. Ordinary civil cases, whether at the trial court or appellate level, are far down the priority list. Indeed, in the hardest hit jurisdictions, civil jury trials have been temporarily suspended. Predictably, backlogs are starting to increase. Oregon’s Chief Justice Carson has succinctly called the situation “a train wreck.”

It goes without saying that our courts

are not, and should not be, exempt from the fiscal realities of state government. Efficiencies and cost savings should be a focus of every court’s administrative office. Many states’ court systems have made important strides toward streamlining their processes and improving their operational systems (often by investing in technology improvements that, themselves, require additional spending). Courts are also realizing cost savings with, for example, mandatory ADR programs, specialized drug courts and other similar diversion programs. Frances Kahn Zemans, *Court Funding*, prepared for the ABA Standing Committee on Judicial Independence, at 7. But court budgets are generally too small a piece of the pie for cuts to make a meaningful dent in a state’s overall deficits.

Moreover, the courts do not control their workload. When the legislatures make new criminal laws, the courts must deal with those who are arrested for violating the law. When civil filings increase and the legislatures continue to create new causes of action, the courts must find a way to process those new cases through the system. Courts are not in a position to turn off the spigot of new criminal and civil cases; they are forced to manage whatever comes in their door with whatever resources they are given by the legislature.

Budget Cuts as Retaliation

There is heightened concern in some quarters that court budget cuts are retaliatory, a concern that goes to the core of judicial independence. Unpopular decisions, particularly those that can be mischaracterized as “political” decisions, are often either misunderstood or, far worse, intentionally used as a weapon against the independent courts that rendered them. In my state of Arizona, Chief Justice Jones has warned that “a few legislators have expressed dissatisfaction with court decisions, and on that basis advocate cutting the budget to ‘control’ the courts.” State of the Judiciary Address at 5. Instances of actual or threatened budget cuts in response to court decisions that were

unpopular with legislators have made news in a number of other states as well. *Court Funding* at 11-13. This is extremely dangerous stuff. Courts do not decide political questions, but they often are called upon to decide legal controversies that intersect with political debates. That is their job. Conservative, moderate or liberal in their personal political views, virtually all judges strive to decide the cases before them based upon the law, not on politics. Indeed, the independent judiciary is intended to be the protector of the rights of the minority against the majority who seeks to silence them.

Utah’s Chief Justice Christine Durham recently emphasized this point:

[Courts] must be, and are in my experience, motivated only by honest convictions, informed by their study of constitutional law, about the content and meaning of constitutional language, and not by policy preferences or disagreements with legislative choices. Because legislators operate in a system that is by definition political and oriented to majority will and the art of compromise, there is sometimes a tendency to assume that judges are similarly motivated by political, personal or partisan preferences. We in this state’s judiciary do not, and cannot, function that way; it would be a violation of our oaths of office, our professional values and the law we serve.

2003 State of the Judiciary Address at 10.

Attempts to punish a judge by cutting the court’s budget are as reprehensible as other, more direct, attacks. At their most extreme, they raise the prospect of litigation between the branches of government, or of a chief justice or supreme court ordering a legislature to adequately fund the courts.

Why Should I Care?

What Can I Do?

“All very interesting,” you say, “but what does it have to do with me?” The

short answer is that in some states, your civil clients are already suffering the consequences of the lack of funding. Perhaps it takes longer to get to a trial. Maybe your courthouse is now closed on Fridays or, worse, has closed completely as part of a budget-driven consolidation plan. In some jurisdictions there is less money, sometimes *far* less money, for indigent defense. In one jurisdiction, misdemeanor domestic violence cases are now being prosecuted by pro bono volunteers because the prosecutor's office is so short of resources; in another jurisdiction, the cases are not being prosecuted at all. As members of the bar and particularly as litigators, we have a unique interest in ensuring that the court system has the resources it needs to operate.

What can you do? Educate yourself about the situation in your state. Read the

most recent report by your Chief Justice and look on the Website for your state court system for the most current information about its budgetary issues and challenges. If you have the opportunity, ask the presiding judge in your division or county what he or she sees on the horizon for the next fiscal year. As a litigator, you need the court system to be adequately funded and fully operational in order to do your work. Make it a priority to learn what the facts are in your courts.

Then, start talking to people about what your courts need. Maybe you personally know a state legislator. If so, make time to tell the legislator how important adequate court funding is and the consequences of dramatic budget cuts to your clients and to the public. Be an advocate for the system you work in every day. Enlist your clients in the cause as well. Whether your

clients are individuals or businesses, they have an interest in funded, fair, and efficient courts. Encourage them to express that interest to the legislators.

Finally, if your state or local bar association or your state's judiciary asks for your help, give it. In Florida, the Chief Justice recently asked every lawyer to contact his or her state legislator in support of restoring funding that had been cut from the judiciary's budget. Chief Justices in other states are also asking lawyers to respond to budget cuts in a variety of specific ways. Bar associations are developing a wide range of organized responses to budget cuts. Please volunteer, or write a letter, or make a phone call—whatever assistance you can give may make the difference. The independence of our judiciary deserves no less from us. □