

COURT FUNDING

Prepared for the American Bar Association Standing Committee
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 than 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 raise 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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