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JUDICIAL INDEPENDENCE, ADEQUATE COURT FUNDING, AND INHERENT JUDICIAL POWERS

JEFFREY JACKSON*

In Alamance County, North Carolina, a trial judge convened a grand jury to inspect the deplorable conditions of the courthouse and to make recommendations for its renovation. Following his receipt of the grand jury's report, the trial judge conducted a hearing on the adequacy of the court facilities. The county commissioners were not allowed to participate. The judge then issued an ex parte order requiring the county commission to provide the court with adequate facilities, specifying such details as the size of each room to be provided. The commission contested both the authority of the judge to issue the order and the procedure used by the judge in its issuance. On appeal, the North Carolina Supreme Court, while vacating the judge's order, confirmed the trial judge's inherent authority to require another branch of government to provide necessary support for the judicial branch.

In New York, after Governor Mario Cuomo submitted to the legislature a budget request for the judiciary far less than the amount the judiciary had established as the minimum necessary for the efficient operation of the state courts, then-Chief Judge Wach-

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1. In re Alamance County Court Facilities, 405 S.E.2d 125, 126 (N.C. 1991).
2. Id.
3. The county commissioners were served notice of the hearing and of their entitlement to offer evidence regarding the adequacy of court facilities. Id. A motion to dismiss filed by four commissioners was denied, however, on the grounds that the commissioners were not parties to the action and thus lacked standing. Id. at 127. The commissioners attended the hearing, but did not participate. Id.
4. Id. at 128.
5. Id.
6. Id. at 126.
tler of the New York Court of Appeals sued the Governor and the legislature in a state trial court to compel adequate funding. When this relief was denied, the Governor responded by removing the action to federal court and by filing a separate federal declaratory judgment action. The Governor contended that the relief Chief Judge Wachtler sought would, among other things, deprive the citizens of New York of the right of self-determination through their elected officials. United States District Court Judge Weinstein, who had refused to enjoin the state court proceedings, noted "the paradox that litigation designed to solve a problem makes its solution less likely."

The underlying disputes in Wachtler and in Alamance arise from the underfunding of the judiciary by the branches of government responsible for appropriations. Both actions assert the right of citizens derived from state constitutions to have a judicial system with sufficient resources to undertake an orderly and efficient administration of justice. The plaintiff-judges in Wachtler and Alamance based their assertions of inherent power to compel funding on the need to maintain judicial independence to discharge the court's constitutionally mandated functions.

Alamance followed what has become a typical course for litigation involving the inherent powers of judges to compel funding. The trial judge asserts his power by issuing an order, or obtains an order from an "impartial court." The funding authority resists. On appeal, the reviewing court acts as mediator and confirms the trial court's power to compel action by the funding authority, but modifies the lower court's order to reduce its financial impact on the funding authority. The result is an appearance of splitting the dif-

9. See id., slip op. at 1. United States District Court Judge Weinstein instead recommended former Secretary of State Cyrus R. Vance as a mediator, id. at 4, expressing "dismay and sadness [over the clash between] these titans of New York . . . " Id. at 2.
12. See Complaint at 10, Cuomo v. Wachtler, No. 91-CV-1270.
15. See cases cited infra notes 66-95.
ference in the dispute.

Cases such as Alamance have been characterized as disputes between non-equals. The trial court, and the appellate court reviewing the lower court’s action, act on behalf of a branch of state government, while the funding authority is represented only by subdivisions such as county or municipal executives. The dispute centers on a “marginal” increase in an individual court’s budget as opposed to the entire budget of the court. In the dispute between non-equals, the trial judge’s use of inherent power to compel funding is restrained less by the external forces of the legislative branch or of public opinion, and more by the appellate court which imposes both procedural and substantive restraints on the trial judge’s inherent powers.

Wachtler differs in an important respect. There, the dispute was between co-equals. The chief judge of the state’s highest court confronted the state’s chief executive officer and legislative leadership. All parties acted in their official capacity, representing co-equal branches of state government. Unlike disputes over marginal increases for individual local courts, the dispute involved the entire state court budget and the authority and responsibility of each branch of government to control that budget.

Alamance and Wachtler illustrate both the evolution and continuing vitality of the inherent powers doctrine in the area of court funding. For years, state courts have complained about inadequate funding, particularly at the local level where courts in many states, such as North Carolina, rely on local funding for all or a large part of their budgets. It has been suggested that the need to resort to inherent judicial powers to compel funding could be reduced if local courts received more funding under state budgets, as is the case in New York.

17. See Carl Baar, Separate but Subservient: Court Budgeting in the American States 145 (1975) (noting that disputes generally have been between state-level judges and local governments).
18. Id.
19. See infra notes 192-204, 211-215 and accompanying text.
20. See infra notes 55-133 and accompanying text.
21. When he prepared his funding action against the Governor, Chief Judge Wachtler reportedly identified fourteen lawsuits related to justice system funding. ABA Special Committee on Funding the Justice System, Crisis in the Justice System 11 (1991).
23. See Geoffrey C. Hazard, Jr. et al., Court Finance and Unitary Budgeting, 81 Yale L.J. 1286 (1972) (comparing the inherent power and unitary budget approaches to funding the judiciary).
A common thread running through opinions in cases involving court funding is a concern that courts not use their inherent powers to usurp the legislature's authority to balance and prioritize competing needs for public funds.\textsuperscript{24} The tension in these interbranch disputes is between the need to insure the judiciary's independence and the need to protect funding authorities from overreaching judges. To balance these opposing objectives, appellate courts have imposed an increasing number of substantive and procedural restraints on inherent judicial powers. The diversity of procedural and substantive restraints throughout the states demonstrates differing conceptions of inherent judicial powers, judicial independence, and interbranch relations.

Although state jurisprudence on these issues is diverse, some general trends have emerged as the doctrine of inherent powers has been refined. Appellate courts have resolved the potential tension between legislative autonomy and underfunded courts by recognizing, but restraining, the inherent powers of lower courts. These restraints define the shape of judicial branch independence as they limit the inherent powers of individual judges and courts to achieve adequate funding while consolidating that power in the centralized appellate courts.

This Article discusses the development of these restraints and their impact upon judicial independence. Part I briefly discusses the need to preserve judicial independence under the separation of powers doctrine, the asserted grounds for inherent judicial power. Part II discusses the procedural and substantive restraints, as well as other nonjudicial restraints, that state appellate courts have created to limit this power. Part III evaluates alternative mechanisms that might be used to increase funding to state courts while reducing interbranch conflicts.

I offer an additional note on the scope of this Article. Both Alamance and Wachtler follow in a long line of American cases in which courts have asserted inherent judicial power to preserve judicial independence.\textsuperscript{25} This Article focuses on cases involving logistic au-

\textsuperscript{24} See discussion infra Part II.F.

tonomy,²⁶ including control over courthouse personnel, court budgets and court facilities,²⁷ because these cases in particular have


²⁶ It has been suggested that judicial independence may be divided into four separate, but related, concepts: (1) logistic or housekeeping autonomy; (2) decisional autonomy, including the power of the judge to decide pending cases; (3) trial practice autonomy, which includes the power of the judge to regulate courtroom conduct; and (4) personal autonomy, which is the power of the judge to determine the course of his personal affairs. See J. Covington, Autonomy v. Efficiency—The Continuing Debate on Judicial Supervision of Federal Trial Judges 1-3 (July 23, 1973) (unpublished paper presented to executive sessions of judges of United States Court of Appeals for the Ninth Circuit, in San Francisco), quoted in J. Clifford Wallace, Judicial Administration in a System of Independents: A Tribe with Only Chiefs, 1978 B.Y.U. L. REV. 39, 55-56.

²⁷ For cases discussing the power of a court to hire or discharge employees, see, e.g., In re Janitor, 35 Wis. 410 (1874) (hiring); Holohan v. Mahoney, 480 P.2d 351 (Ariz. 1971) (discharge); District Court v. Williams, 268 A.2d 812 (Me. 1970) (same); Mowrer v. Rusk, 618 P.2d 886 (N.M. 1980) (same). For cases upholding a court’s power to supervise and set salaries for employees, see Smith v. Miller, 384 P.2d 738 (Colo. 1963); People ex rel. Bier v. Scholz, 394 N.E.2d 1157 (Ill. 1979); Young v. Board of County Comm’rs, 530 P.2d 1203 (Nev. 1975).

For cases discussing the power of a court to compel funds for the provision of judicial facilities, see Ex parte Turner, 40 Ark. 548 (1883); Pena v. District Court, 681 P.2d 953 (Colo. 1984) (upholding court’s power to compel funding for courthouse air conditioning); Knuepfel v. Fawell, 449 N.E.2d 1312 (Ill. 1983); Commissioners of Neosho County v. Stoddart, 13 Kan. 207 (1874) (power to compel funding for courthouse carpeting); Hosford v. State, 525 So. 2d 789 (Miss. 1988); State ex rel. Kitzmeyer v. Davis, 68 P. 689 (Nev. 1902) (carpeting and furniture); In re Alameda County Court Facilities, 405 S.E.2d 125 (N.C. 1991); In re Furnishings for Judge, 423 N.E.2d 86 (Ohio 1981) (furniture); Committee for Marion County Bar Ass’n v. County of Marion, 125 N.E.2d 521 (Ohio 1954) (reversing lower court’s mandate compelling funds for installation of elevator); In re El Paso County Courthouse, 765 S.W.2d 876 (Tex. Ct. App. 1989).

For cases affirming a court’s power to allocate courthouse space see Chief Judge v. Board of County Comm’rs, 401 So. 2d 1330 (Fla. 1981); Board of Comm’rs v. Riddle, 493 N.E.2d 461 (Ind. 1986); Imbornone v. Early, 401 So. 2d 953 (La. 1981); Anderson County Quarterly Court v. Judges of 28th Judicial Circuit, 579 S.W.2d 875 (Tenn. Ct. App. 1978).

For cases affirming the inherent power of a court to order office equipment, see O’Coins, Inc. v. Treasurer of the County of Worcester, 287 N.E.2d 608 (Mass. 1972); Young v. Board of County Comm’rs, 530 P.2d 1203 (Nev. 1975); District Judges v. County Judge, 657 S.W.2d 908 (Tex. Ct. App. 1983).

For cases discussing the power of a court to regulate, through direct negotiation or judicial review, contractual terms with employee unions, see, e.g., Orenic v. Illinois State Labor Relations Bd., 537 N.E.2d 784 (Ill. 1989); County of Kane v. Carlson, 507 N.E.2d 482 (Ill. 1987); In re Michigan Employment Relations Commission’s Order, 281 N.W.2d 299 (Mich. 1979); Livingston County v. Mahinske, 225 N.W.2d 352 (Mich. 1975); Judges of 74th Judicial Dist. v. Bay County, 190 N.W.2d 219 (Mich. 1971); State ex rel. O’Leary
presented courts with special problems in defining limits to their authority consistent with the prerogatives of other branches and with the judiciary's obligation to render impartial decisions.\textsuperscript{28} In


For a case discussing the power of a court to restrict the areas of permissible collective bargaining, see \textit{Bradley}, 388 A.2d 736.

28. Discussion of decisional autonomy, trial practice autonomy, and personal autonomy cases is beyond the scope of this Article. The following references are provided for supplementary use.

For cases involving the power of a court to assume jurisdiction, see, e.g., Patterson v. Crabb, 904 F.2d 1179 (7th Cir. 1990) (affirming court of appeals' power to recall mandate and reinstate appeal); LaReau v. Reincke, 264 A.2d 576 (Conn. 1969) (extending jurisdiction of appeals court to consider untimely petition); \textit{In re} Albemarle Mental Health Ctr., 256 S.E.2d 818 (N.C. Ct. App. 1979) (interpreting rules of procedure liberally to allow jurisdiction despite lack of statutory authority), \textit{review denied}, 259 S.E.2d 298 (N.C. 1979); to reverse not guilty verdicts, see, e.g., Louisiana v. Mims, 329 So. 2d 686 (La. 1976) (reversing verdict of not guilty where case not tried); or to permit federal courts to enjoin relitigation of issues in state court, see, e.g., Meridian Investing & Dev. Corp. v. Suncoast Highland Corp., 628 F.2d 370 (5th Cir. 1980). Judge Wallace argues that curtailment of logistic autonomy may be permissible without sacrificing judicial independence, but that judicial independence could not survive interference with decision autonomy. See \textit{Wallace}, \textit{supra} note 26, at 55-56.


For cases discussing the power of the court to make rules of procedure or evidence, see, e.g., \textit{Slayton v. Shumway}, 800 P.2d 590 (Ariz. 1990) (permitting an amendment to the state's constitution to shift authority to legislature to make rules of procedure and
the logistic autonomy cases, local courts have also found that increasing intrabranch and interbranch restraints are reducing their ability to assert inherent powers to achieve adequate funding.

I. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

Few people would argue that the constitutional provisions that established the judiciary, or those that established the legislature and the executive branch, set forth each and every necessary power and responsibility. The oft-quoted expression of Michigan Supreme Court Chief Justice Brennan in his first opinion in *Judges for Third Judicial Circuit v. County of Wayne,*

30 that "[i]t is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate,"

31 is merely an abbreviated and intuitive way of saying that the powers of each branch of government are not exhaustively listed in state constitutions. An overly expansive reading of constitutional texts is not required to suggest that the three branches of state government, in furtherance of their constitutionally mandated responsibilities, must have the authority to hire and pay staff and to do other acts beyond those explicitly stated in the constitutional texts.

32 It cannot be disputed that courts have the power to compel briefs, or to designate issues for additional briefing, even though such specific powers may not be stated explicitly in a state constitution. The real argument is centered not on the existence of incidental powers, but on the nature and extent of those powers.

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31. Id. at 440 (adding that such power "necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments").

32. See *O'Coins,* Inc. v. Treasurer of the County of Worcester, 287 N.E.2d 608, 611 (Mass. 1972) (noting that a court's authority is "not limited to adjudication, but includes ancillary functions"); see also *In re Salary of Juvenile Director,* 552 P.2d 163, 169 (Wash. 1976) (citing *O'Coins*).
To concede the existence of incidental judicial powers does not necessarily entail a concession that the judiciary has the inherent power to compel fiscal expenditures. 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. This apparent invasion into the responsibilities of the legislature is defended under separation of powers principles as necessary to preserve judicial independence.

The concept of the independence of the three branches of government extends from the notion that, for government to be properly restrained, it must be divided so that no single branch might enjoy enough power to tyrannize the other branches or the citizenry. Power, once separated, must be wielded by co-equal branches of government sufficiently independent to check assertions of power by each other. The doctrines of separation of powers and of checks and balances entail and require branch independence. A breakdown of such independence would result in the inability of one branch of government to check the arbitrary or self-interested assertions of another.

Just as the executive may not prevent a judge from discharging her judicial duty by physically blocking the courthouse with the police force, and just as the legislature may not enact laws removing all jurisdiction from courts, courts may not be obstructed by underfunding. While, as a general proposition, the authority of legis-

33. See, e.g., Chiles v. Children, 589 So. 2d 260, 265 (Fla. 1991) ("[T]his Court has long held that the power to appropriate state funds is legislative. . . . The legislative responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government."). See also Morgan County Comm'n v. Powell, 293 So. 2d 830, 834 (Ala. 1974); In re Alamance County Court Facilities, 405 S.E.2d 125, 126 (N.C. 1991).

34. For examples of state court discussions of separation of powers in cases involving funding orders, see Morgan County Comm'n, 293 So. 2d at 837; Orenic v. Illinois State Labor Relations Bd., 537 N.E.2d 869, 872-74 (Ill. 1989); Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 872-74 (Iowa 1978); Opinions of the Justices to the Senate, 363 N.E.2d 652, 659 (Mass. 1977); Judges for Third Judicial Circuit, 172 N.W.2d at 439-40; Mower v. Rusk, 618 P.2d 886 (N.M. 1980); Alamance, 405 S.E.2d 125; Juvenile Director, 552 P.2d at 167-68. For an excellent discussion of separation of powers principles in this context, see BAAR, supra note 17, at 149-60.

35. See, e.g., Juvenile Director, 552 P.2d at 168-73.

36. BAAR, supra note 17, at 149-52.

37. See Juvenile Director, 552 P.2d at 170 (discussing how improper judicial checks can undermine the operation of another branch).

latures to control the purse in the first instance is unquestioned, legislative refusal to provide sufficient funding for courts would be an improper check on a co-equal branch of government. If the judicial branch is to perform its primary function (adjudication), it must be able to command adequate resources for that purpose. This authority to exercise (or to compel the exercise of) legislative power to preserve separateness, which at first blush appears to be a violation of concepts of separateness and an invasion of legislative autonomy, is instead necessary to maintain that separateness.39

The level of judicial independence required and the manner in which it is secured are the underlying questions in cases involving the exercise of inherent powers to compel fiscal expenditure. Given the centrality of the concept of judicial independence to the doctrine of inherent powers, it is useful to consider it more carefully.40

In America, judicial independence was, in part, a response to colonial judges who were "dependent on the [King's] will alone, for their tenure and their offices."41 The framers of the United States Constitution included two separate provisions to ensure the independence of individual judges, the Good Behaviour Clause,42 giving federal judges lifetime appointment subject only to removal by impeachment, and the Compensation Clause,43 making judicial salaries irreducible. Alexander Hamilton noted that if power over periodic appointments were left to other branches of government, "there would be danger of improper complaisance to the branch which possessed it."44 If the people held such a power, "there would be too great a disposition to consult popularity."45 Regarding the need for protection of salaries, Hamilton wrote that "[n]ext to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support. . . . In

39. For discussions on the use of inherent powers to preserve judicial autonomy, see Juvenile Director, 552 P.2d at 168; Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa.), cert. denied, 402 U.S. 974 (1971).
42. U.S. CONST. art. III, § 1.
43. Id.
45. Id.
the general course of human nature, a power over a man's subsistence amounts to a power over his will." For the judiciary to be able to impartially adjudicate matters involving government or citizens, it must be independent of both.

There is no indication that judicial independence as conceived by the framers of the Constitution entailed the inherent right to compel fiscal expenditure. That federal judges were given lifetime tenure and salary protection to preserve independence may, indeed, indicate a contrary intention. Moreover, attempts to vest federal judges with extra-judicial functions, such as advising on policy or law formation, were soundly defeated at the Constitutional Convention. The records of the Constitutional Convention evidence a concern for a judiciary capable of impartially adjudicating cases, and checking the power of other branches of government, but provide little direct support for the proposition that, to maintain independence, the judiciary should have a right to compel funds for its

47. One commentator noted the following purpose for judicial independence:
   The argument for the independence of the judge is that in performing his function of rule-interpretation he should not be subject to pressure that would cause him to vary the meaning of the rules to suit the views of the persons affected by them, and that in ascertaining 'facts' he will not be influenced by consideration of expediency. It is an essential element in the maintenance of that stability and predictability of the rules which is the core of constitutionalism.
48. Hamilton expressly suggested that it did not:
The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.
THE FEDERALIST No. 78, supra note 44, at 522-23.
50. See Paul M. Bator et al., Hart & Wechsler's Federal Courts and the Federal System 8 (2d ed. 1973). Rufus King argued that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." 1 THE RECORDS OF THE FEDERALIST CONVENTION OF 1787, at 109 (Max Farrand ed., Yale Univ. Press 1966).
51. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) ("The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.").
needs. Indeed, while federal courts have similarly recognized an inherent judicial power, such power has generally not been used to compel expenditures for court facilities and staff.\footnote{52. But see Armster v. United States Dist. Court, 792 F.2d 1423, 1430-31 (9th Cir. 1986) (holding that jury trials could not be suspended, despite lack of funds); Jonathan Bunge, Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee, 55 U. Chi. L. Rev. 237 (1988).}

For the judiciary to serve the function of checking the other branches, judicial branch independence is required.\footnote{53. See Wallace, supra note 26, at 40-43.} To serve the function of impartially deciding cases, the independence of individual judges is necessary.\footnote{54. See id. at 43-44.} An obvious dilemma in the inherent powers cases is that, in its effort to maintain the independence of the branch, the judiciary assumes a power which arguably cannot be checked by other branches of government. Assertions of branch independence, consistent with obligations imposed by the constitutional structure, potentially infringe on the autonomy of other branches. In the process of deciding cases in which judges are parties, the judiciary may also appear to abandon impartiality by adjudicating while simultaneously acting as an advocate. Therefore, the history of the inherent powers doctrine can be seen as an effort of the judiciary to command resources sufficient to serve constitutionally mandated roles, while simultaneously maintaining limits on these powers consistent with constitutional norms and judicial impartiality. Legitimacy of the doctrine may ultimately rest on how well the judiciary succeeds in each of these efforts.

II. RESTRAINTS ON THE DOCTRINE

Reviewing courts have imposed or identified several restraints on the inherent powers of courts. Included among these restraints are procedural protections for funding authorities who challenge judicial authority, burden of proof requirements, and substantive standards limiting a judge's ability to resort to the doctrine. This Part discusses these various mechanisms for restraining inherent powers and suggests trends in states toward adopting particular restraints.

A. Procedures for Enforcing Judicial Demands for Resources

Most courts agree that actions to procure funding should not be commenced, nor should funding orders be issued, until judges have attempted and failed to procure adequate funding through normal
budget channels. In this respect, Indiana's procedure is exceptional. Indiana, a state with a long history of inherent powers cases, requires by court rule that funding orders be made part of the budget process. Under the rule, judges demanding funds must first meet with the funding authority "to demonstrate the need" for the funds. Thereafter, the court may issue an "Order for Mandate of Funds." When Indiana courts issue funding orders, they are, therefore, pursuing a normal supplemental appropriations process, albeit one established by the judiciary itself.

Considerable variation exists in the procedures other state courts may employ to enforce a resource demand. Judges may issue mandates to local funding boards to compel funding, institute mandamus proceedings against the boards in neutral fora, or issue orders to show cause why funding should not be provided. This latter procedure was followed by the Colorado Supreme Court in *Smith v. Miller*, where the local funding board was obligated to either obey or contest the judge's order. The court held that an order compelling compliance could be entered absent a finding that the requests were unreasonable, arbitrary, or capricious.

55. The case most cited for this proposition is *State ex rel. Hillis v. Sullivan*, 137 P. 392, 395 (Mont. 1913) ("[W]hen an emergency arises which the established methods cannot or do not instantly meet, then and not until then does occasion arise for the exercise of the inherent power."). See also *Pena v. District Court*, 681 P.2d 953 (Colo. 1984); *Rose v. Palm Beach County*, 361 So. 2d 135 (Fla. 1978); Twenty-First Judicial Dist. Court v. State, 548 So. 2d 1208 (La. 1989); *O'Coins, Inc. v. Treasurer of the County of Worcester*, 287 N.E.2d 608 (Mass. 1972); *In re Clerk of Court's Compensation*, 241 N.W.2d 781, 786 (Minn. 1976); *In re Court Reorganization Plan*, 391 A.2d 1255, 1259 (N.J. Super. 1978), *aff'd*, 396 A.2d 1144 (N.J. 1979); *In re Alhambra County Court Facilities*, 405 S.E.2d 125 (N.C. 1991); *Leahey v. Farrell*, 66 A.2d 577 (Pa. 1949).


57. See *Ind. R. Tr. Proc. 60.5*

58. *Id. at 60.5(A).*

59. *Id. at 60.5(B).*

60. See, *e.g.*, *In re Salary of Juvenile Director*, 552 P.2d 163 (Wash. 1976).


62. See, *e.g.*, *Morgan County Comm'n v. Powell*, 293 So. 2d 830 (Ala. 1974).

63. 384 P.2d 738 (Colo. 1963).

64. *See id.* at 742.

65. *Id.*
Two related questions have emerged regarding commencement of cases to enforce or resist funding orders based on inherent powers. First: what is the legal status of a judge's order that her court requires additional funding? Stated otherwise, if a funding unit fails to contest a funding order, has it waived its right to deny funds? Second: may the same judge who issues a funding order consider evidence relevant to the merits of the order?

In several states, orders requiring funding have been treated as valid unless contested. For example, in Broomfield v. Maricopa County, the Arizona Supreme Court held that a board of supervisors must commence a special legal action to set aside a funding order. Failure to do so would bar any opportunity to contest the order on the merits. The Broomfield court stated that “[i]t is a settled principle of law that an order issued by a court with jurisdiction over the subject matter must be obeyed by the parties until that order is reversed by orderly and proper proceedings. This principle applies whether the subject matter be litigation or administrative . . . .” Under the Arizona scheme, therefore, an ex parte funding order may be issued by the judge, but the funding unit may obtain a neutral forum to contest the order by filing a timely special action.

In In re Furnishings for Judge, the Ohio Supreme Court held that it is an appropriate procedure for a judge to issue a funding order, and then issue an order to show cause why the funding unit should not be held in contempt for violating the order. The funding unit was obligated to make its record for appeal in the contempt proceeding before the judge who issued the original funding order. Until the funding unit was found to be in contempt, it could not

68. Id. at 1083.
69. Id.
70. Id. (citations omitted).
71. 423 N.E.2d 86 (Ohio 1981).
72. Id. at 88.
73. The court reasoned that “it is incumbent upon the board to point out errors in the record. Otherwise, all reasonable presumptions consistent with the record will be indulged in favor of the regularity and legality of the proceedings below.” Id. at 88-89.
appeal the funding order.\textsuperscript{74} In the contempt proceeding the burden of proof was on the board to show the unreasonableness of the court's request.\textsuperscript{75} In \textit{Knuepfer v. Fawell},\textsuperscript{76} the Illinois Supreme Court likewise approved a procedure in which a chief circuit judge presided over an administrative hearing regarding the need to expand the facilities of the circuit court.\textsuperscript{77} The court noted that, given the special knowledge of the chief judge regarding the problems and needs of the judiciary, he should not be excluded from conducting a hearing on the matter.\textsuperscript{78}

A similar procedure was sanctioned by a New Jersey appellate court. In \textit{In re Court Reorganization Plan},\textsuperscript{79} an assignment judge, in an effort to reorganize the administrative structure of his court, entered sixteen orders regarding personnel appointments and salaries.\textsuperscript{80} After failing to win the cooperation of the county to implement these orders, the judge issued an order to show cause why the county should not be required to implement the reorganization.\textsuperscript{81} The judge then held a hearing on the order to show cause.\textsuperscript{82} The county protested that the judge's failure to disqualify himself constituted a violation of due process.\textsuperscript{83} Distinguishing between administrative and adjudicative actions, the appellate court dismissed the protest as follows:

The hearing itself was not mandated by the due process requirements of proceedings involving adjudications between litigants. . . . [A]ppellants were granted a hearing as a gratuitous gesture and Judge O'Brien did not undertake to decide a justiciable controversy; nor did he sit in review of his own action. He simply used the public forum of a courtroom to hear the views of county officials and to express his reasons for the issuance of his administrative order.\textsuperscript{84}

\begin{flushright}
74. \textit{Id.} at 89 ("When a judge undertakes to enforce his order by proceedings in contempt, instead of by way of mandamus, a board’s remedy is by way of appeal from a finding of contempt.").
75. \textit{Id.}
76. 449 N.E.2d 1312 (Ill. 1983).
77. \textit{Id.} at 1317.
78. \textit{See id.} at 1316.
80. \textit{Id.} at 1257.
81. \textit{Id.}
82. \textit{Id.}
83. \textit{Id.}
84. \textit{Id.} at 1258.
\end{flushright}
It is unclear from the opinion, however, how the appellate court received its record for review (which it described as fully supporting the administrative orders\textsuperscript{85}) if not from Judge O'Brien's public forum. From the county's point of view, the issue to be adjudicated was whether the resources required by the judge were reasonably necessary to empower the judge to command them. To say that the judge was only acting administratively and that the county was not entitled to make its record in an impartial hearing merely stated a conclusion which the county sought to dispute.

There is a trend away from procedures under which the same judge who issues or seeks a funding order hears evidence on the order.\textsuperscript{86} The perceived problem is lack of impartiality, a quality which is central to the purposes of judicial independence and the very authority of the judicial branch. Courts have recognized the existence of a problem where a judge attempts to adjudicate and advocate simultaneously.\textsuperscript{87} Notions of fairness and interbranch harmony appear to be compromised when a judge issues an order to show cause why her court's resources should not be increased, and then hires a lawyer to present "her" evidence in a proceeding over which the judge herself presides.\textsuperscript{88}

Numerous courts have attempted to preserve impartiality by providing a process in which judges not involved in the subject dispute are called upon to decide it.\textsuperscript{89} For example, in \textit{McCorkle v. Judges of Chatham County},\textsuperscript{90} the Supreme Court of Georgia established procedures which contrast with New Jersey's treatment of the

\textsuperscript{85.} Id. at 1261.
\textsuperscript{86.} For cases discussing the need for independent judicial review of funding orders, see \textit{McCorkle v. Judges of Chatham County}, 392 S.E.2d 707 (Ga. 1990); Allen County Council v. Allen Circuit Court, 549 N.E.2d 364 (Ind. 1990); Imbornone v. Early, 401 So. 2d 953 (La. 1981) (Dennis, J., dissenting); Employees of Second Judicial Dist. Court v. County of Hillsdale, 378 N.W.2d 744 (Mich. 1985); Young v. Board of County Comm'rs, 530 P.2d 1203 (Nev. 1975).
\textsuperscript{87.} See, e.g., \textit{McCorkle}, 392 S.E.2d 707, 709; Committee for Marion County Bar Ass'n v. Marion County, 123 N.E.2d 521, 524 (Ohio 1954) ("[I]n view of the interest which the Common Pleas Court would necessarily have in such instances with respect to the remedy sought, it is apparent that such a remedy should probably be sought in another court . . . ."). \textit{But see Knuepfer v. Fawell}, 449 N.E.2d 1312, 1316 (Ill. 1983) (noting that knowledge of chief judge regarding needs and problems of judiciary makes him "particularly well qualified to evaluate the evidence presented in an administrative hearing").
\textsuperscript{88.} This was the procedure followed by the trial judge in \textit{In re Alamance County Court Facilities}, 405 S.E.2d 125 (N.C. 1991).
\textsuperscript{89.} For cases discussing the need for a hearing by an impartial judge, see Chief Judge of Eighth Judicial Circuit v. Board of County Comm'rs, 401 So. 2d 1330 (Fla. 1991); Livingston County v. Mahinske, 225 N.W.2d 552 (Mich. 1975); \textit{In re Clerk of Court's Compensation}, 241 N.W.2d 781, 786 (Minn. 1976).
\textsuperscript{90.} 392 S.E.2d 707 (Ga. 1990).
judge's administrative action. In *McCorkle*, county commissioners filed a motion for recusal following issuance of a lower court's en banc order to show cause why county officials should not continue funding two clerical positions. Without holding a hearing, the en banc court denied the motion to recuse and entered a funding order which contained detailed factual findings. While agreeing that the en banc court should have granted the motion to recuse, the Supreme Court of Georgia established a procedure under which a lower court could issue a certificate approving expenses under its inherent powers, without the need for an order. The commissioners could then file a protest within thirty days challenging the certificate as being issued beyond the court's inherent powers. The protest would be treated as an action in equity and, upon request for recusal of the judge certifying the expense, would be heard by a judge from outside the circuit. As in New Jersey, the Georgia procedure allows the judge to act administratively without unnecessary process. Upon protest, however, the county is given the opportunity to contest the administrative action before an outside judge, fostering the appearance of impartial review.

Because even such procedures as Georgia's involve a judge deciding the extent of powers of another judge, not all governmental officials are likely to be impressed by the impartiality of the process. Insufficient information is available on whether local government officials have confidence in the neutrality of the decision-makers. Requests by funding authorities for jury trials have often been denied. Nevertheless, it is more likely that funding officials believe that justice is done when they are involved in a process in which the decision-maker does not have a direct interest in the outcome.

A few additional points should be made here. First, if the purpose of resorting to inherent powers is to preserve judicial independence, procedures should be developed that are consistent with that end. In pursuit of the independence necessary to insure impartiality, the judiciary should insure that the pursuit itself is conducted impartially.

Second, it is hardly unprecedented for the judiciary to decide

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91. *Id.* at 708.
92. *Id.*
93. *Id.* at 709.
94. *Id.*
the extent of its own powers. In that sense, an inherent powers case requires a judge to perform a task not unlike determining whether she has the power to order extraordinary remedies such as mandating school busing or prison supervision. Nonetheless, one striking difference between inherent powers cases and other cases where judges exercise extraordinary judicial powers is that, in inherent powers cases, the judge appears to have a direct interest in increased resource allocation to her court. While it could be argued that a judge's demand for improved courthouse facilities for litigants is similar to her demand for improved conditions for prisoners, it must be noted that when a judge orders that her courtroom be cooled, she, too, will enjoy the air. Moreover, when employees are retained and their salaries are increased by order of the court, it can be assumed that the judge, like other political actors, receives the benefits of such patronage.

B. Standards for Controlling Resort to the Power: Reasonable Necessity

Appellate courts restrain inherent powers of lower courts in several ways. One means of restraint is the enforcement of procedural safeguards on lower courts. As previously discussed, these safeguards include a requirement that neutral judges hear inherent powers cases. Reviewing courts also check lower court power by setting and enforcing substantive standards that govern the circumstances under which inherent powers can be used.

A majority of state appellate courts have held that judges may not resort to inherent powers to compel expenditures unless the expenditures are "reasonably necessary" for the effective (and perhaps efficient) administration of justice. The reasonable-necessity standard was used in the leading Pennsylvania case of Commonwealth ex rel. Carroll v. Tate, as well as in the equally famous Massachusetts

96. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (upholding power of the Court to review state civil cases).
97. See supra notes 86-95 and accompanying text.
98. See, e.g., Pena v. District Court, 681 P.2d 953, 957 (Colo. 1984) (noting that courts have "uniformly upheld the exercise of [inherent] power when . . . expenses were reasonably necessary to the efficient operation of the court or the performance of judicial functions and were made necessary by the refusal of the executive or legislative branch to honor reasonable requests"); Knuepfer v. Fawell, 449 N.E.2d 1312 (Ill. 1983); Board of Comm'rs v. Riddle, 493 N.E.2d 461 (Ind. 1986); In re Clerk of Court's Compensation, 241 N.W.2d 781 (Minn. 1976); Mead v. McKittrick, 727 P.2d 517 (Mont. 1986); Young v. Board of County Comm'rs, 530 P.2d 1203 (Nev. 1975); In re Alamance County Court Facilities, 405 S.E.2d 125 (N.C. 1991); In re Furnishings for Judge, 423 N.E.2d 86 (Ohio 1981).
case of O'Coins, Inc. v. Treasurer of the County of Worcester.\textsuperscript{100} In Carroll, during a budget crisis in Philadelphia, the court of common pleas received a budget appropriation that the judges believed was inadequate for the court to function.\textsuperscript{101} The president judge of the court initiated a mandamus proceeding to compel the city to increase court funding by an amount in excess of $5 million.\textsuperscript{102} A judge specially assigned by the Supreme Court of Pennsylvania to hear the matter ordered a $2.4 million increase in the court's budget.\textsuperscript{103} On appeal, the supreme court, while reducing the award to $1.3 million, held that:

\begin{quote}
the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.\textsuperscript{104}
\end{quote}

In so holding, the burden of proving this necessity was placed upon the court.\textsuperscript{105}

Relying on Carroll, the Supreme Judicial Court of Massachusetts in O'Coins likewise adopted the standard of reasonable necessity. In O'Coins, however, the expenditure was an $86 purchase of a tape recorder and tapes by a trial judge who bypassed statutory procurement procedures to be able to conduct proceedings in the absence of his court reporter.\textsuperscript{106} The appellate court held that a judge's resort to inherent powers to compel funding should be limited by a standard of reasonable necessity.\textsuperscript{107} The court promised to adopt a rule that would require judges to obtain approval from the chief justice or his designate before compelling expenditures.\textsuperscript{108} Under the rule, the approved action of the trial judge could be challenged by the county, but the county would bear the burden of proving that the judge's action was an abuse of discretion.\textsuperscript{109}

Several other courts have adopted the reasonable necessity

\begin{thebibliography}{99}
\bibitem{100} 287 N.E.2d 608 (Mass. 1972).
\bibitem{101}  Carroll, 274 A.2d at 195.
\bibitem{102}  See id.
\bibitem{103}  See id. at 196.
\bibitem{104}  Id. at 197.
\bibitem{105}  Id. at 199.
\bibitem{106}  See O'Coins, 287 N.E.2d at 610.
\bibitem{107}  Id. at 612-13.
\bibitem{108}  Id. at 615.
\bibitem{109}  Id.
\end{thebibliography}
standard to limit a lower court's resort to inherent powers. In Indiana, for instance, the standards have been memorialized in a set of court rules governing inherent powers cases.

C. Other Standards

Other state courts have adopted the reasonable-necessity standard, but have raised the level of proof required of the judge who seeks funds. The Washington Supreme Court and the Tennessee Court of Appeals each have required that reasonable necessity be proved by clear and convincing evidence. A Florida court phrased the standard as one of "clear necessity." In *Beckert v. Warren*, the Pennsylvania Supreme Court appeared to make the reasonable-necessity standard of *Carroll* more stringent. The *Beckert* court reviewed a dispute in which a county funding board refused to increase the common pleas court budget to fund new staff positions. The supreme court noted that, under the reasonable-necessity standard, courts' resort to inherent powers should be reserved for crisis situations in which there is "a genuine threat to the administration of justice."

Other standards have been imposed by state appellate courts, some of which appear to be more stringent than *Carroll*'s standard of reasonable necessity. In *Grimsley v. Twiggs County*, the Georgia Supreme Court held that a court must show, by clear and convincing evidence, a "compelling need essential to the orderly administration of the court." The Iowa Supreme Court has similarly suggested that resort to inherent powers should be reserved for cases of "immediate, necessary, efficient and basic functioning of the court." In so holding, that court refused to affirm a trial judge's order reappointing a criminal investigator in the district at-
Mississippi's supreme court recently established a standard of "absolute necessity" would limit the judiciary's ability to resort to its inherent powers to only those times when the court must procure "absolute essentials." 

Nevertheless, some state appeals courts have imposed less restrictive standards. For example, in Smith v. Miller, the Colorado Supreme Court treated a judge's action fixing court employee salaries as presumptively valid and held that it could be overturned only upon proof by the county funding board that the judge's action "was wholly unreasonable, capricious and arbitrary." The Smith case and others that place the burden on the funding board to prove the judge's actions arbitrary and capricious involved, in addition to inherent powers issues, a statute giving the court authority to set salaries subject to the approval of the funding board.

D. Allocations of the Burden of Proof

Several courts have relied on statutory bases to allocate the burden of proof in funding disputes. For example, a Texas appeals court held that, because authority over court equipment and personnel was allocated to the county by statute, the county's budget actions were presumptively valid. A Texas court challenging a county's refusal to provide funds to the judiciary must show that "the funds sought to be compelled are essential for the holding of court, the efficient administration of justice, or the performance of its constitutional and statutory duties." The Florida Supreme Court similarly allocated to the court the burden of proving the necessity of expenditures for witnesses in excess of the amounts provided for by statute. Three years later, however, that same court held that a county could not upset the status quo by evicting a court from court space without first demonstrating that the space was not

120. Id. As an initial matter, the court questioned whether the investigator was properly considered a judicial department employee, but concluded that even if he were, there was no sufficient finding that his services were necessary "to help unclog the Webster County Court Docket and to speed justice." Id.
121. See Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988).
122. 384 P.2d 738 (Colo. 1963).
123. Id. at 742.
124. See id. at 740. See also cases cited supra note 66.
126. Id.
127. Rose v. Palm Beach County, 361 So. 2d 135, 189 (Fla. 1978).
reasonably necessary for court functions.\textsuperscript{128}

Other courts allocate the burden of proof based on the court's conception of the nature of inherent powers without regard to statutory allocations. For instance, Indiana courts, which have consistently ruled that statutory control over court personnel violates the state constitution,\textsuperscript{129} place on counties both the burden of proof in funding disputes and a limit of thirty days within which to commence an action. In \textit{State ex rel. Johnson v. Taulbee},\textsuperscript{130} the Ohio Supreme Court declared unconstitutional a statute which would have allocated to a juvenile court the burden of demonstrating the necessity of court improvements.\textsuperscript{131} The Ohio Supreme Court also announced in \textit{In re Furnishings for Judge}\textsuperscript{132} that orders by judges requiring resources—outside of the competitive bidding process—are presumptively valid and, therefore, funding units have the burden of either challenging or obeying these orders.\textsuperscript{133}

Pennsylvania\textsuperscript{134} and Michigan,\textsuperscript{135} on the other hand, require courts seeking additional resources to commence actions against funding authorities and to carry the burden of proof in such actions. A New Jersey appellate court, deciding \textit{In re Court Reorganization Plan},\textsuperscript{136} held that an assignment judge had the initial burden of showing the reasonableness of his appointments and compensation determinations, but that, upon a prima facie showing of reasonable necessity, the burden shifts to the funding unit to prove that the judge's action was arbitrary and unreasonable.\textsuperscript{137}

\begin{thebibliography}{99}
\bibitem{128} Chief Judge of Eighth Judicial Circuit v. Board of County Comm'rs, 401 So. 2d 1330, 1332 (Fla. 1981) (holding, nevertheless, that "the court would carry the burden of showing a reasonable necessity to justify additional or renovated space").
\bibitem{129} \textit{E.g.}, Carlson v. State, 220 N.E.2d 532 (Ind. 1966) (although source of city court was statute rather than state constitution, its function was truly judicial in character and its power to compel necessary funding may not be diminished by statutory provisions).
\bibitem{130} 423 N.E.2d 80 (Ohio 1981).
\bibitem{131} \textit{Id.} at 83.
\bibitem{132} 423 N.E.2d 86 (Ohio 1981).
\bibitem{133} \textit{Id.} at 88-89.
\bibitem{135} \textit{See} Employees of Second Judicial Dist. Court v. County of Hillsdale, 378 N.W.2d 744, 759 (Mich. 1985). Interestingly, Michigan's Supreme Court, whose opinion in \textit{Hillsdale County} is one of the most cited decisions in this area, has not yet announced a standard to govern actions of judges pursuant to inherent judicial powers. \textit{See} Seventeenth Dist. Probate Court v. Gladwin County Bd. of Comm'rs, 401 N.W.2d 50, 59 (Mich. 1986).
\bibitem{137} \textit{Id.} at 1262.
\end{thebibliography}
E. First Typical Defense: The Court is Still Functioning

In addition to raising defenses related to separation of powers, funding units have used two common defenses to contest court-issued expenditure orders. The first common defense is that the court is still functioning and can continue to function on existing or lower funding levels. The second is that the funding unit lacks sufficient funds to satisfy the court’s demand.

The defense that a court is still functioning is often raised in cases involving orders for increases in court staffing levels, or for increases in salaries for court personnel. Facts typically cited to support the defense are that no employee has yet quit the court, or that the court can easily replace existing employees with new employees without increasing salary levels. Therefore, the resources demanded are not reasonably necessary to the maintenance of the administration of justice.

This defense is used to counter a common contention by judges in inherent powers cases: if additional resources are not immediately provided, employees will leave and the judicial system will crumble. Funding authorities use the defense to demonstrate that if no employee has left, or if departing employees can easily be replaced, there is hardly a crisis justifying an intrusive judicial funding order. This sounds, in part, like the argument that “if no one has abandoned ship, the ship is not sinking.” The defense has been rejected by several courts. A typical response to the defense was provided by the Indiana Supreme Court in *McAfee v. State ex rel. Stodola.* The court wrote:

138. See, e.g., Allen County Council v. Allen Circuit Court, 549 N.E.2d 364, 366 (Ind. 1990); McAfee v. State *ex rel.* Stodola, 284 N.E.2d 778, 782 (Ind. 1972); Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 879 (Iowa 1978) (Uhlenhopp, J., concurring specially); In re Court Reorganization Plan, 391 A.2d at 1261-62; In re Salary of Juvenile Director, 552 P.2d 163, 175 (Wash. 1976).

139. See, e.g., In re Court Reorganization Plan, 391 A.2d at 1262 (rejecting county’s argument that the court must bear the burden of proving that the salaries proposed by the county are so inadequate that no county employees can be found to fill the positions).

140. A recent Indiana Supreme Court case noted that “[e]vidence showed that both offices were overburdened with an excessive workload, and in fact if they did not receive some relief, they were threatened with an exodus of their staffs to greener pastures.” *Allen County Council,* 549 N.E.2d at 366.

141. 284 N.E.2d 778 (Ind. 1972). In *McAfee,* county judges brought separate actions to compel the county council to pay salaries to court employees in amounts requested by the judges in their budget presentations rather than in the amounts set by the council. *Id.* at 780.
The fact the courts were continuing to function at the time of the request does not mean that the requests were unreasonable. We hold that the test of reasonableness does not require the trial judge to sit by until his court has ceased to function before acting. We hold he is acting within reason when he takes steps to forestall foreseeable difficulties which are imminently threatening the functions of his court.\textsuperscript{142}

Although a majority of the reported cases has rejected this defense,\textsuperscript{143} its continued acceptance is due to its favorable treatment by the Washington Supreme Court in \textit{In re Salary of Juvenile Director}.\textsuperscript{144} There, the court reversed a lower court's mandate requiring a board of commissioners to raise the salary of the Director of Juvenile Services.\textsuperscript{145} The factual basis for the order included testimony that other directors in Washington received higher salaries, and that starting salaries in similar counties for directors exceeded that ordered by the judge.\textsuperscript{146} In vacating the mandate, the supreme court noted that, because thirteen applicants sought the position when the Director was hired, """"[n]o showing was made that other qualified employees could not be obtained at the salary established by the county commissioners.""""\textsuperscript{147} The court also found that the judge had not met his burden of proving the necessity of the salary increase by clear and convincing evidence.\textsuperscript{148}

Because appellate courts do not review unsuccessful defenses in great detail, it is difficult to determine how often funding boards have raised the defense that other employees can be found at existing or lower salaries.\textsuperscript{149} Rejection of the defense by appellate courts suggests that judges enjoy great deference in personnel matters. This enhances the autonomy of lower court judges not only to demand reasonable support, but also to choose who delivers that support. Certainly, the value of retaining employees should be rec-

\begin{thebibliography}{9}
\bibitem{142} Id. at 782.
\bibitem{143} \textit{E.g.}, id.; Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 875 (Iowa 1978). For a contrary view, see Justice Uhlenhopp's concurring opinion in \textit{Flattery}, 268 N.W.2d at 879 (Uhlenhopp, J., concurring specially) (""""If the court can function but the dispute is over the extent of the salaries, equipment, facilities, and personnel which are to be provided, I come down on the side of the appropriating authorities."""").
\bibitem{144} 552 P.2d 163 (Wash. 1976).
\bibitem{145} Id. at 175.
\bibitem{146} See id. at 164-65.
\bibitem{147} Id. at 165.
\bibitem{148} Id. at 175.
\end{thebibliography}
ognized by appellate courts, as should the cost of training new employees, when funding authorities argue that new employees can be procured at the same cost. Against these concerns, however, reviewing courts must weigh the implication made by funding authorities that a judge's aim in retaining employees is not only efficiency but also patronage.  

F. Second Typical Defense: The Cupboard is Bare

Another common defense of funding authorities, in cases involving orders to provide additional appropriations to courts, is that the funding authority simply has insufficient funds to meet the appropriations required by the court. This argument has met with little success. That the insufficient funds defense is raised so often may be attributable to the fact that a funding authority's budget problems adversely affect not only the courts, but also all other government services. It is no coincidence that Chief Judge Wachtler's funding action against the other branches of New York state government came during a year when that state faced massive deficits.  

A prior funding case in New York involved an order requiring retention of personal assistants to trial court judges during a time when New York City was going bankrupt.

This "inability-to-pay" defense has been raised in several cases, the most prominent of which is Commonwealth ex rel. Carroll v. Tate. In affirming a modified award of $1.3 million in appropriations to Philadelphia courts despite the city budget crisis, the Pennsylvania Supreme Court gave the following treatment to the city's defense:

[defendants contend, inter alia, that the overall problem of financial difficulties which undoubtedly confront and harass the City of Philadelphia should be considered in determining what is "reasonably necessary" for the "efficient administration of Justice by the Courts." The demand, often amounting to necessity, for additional funds for both

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150. Cf. Timpanogos Planning & Mining Management Agency v. Central Utah Water Conservancy Dist., 690 P.2d 562, 568 (Utah 1990) ("Respect for the position has materially lessened whenever judges have attempted to discharge duties of an executive character. The judge should have no favors to grant, no patronage to dispose of, and no friends to reward.").

151. New York's 1991-92 deficit was $875 million; its projected deficit for the next fiscal year is $3.5 billion. Gary Spenser, Wachtler, Cuomo Settle Funding Suit, N.Y. L.J., Jan. 17, 1992 at 1.


the maintenance and the improvement of public services and general public welfare, and the essential increases in wages, and the unfortunate rise in costs of nearly every description, is widespread. Nevertheless, the deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice.\textsuperscript{154}

Two concurring justices commented further on the city's alleged inability to pay. Justice Pomeroy argued that the court system is specially protected, noting that it:

is not just another competing cause or need; it is itself a separate branch of government. . . . The distinction is not one of degree, but of kind. No doubt the courts must be mindful, in making the estimates of their financial needs, of the needs of the total community . . . but the courts having made their determination as being reasonably necessary to performance of their constitutional functions, it is not for the legislative branch to deny the reasonableness or the necessity on the ground that something else is more urgent or more important.\textsuperscript{155}

Justice Jones, on the other hand, disagreed with the court insofar as it held that “whatever amount is ‘reasonably necessary’ for judicial administration must be awarded even though the City may have no available funds.”\textsuperscript{156} He argued that the court must consider the city's financial resources in making any determination of reasonable necessity.\textsuperscript{157} In the end, the city never did comply with the order to provide additional funds.\textsuperscript{158}

The inability-to-pay defense has been considered frequently by the Indiana Supreme Court. In Indiana, in addition to determining whether mandated funds are “reasonably necessary,” a court is required to consider “whether any specific fiscal or other governmental interests are adversely affected by the mandate . . . .”\textsuperscript{159} This test requires courts to consider the ability of local governments to provide mandated funds in light of other governmental interests. The

\textsuperscript{154.} Id. at 199.  
\textsuperscript{155.} Id. at 202 (Pomeroy, J., concurring).  
\textsuperscript{156.} Id. at 204 (Jones, J., concurring).  
\textsuperscript{158.} See BAAR, supra note 17, at 147.  
\textsuperscript{159.} State ex rel. Lake County Council v. Lake County Court, 359 N.E.2d 918, 920 (Ind. 1977).
kind of consideration that the test requires is illustrated by *In re Mandate of Funds*, \(^{160}\) in which the Indiana Supreme Court reviewed a mandate requiring hiring of a part-time small-claims referee at a salary of ten thousand dollars.\(^{161}\) The county resisted the mandate and offered testimony that the payment of the referee would have an impact in other areas.\(^{162}\) The testimony, however, did not "specify what this impact would be."\(^{163}\) The court dismissed other evidence of county financial hardship, and stated that "no evidence was presented to show that the payment of a referee was the primary cause of this financial hardship."\(^{164}\) In *Allen County Council v. Allen Circuit Court*, \(^{165}\) the same court refused to vacate an order for funding even though it would cause a "fiscal impact of $269,000" on a county "already spending more money than it is taking in."\(^{166}\) The court reasoned:

> the judicial budget is less than three percent of the total budget. Given the small percentage represented by the expenditure required by the mandate, it hardly can be said to present an insurmountable problem for the council and the auditor.\(^{167}\)

Although Indiana's courts are required to consider potential adverse impacts on other governmental functions, a funding body must overcome a high standard of proof. It is doubtful that any county funding authority could effectively use an inability-to-pay defense if the county must show either that a judicially mandated salary is the "primary cause"\(^{168}\) of its financial hardship or that a $269,000 increase in a judicial budget is an "insurmountable problem."\(^{169}\)

The ambivalent attitude of courts toward the financial hardships of funding authorities reflects the underlying tension in the inherent powers doctrine itself. It is problematic for courts not to consider the ability of a community to fund courts at mandated levels. On the one hand, ignoring other governmental priorities allows a trial judge to make her determination of reasonable necessity
apart from a community's fiscal realities. On the other hand, the requirement that a court determine the "reasonableness" of a need suggests that a court should balance its need with other needs. Reasonableness is a relative measure. In fact, judges who issue funding mandates probably do consider other public projects when they determine what level of funding is reasonably necessary to maintain the effective administration of justice; judges are tax-paying citizens who themselves rely on public services and who have some sense of the level of judicial efficiency a community can afford. It is unclear, however, exactly what role other governmental funding priorities should play in a court's determination of reasonableness. Looking at other governmental priorities relative to the court's needs may invite the courts to weigh funding priorities.

While courts might be urged in inherent powers cases to weigh, or to at least consider, the impact funding orders will have upon other government programs, courts may find themselves incapable of the task. Here there is a collision between judicial and legislative decision-making. Inherent powers cases suggest that court funding below some discernible level is constitutionally illegitimate. The concept of a discernible funding level, defined as those sums reasonably necessary for the efficient operation of a system of justice, is antithetical to a political process in which priorities are negotiated rather than divined. Insofar as majoritarian politics, and not neutral principles, determine the ordering of governmental priorities in the legislative process, "appropriate" or "proper" priorities are discernible through the politics of compromise and not through the judicial method.

In the legislative process, consultation with popular sentiment is appropriate and important in setting governmental priorities. The same is not true in judicial decision-making. Judicial independence, the underlying purpose behind the inherent powers doctrine, entails a judiciary free from popular attitudes. If the request that courts consider other governmental priorities invites courts to base constitutional decisions on public sentiment, courts should probably refuse the invitation.

Accepting the argument that a funding authority is out of money is problematic for another reason. Such an argument from a funding authority is self-serving. The budget of a funding authority

170. See Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (explaining that the judiciary is not a subordinate branch of the government, but rather, a "coequal"); id. at 202 (Pomeroy, J., concurring) ("the court system . . . is not just another competing cause or need").
is within that authority's control and discretion. A funding authority may initially establish a budget that does not provide sums reasonably necessary for courts and later, when disputing a court's funding order, declare that it is out of money. In this situation, acceptance of an inability-to-pay argument requires a court to concede that a funding unit has the authority to choose to underfund the judiciary.

It has been suggested that courts that mandate funds are, if only by default, establishing a governmental funding priority for the mandated funds. Issuance of a funding order is a statement by the courts that the funds should be appropriated, even if other governmental functions must correspondingly be reduced. Court funding orders obviously have an impact on other governmental functions. Local governments do not print money; they obtain it through taxation. It is imprecise, however, to say that a funding order establishes those funds as the funding authority's "first priority." A funding order only establishes that the court must be given funds before the county exceeds its spending limit. The county remains capable of determining which other programs within its budget, if any, should be reduced in order to fund the court's mandate.

The ambivalent attitude of courts toward funding authorities' use of the "empty cupboard" defense suggests underlying problems with the "reasonable necessity" test. Courts ordering funds probably do consider whether the community in which they are located can afford such expenses in light of other needs. Given the difficulties in making judges rank local governmental needs, however, an "absolute necessity" test would be more manageable than the "reasonable necessity" test. A court would then only be asked to determine, without consideration of other governmental priorities, the minimum funding level it requires to function as a court. Under this standard, a court could order funding only when necessary to preserve its existence. While such a standard might be more manageable, its application would both decrease court funding mandates and considerably reduce the court's autonomy.

A final comment might be made about Justice Pomeroy's statement that courts have a constitutional entitlement to funds, and are not "just another" government program like schools, highways or

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171. Although only a semantic point, the court asserts no "first priority" status on its claim for funds. The court's funding needs may be the tenth or twentieth or last priority of the county within its existing budget.

172. The standard was used in Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988) (holding that county board of supervisors had "clear statutory duty . . . to provide a courtroom free of noise that substantially interrupts court proceedings").
Medicaid.\textsuperscript{173} While the statement may serve to legitimize the courts' right to funding, it does little to identify what level of funding is constitutionally required. For example, it is far from clear that because Mississippi's trial courts are part of the judicial branch of government, they are entitled to air conditioning,\textsuperscript{174} when such amenities are not enjoyed by children who attend public school there. The assertion of a constitutional right to funding may now be beyond debate in most states, but such an assertion provides little guidance for resolving disputes over the extent of that funding. The difficult question remains: Under what circumstances, and under what standards, should courts order additional funding?\textsuperscript{2}

\textbf{G. Other Intrabranch Controls}

As Professor Baar has observed, one of the byproducts of inherent powers decisions is the increase of supervisory controls of the highest courts over local ones.\textsuperscript{175} Promulgation of rules governing a lower court's resort to inherent powers is an example of this type of increased administrative control. In Michigan, for example, under a rule promulgated by the supreme court,\textsuperscript{176} judges are now required to submit their budget requests to the state court administrator and, in the event of underfunding, may not resort to use of inherent powers until the state court administrator has had the opportunity to mediate the court's dispute with the local funding authority.\textsuperscript{177} Judge Wallace has identified such administrative controls as an intrabranch challenge to judicial independence.\textsuperscript{178} In light of the fact that inherent powers are intended to increase judicial autonomy, the development of intrabranch controls is ironic. Judge Wallace also argued, however, that intrabranch limitations on logistic autonomy are the most tolerable of the various potential intrabranch challenges to independence.\textsuperscript{179}

Several cases illustrate intrabranch controls over a judge's re-
sort to inherent powers. For example, *Pena v. District Court* involved a resort to inherent powers by a trial judge in order to require state officials to lower the temperature in her court room. In *Pena*, the judge's use of inherent powers was curtailed by administrative procedures provided by statute and by a rule of the Chief Justice of the Colorado Supreme Court. Together they established a process through which only the chief judges of judicial districts could submit requests for maintenance or construction of courtroom facilities. As a result, the trial judge's inherent powers apparently were lost to the chief judge through whom she was required to make a request for a cooler courtroom.

Some judges have recognized that other intrabranch officials have power over the provision of resources and have attempted to use their inherent powers to compel judicial branch officials to provide more resources for lower courts. In *Twenty-First Judicial District Court v. State*, judges of a Louisiana judicial district court brought an action against all three branches of government, including the judicial branch budget review board, to compel additional expenditures for the court. The action failed when the supreme court held that, by rule of the court, the judiciary budget review board had authority over resource and budget requests. Power of the district court judges was limited to making requests through the board. A dissenting justice contended that, if the budget review board failed to allocate to the court adequate resources to perform its constitutional functions, the lower courts should retain their inherent powers to compel funding from other branches of government. Under the reasoning of *Twenty-First Judicial District Court*, however, the inherent powers of lower courts are constrained by intrabranch budget processes. If those processes fail in particular

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182. See CHIEF JUSTICE DIRECTIVE No. 79-6 (issued by Colorado's supreme court).
184. 548 So. 2d 1208 (La. 1989).
185. *Id.* at 1209.
186. *Id.* at 1210.
187. *Id.*
188. *Id.* at 1210 (Cole, J., dissenting). But cf. *Blyn v. Bartlett*, 348 N.E.2d 555 (N.Y. 1976) (holding that the statutory power of civil court judges to appoint and remove certain court employees did not preclude an administrative board from eliminating such positions in a financial emergency).
courts, the court may be without inherent authority to remedy the problem.

Another Louisiana case presents an additional and unusual variant of intrabranch controls over judicial powers. In *Imbornone v. Early*, a lower trial court was evicted from court space by a higher trial court, to whom the mayor of New Orleans had delegated the responsibility of allocating adequate space. The eviction was affirmed on appeal as an appropriate use of either the higher court's inherent powers or the delegated mayoral powers. The appellate court offered no guidance, however, on how the lower court could solve its space problem when its power to maintain adequate court space obviously was curtailed by the superior power of a higher court.

In these intrabranch disputes, higher value is placed on intrabranch mechanisms for orderly resource procurement and distribution than on protecting the autonomy of individual judges. That valuation suggests a greater concern for preserving branch autonomy and order at the expense of the logistic autonomy of the individual judge. Likewise, the interests of the funding authority and the judicial branch in an orderly mechanism with which to resolve funding disputes take precedence over the interest of individual judges in procuring, on an ad hoc basis, adequate funding for their courts. Therefore, local judges may not have cause to hope for increased state-level funding of their courts. While state-level funding may increase resource allocations to local courts and reduce resource disparities among local courts, it also may increase the power of centralized judicial administrators at the expense of the inherent powers of judges to compel expenditure.

**H. Extrajudicial Limitations on the Doctrine**

In addition to procedural and substantive limitations on the doctrine of inherent powers, observed by judges and enforced on review, the doctrine may also be limited by extrajudicial forces. For instance, one court expressed its belief that a "usurpation of powers

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189. 401 So. 2d 953 (La. 1981).
190. See id. at 956.
191. The *Imbornone* dispute was finally resolved by a compromise between the competing trial courts and judges after the lower court threatened to seek legislative relief. The compromise provided the lower court with temporary space while an addition to the courthouse was planned, funded, and constructed over the next several years. Telephone Interview with Judge Charles Imbornone, First City Court, Parish of New Orleans, Section A (Dec. 29, 1992).
by any governmental department ultimately will be sensed and corrected by the public.” Nevertheless, it may be incorrect to suggest that the public process which corrects unfavorable legislative actions can or will serve to correct abuse of inherent judicial powers. Although judges have lost elections after much-publicized interbranch confrontations over their resort to inherent powers, judicial elections, and the rules governing them, may not lend themselves to public debate on legal issues. In fact, under Canon 5 of the Code of Judicial Conduct, candidates for judicial office are prohibited from taking positions on, much less arguing the merits of, legal issues. In states that have adopted this Canon, even if candidates are inclined to address the proper role of judges relative to legislative power, such rules will stifle debate. Therefore, there is some cause to doubt the claim that the public will be able to check abuses.

It also can be argued that, when lower courts resort to inherent powers, they reduce the likelihood of public debate on the issue of the adequacy of court funding. The bar and litigants, the constituents to whom courts should look to mobilize support for funding, are unlikely to be politically mobilized when courts try to solve their funding problems by order, rather than by political debate. Courts in financial crises might consider letting their user-base act politically to resolve the crisis. Courts that rely on the bar may find, however, that the crisis perceived or foreseen by judges is not always recognized by others.

Most inherent powers cases involving the judiciary are disputes

192. Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 874 (Iowa 1978); see also Carlson v. State, 220 N.E.2d 532, 536 (Ind. 1966) (explaining that either the judge or the person with power of appointment will be held accountable by the voters at the polls).
193. See Baar, supra note 16, at 5.
195. See Baar, supra note 17, at 45; Hazard et al., supra note 23, at 1288.
196. Professor Baar has argued that certain state courts that handle small claims in which the bar is not involved do not have effective political constituencies to mobilize support. Baar, supra note 16, at 12. If the bar cannot be mobilized to support the administration of justice in juvenile courts, however, the bar has abandoned its obligation to the courts. Solving a juvenile court’s funding problems through funding orders will not address the more serious systemic problem of a bar politically and morally detached from the administration of justice. As Justice Clark stated some years ago: “The idea that a lawyer’s first loyalty is to his client—right or wrong—is itself wrong. His first duty is to the administration of justice and the courts.” Tom C. Clark, Judicial Self Regulation—Its Potential, 35 LAW & CONTEMP. PROBS. 37, 41 (1970).
between non-equals.\textsuperscript{197} Local governments may not be able to command the kind of media attention and public support necessary to restrain the inherent powers of the judicial branch. On the other hand, the \textit{Wachtler v. Cuomo} litigation, unlike most inherent powers cases, involved a dispute among co-equal branches of state government.\textsuperscript{198} \textit{Wachtler} may be the type of inherent powers case that generates some level of public debate,\textsuperscript{199} and, perhaps more importantly for courts, exposes the problems that lead judges to resort to those powers.

The \textit{Wachtler} dispute was ultimately resolved when the governor and the legislature agreed to allocate $893 million to the judiciary's budget,\textsuperscript{200} $75 million less than the amount the judiciary had claimed to be the "minimum amount of money reasonable and necessary to enable the Judicial branch to fulfill its constitutional and statutory functions."\textsuperscript{201} As a result of the dispute, the ability and the willingness of the public to restrain or endorse a court's use of inherent powers may have been tested.\textsuperscript{202} The dynamics of inherent powers certainly change as state, rather than local, officials become involved in funding disputes with the judicial branch. As a consequence, in states where funding disputes arise over inadequate state, as opposed to local, funding, the inherent judicial power to compel funding may be significantly restrained by public opinion and political pressure from state officials.

\begin{footnotes}
197. See \textit{Baar}, supra note 17, at 145; \textit{Hazard et al.}, supra note 23, at 1288. \textit{See also supra} notes 17-20 and accompanying text.

198. See \textit{supra} text following note 20. The recent funding dispute in Alabama, on which an appeal is pending, pitting the judicial system against the governor, likewise has received substantial media attention. \textit{See} \textit{David White, Proration Ruled Illegal, But Appeal Certain}, \textit{Birmingham News}, Aug. 1, 1992.


200. See \textit{Spenser}, \textit{supra} note 151, at 1.


202. It is difficult to declare "winners" in \textit{Wachtler}. The agreed-upon appropriation, while not being the $77 million increase sought by the judiciary, did allow New York's courts to operate through the fiscal year without the 4\% cutback proposed by the governor. The parties also agreed to increase spending for the judicial system by $19 million and to consider $15 million in cost savings for the next fiscal year. The governor had proposed a cut of an additional $132 million for the next fiscal year. \textit{See} \textit{Spenser, supra} note 151, at 2.
\end{footnotes}
III. ALTERNATIVES TO USE OF INHERENT POWER TO COMPUL
FUNDING

Use of inherent judicial power to compel funding obviously
would not be required if state courts enjoyed budget autonomy or
were adequately funded. Other than West Virginia's judiciary,
which enjoys limited budget autonomy,203 state judiciaries do not
have autonomy over funding, and it is unlikely that, in this period of
limited state budgets, state constitutions will be changed to provide
that autonomy. Therefore, other solutions must be sought to
achieve adequate funding, and to make resort to inherent powers
unnecessary.

A. Unitary Budgeting, State-level Financing, or Both

One proposed solution to inadequate court funding is conver-
sion to state-level court financing.204 This could, perhaps, be ac-
complished through the adoption of unitary budgeting, that is, a
"comprehensive system in which all judicial costs are funded by the
state through a single budget administered by the judicial
branch."205 Unitary budgeting certainly should be helpful in reduc-
ing disparities in funding among various local courts within a
state.206 Adequacy of justice should not depend on the county or
parish in which a case happens to be commenced. State-level court
financing, whether or not through unitary budgeting,207 might re-
duce administrative inefficiencies and intercourt disparities caused
by drawing funds for court systems from local, regional and state-
level sources. For all of its merits, however, state-level financing
does not insure adequate court funding. States which provide sub-
stantial funding for local courts on a state-level basis, such as New
York, still face inadequate court funding. The lesson to be learned
from Wachtler may be that the method of budgeting cannot cure the
lack of available funds. Indeed, as was noted in the previous sec-

203. See W. VA. CONST. art. VI, § 51 B(5); State ex rel. Bagley v. Blankenship, 246
S.E.2d 99 (W. Va. 1978) (enforcing state constitutional bar preventing legislature from
reducing funds to judiciary).
204. See Carl Baar, The Limited Trends Toward State Court Financing, 58 JUDICATURE 322,
326 (1975).
205. Hazard et al., supra note 23, at 1293.
206. Id. at 1296.
207. State-level financing could be instituted without adoption of unitary budgeting,
that is, without instituting centralized budget control and administration. Professor
Baar notes that opposition among regional and local state court administrators to uni-
tary budgeting has slowed the trend toward state-level court funding. Baar, supra note
204, at 327-29.
tion, where courts have been primarily funded on a state level, they may find that their inherent powers to compel funding from co-equal branches of state government are significantly restrained by the political powers of the governor, the legislature, or both.

B. Refusing to Proceed without Adequate Resources

A second alternative to compelling funding would be for judges to refuse to adjudicate cases when insufficient funds are provided for the orderly functioning of a court. For example, a judge faced with inadequate court facilities to try a criminal matter could order that the defendant be released unless sufficient facilities are provided to insure a fair trial. This brinkmanship approach, which arguably would compel a solution by triggering a crisis in the justice system, appears unacceptable to courts for several reasons, not the least of which are the interests of judges and society in enforcing criminal laws.208

As a practical matter, dismissal of criminal cases, or a threat to do so, is unlikely to produce an outpouring of public support for the judiciary; rather, it might be viewed as exhibiting more concern for coddling criminals and less concern for law enforcement and criminal justice. Moreover, while a state might be put to the test by a threat to dismiss criminal cases, in civil cases such a threat would hardly be compelling to state officials beset with other programs demanding funding.209 Postponement of civil rights enforcement against the state and its agencies would be an abdication of the judiciary's constitutional role to check usurpations of power by the other branches of government. In addition, insofar as one of the premises of the inherent powers doctrine is the claimed right of courts to receive sufficient funding to perform their constitutional responsibilities, courts might wish to rely on that constitutional argument rather than on uncertain public sentiment and political support. A permanent solution to underfunding, however, may ultimately be impossible without that public support.

208. "Frequently, the ultimate result of a clear denial of due process is freedom for the accused, who may be guilty. Therefore . . . it is essential to the judicial function that courts have the inherent power to protect against such a denial, in the interest of both the state and the accused." Rose v. Palm Beach County, 361 So. 2d 155, 136 (Fla. 1978).

209. This might be especially true when the state is a defendant in a civil suit.
C. Public Support

I have questioned whether courts promote public debate and mobilize public support for appropriate judicial funding by resorting to inherent powers.\(^{210}\) Inherent powers orders possibly postpone political debate, thereby inhibiting support for curing funding problems.\(^{211}\) Although courts may be constitutionally entitled to adequate funding, such constitutional requirements and widespread willingness to resort to inherent powers to compel fiscal expenditure obviously have not produced a permanent solution and have merely served as an ad hoc mechanism to correct funding inadequacies. As Geoffrey Hazard and others argued some years ago, "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."\(^{212}\)

It is unclear why users of state courts have not been more effective in mobilizing support for those courts. Professor Baar has argued that some state courts that handle claims in which the bar is not involved, such as small claims, adult probation, and juvenile cases, do not have effective political constituencies to mobilize support.\(^{213}\) However, this explanation fails to recognize that, as non-lawyer courts erode, more people will seek justice in other courts. A crisis in one part of the system, if genuine, will infect all courts, as resources are shifted to stem the crisis. In New York, for example, in response to budget reductions proposed by the governor, resources were shifted from civil courts to family and criminal courts.\(^{214}\)

Some efforts are being made to mobilize public support for state court funding. The American Bar Association has studied the problem of underfunding and will attempt to build broad public co-

\(^{210}\) See supra Part II.H.

\(^{211}\) "Indeed, the virtue of the doctrine seen by some of its supporters—that it takes the problem of maintaining an adequate court system out of the realm of public debate and political commitment—may also be viewed as an essential vice.” Hazard et al., supra note 23, at 1290.

\(^{212}\) Id.

\(^{213}\) See supra note 196.

\(^{214}\) "In order to protect public safety, as well as the interests of children and families, and in recognition of the unprecedented caseloads in the family and criminal courts, it was determined that the family and criminal courts should be kept operational . . . and that the brunt of the base-budget shortfall would have to borne in civil courts and administrative functions.” Plaintiffs' Complaint at 21, Wachtler v. Cuomo (No. 6034/91) (N.Y. Sup. Ct. filed Sept. 25, 1991).
alitions to support state court programs.215 This program, which will include educational and informational components, may provide the impetus for public debate and ultimately bring sustained public support for court programs.216 Still, the likely impact of these efforts on state courts may not be entirely positive. Whether judges should actively join such efforts is, at least, debatable.217 Judges have some stewardship responsibility to insure that the judiciary is capable of discharging its assigned functions. However, active involvement by judges in efforts to build support for the fiscal agendas of their courts risks the type of political entanglement antithetical to an independent judiciary.218 Reliance upon court users to mobilize public support may be necessary to assure adequate judicial funding to preserve the independence of the judiciary. However, active judicial involvement in these public debates may risk sacrificing the very independence sought to be preserved by the exercise.

IV. THE TRENDS AND SOME CONCLUSIONS

The judiciary's use of the inherent powers doctrine exhibits its desire to maintain independence without either sacrificing impartiality or arrogating power that cannot be checked by other branches of government. The history of the doctrine, therefore, reflects efforts by appellate courts to impose both procedural and substantive restraints on the judiciary's use of the doctrine. These restraints, however, are far from uniform. Procedural requirements, allocations of burdens of proof, and substantive standards limiting resort

215. See ABA Special Committee on Funding of the Justice System, Funding the Justice System 28 (1992).
216. Id. at 30. Interestingly, the Committee recognized the utility of litigation to obtain court funding. Id. at 31.
217. Under the Model Code of Judicial Conduct, a judge is permitted to engage in activities to improve the legal system "if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him." MODEL CODE OF JUD. CONDUCT Canon 4 (1990). This, however, begs the question of what types of political entanglements will compromise impartiality and, therefore, the independence of the judge and the judicial branch.
218. However much they affect each other, the legislative and judicial branches have been uncertain as to how, and whether, to communicate directly. In part the judiciary has been reluctant to maintain a greater role because of the need to avoid prejudgment of issues, because of precedential barriers against advisory opinions, and perhaps to enhance its legitimacy by appearing above the political fray. Judicial codes of ethics, including the ABA's 1990 model code of judicial conduct, provide little guidance. . . .

to inherent powers vary in state practice. Nevertheless, there is a
trend in states to preserve impartiality by insuring that funding bod-
ies may challenge funding orders in some neutral forum. While
there is a clear movement to require courts to initiate adversarial
proceedings to procure resources (as evidenced by Michigan's and
Pennsylvania's procedures), a majority of states still allow courts to
issue \textit{ex parte} orders compelling funding.

Inherent powers actions have led to an increase in centralized
administrative control over lower courts. This is an ironic, but nec-
essary, intrabranch challenge to an individual judge's autonomy.
Development of intrabranch administrative controls on lower courts
elevates branch autonomy over the autonomy of individual judges.
These intrabranch controls serve to standardize procedures for
resolving interbranch disputes over funding by requiring lower
courts to "work through" branch officials to procure funding.

Although the reasonable necessity standard is still used in most
states, courts continue to have a difficult time applying that standard
when funding bodies claim they are out of money. Judicial opinions
suggest the need for consideration of other funding priorities of
governments. However, courts are ill-suited for this task, and so
they have been at best ambiguous in their attempts to articulate
whether and how the inability-to-pay defense should be treated.

Most inherent powers cases arise because of inadequate levels
of local funding. \textit{Wachtler}, the exceptional case, demonstrates that
this problem may not be solved even by state-level funding because
states, as well as local communities, can fail to make adequate provi-
sions. \textit{Wachtler} is noteworthy for other reasons. As Professor Baar
and others have observed, most inherent powers cases are disputes
between non-equals. Because these cases most often involve a dis-
pute between courts, a branch of state government, and funding au-
thorities of counties or municipalities, which are of unequal
constitutional stature, the fight has been unbalanced. Moreover, a
constitutional confrontation may have been avoided in part because
the power of co-equal state legislatures or executives has not been
challenged.

Nevertheless, cases like \textit{Wachtler} create the possibility of a con-
frontation of constitutional dimension when a legislature or executive
able of protecting its authority, or marshalling significant
public support against judges, refuses to comply with a funding or-
der from the judiciary. Cases involving co-equals expose the inter-
branch conflict that underlies inherent powers disputes. It is to the
credit of both bodies, and in the interest of the public, when co-
equal branches of government settle their differences through negotiation. Should they fail to do so, courts may find themselves unable to marshal the kind of public support they need to “win” an inherent powers dispute that unfolds on a state level. Judicial opinions often suggest that, if judges abuse their inherent powers, the public can correct that abuse. Effective public correction of judicial behavior is made more likely by widely publicized cases like Wachtler. Such cases focus public attention on the needs of the judicial branch for sufficient resources to do the tasks which society has assigned to them.

As baby-boomers age and the number of people requiring services such as health care and retirement protection from publicly funded sources increases, underfunding of courts may also increase. Questions about the level of justice a state can afford may then demand to be answered in public debate, unencumbered by the expanding jurisprudence of inherent judicial powers.