

Symposium on State Court Funding: Keynote Address

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INTRODUCTION

In October 1998, I had the wonderful opportunity to speak at an international judicial conference in Ulyanovsk, Russia, often thought to be Vladimir Lenin's birthplace. I was one of several Americans invited to participate, and judges and dignitaries from several countries were in attendance. The conference was held in a local courthouse, and although it was only October, it was very cold. Unfortunately, there was no heat in the courthouse, and it was even possible to see one's breath while in the building. Finally, an American federal judge complained and asked if there could be some heat. The conference organizers apologized and explained that they did not have funds for heat in the building.

In each courtroom there was a large cage; its bars went from floor to ceiling. We were told that this is where criminal defendants would sit during criminal trials. During the conference, we were told that there was a movement to create jury trials in Russia. Several people expressed concern that it would be highly prejudicial for a jury to see a criminal defendant sitting in a cage. The local court officials explained that they had no choice. They did not have funds for security guards in the courtrooms.

Every aspect of the courthouse looked shabby. The linoleum was worn, and the paneling was inexpensive and peeling from the walls in several places. The lighting was poor. It was far from the respect-inspiring majesty of the American courtrooms.

It was easy for the Americans in the group to look at all of this and feel thankful for the funding of our courts. But now with devastating budget cuts year after year, it is necessary to wonder how far we are from the dire situation I observed in Russia almost 14 years ago.

In 2009, Margaret Marshall, then-Chief Justice of the Massachusetts Supreme Court, warned that state courts throughout the country stood at "the tipping point of dysfunction."² Since then, the crisis has only grown.

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² Editorial, *State Courts at the Tipping Point*, N.Y. TIMES, Nov. 25 2009, <http://www.ny->

In California, for example, Chief Justice Tani Cantil-Sakauye has called the recently passed budget cuts affecting the courts, which as of June 2011 amounted to “\$150 million announced last month, \$200 million announced earlier this year and a \$300 million reduction to the court construction fund”, “unsustainable and incompatible with equal justice for all.”³

A survey conducted by the National Center for State Courts (“NCSC”) from July to October 2011, and released in November 2011, found a number of troubling trends over the last three fiscal years:

- 42 states cut judicial funding.
- 36 states have taken actions that are likely to reduce or inhibit access to the court.
 - 27 states have increased court fines and fees.
 - 23 states have reduced court operating hours.
 - 9 states have delayed or reduced the availability of jury trials.
- 45 states have taken actions that have reduced court services to the public.
 - 39 states have clerk vacancies.
 - 38 states have judicial support vacancies.
 - 35 states have judicial officer vacancies.
 - 34 states have had court staff layoffs.
 - 28 states have reduced use of retired judges.
 - 23 states have reduced operating hours.
- 45 states have reduced compensation to court personnel.
 - 44 states have frozen salaries of some court personnel.
 - 13 states have reduced salaries of some court personnel.
 - 10 states have furloughed judges coupled with a reduction in pay.
 - 21 states have furloughed court staff coupled with a reduction in pay.

times.com/2009/11/25/opinion/25weds1.html?_r=1.

³ Nancy McCarthy, *Budget Accord Hits Courts and Law Enforcement Hard*, CAL. B. J., June 2011, available at <http://www.calbarjournal.com/July2011/TopHeadlines/TH6.aspx>.

•32 states have taken actions that are likely to increase delays, not including those nine states that have had to delay or reduce the availability of jury trials.

- 31 states face an increase in courtroom backlog.
- 16 states face an increase in time to disposition.
- 11 states face delays in case management.⁴

A recent article by ABA President William Robinson III and Lisa Rickard details a number of consequences of state court budget cuts from around the country.⁵ Examples of those consequences include New Hampshire's 2009 suspension of civil jury trials for 12 months, an Ohio municipal court's announcement "that no new cases could be filed unless litigants brought their own paper for court filings," and a North Carolina court's elimination of copying services.⁶ A November 26, 2011, New York Times article pointed to lengthy delays in New Hampshire courts due to funding cuts.⁷ One family missed seeing their children for three months because a judge's order granting them visitation rights was not mailed for that length of time. As a result, they missed their daughter's first steps.⁸

Dollars for courts and the judicial system are not simply numbers on a balance sheet. Inadequate funding means that courts are not available, and people who need courts—often for the most difficult times of their lives—will find them unavailable.

In this keynote, I want to address three points. First, why is there the crisis in funding the courts? Second, when does the lack of funding violate the United States Constitution? And finally, what can be done about all of this?

I am not so presumptuous as to believe that I have any conclusions to offer. My hope is that in addressing these topics, I can help to identify key questions to be explored in greater depth over the course of this wonderful conference.

⁴ See *State Activities Map*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/States-activities-map.aspx> (last visited June 7, 2012).

⁵ Lisa A. Rickard & Bill Robinson III, *Why Underfunded Courts Hurt All Americans*, USA TODAY, Jan. 4, 2012, <http://www.usatoday.com/news/opinion/forum/story/2012-01-04/courts-judiciary-budget-funding/52379760/1>.

⁶ *Id.*

⁷ John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 26, 2011, <http://www.nytimes.com/2011/11/27/us/budget-cuts-for-state-courts-risk-rights-critics-say.html?pagewanted=all>.

⁸ *Id.*

I. THE CAUSES OF THE CRISIS

I am sure there will be much discussion over these two days with regard to the crisis and how it affects judges, lawyers, justice, and peoples' lives. But I also hope there will be some discussion of the "why" question. It is easy to blame this on the recession; an economic downturn means less tax revenue, so that everything in government suffers. But I think it would be a mistake if the discussion stops there. I think there are underlying causes far deeper than the recent economic downturn to explain the crisis in funding the courts. One part of it is political. Legislatures respond to political pressures, but judiciaries are not a very powerful special interest group. Legislatures respond to those who make campaign contributions to legislative campaigns. They respond to the voters' particular interests. Judges, however, are not able to donate money to influence the legislative process. They cannot marshal voters, and bars and lawyers either do not have or have not used their political influence. The challenge in a time of limited resources is how to mount political pressure for greater funding for courts when judges are at such a political disadvantage.

There also are more subtle aspects to this lack of political influence. One trend across the country that must be noted is the reduction of lawyers in state legislatures. I was recently told by the Executive Director of the California State Bar, Joe Dunn, himself a former state senator, that there are now just two lawyers in the California state senate. Others have made similar remarks as to the ever fewer lawyers in state legislatures. Thus, those who most understand the need to fund the judicial system are not there to advocate and vote for it.

I wonder, too, if the rise of "private justice" does not contribute to the lack of funding of public justice. Think about what has gone on in our public health system. Because those with money can opt out of public hospitals, the quality of public hospital care has precipitously declined. Few of us would choose to be treated in the public hospital if we could afford an alternative. Think of what has gone on in our education system. In so many places, those with means opt for their children to attend private and parochial schools rather than public schools, and the quality of public schools goes down. I have often thought: would the quality of, say, public hospitals go up if everybody had to get their health care there, or the quality of public schools go up if everybody had to have their children educated there?

I believe that we are seeing something very similar with regard to the rise of private justice. The most powerful and the most wealthy in our society, the largest corporations, increasingly opt out of the court system altogether in favor of private arbitration. Is there then the political will to provide the resources for the courts? I, of course, am not condemning

alternative dispute resolution efforts. But I think it is a mistake to ignore the subtle effects of its rise on the long-term funding of the courts.

There is another dimension, too, which contributes to the lack of funding for the courts, which is a much larger problem that transcends the judiciary: an increasing lack of desire to adequately fund government. The reality is that we as a society need and want far more in the way of government than people are willing to pay for in taxes. Although I think the lack of funding of the courts is part of it, this is a crisis that is much greater than the funding of the courts.

For example, the problem in California is not a lack of resources in the tax base. The problem is that the Republicans in the state legislature have announced that they will not approve any additional tax, and in the California Constitution it takes a two-thirds vote to pass a tax. The result is there is no alternative but to meet the budget problems by cutting and then cutting some more.

As I listen to the political rhetoric in this country that constantly proclaims “no new taxes,” and that constantly bashes government, I wonder how there can be the political will necessary to fund what we need in government, including funding courts. We live in a time when what most unifies one political party is its opposition to tax increases, and the other political party feels that it is suicidal to advocate for greater taxes. The result is a society that increasingly has a government that lacks the resources to provide for essential services, including education, health care, and its judicial system.

As this conference focuses on the budget cuts and their consequences, it is important to also talk about why. The answers are complex and involve much more than just a deep recession.

II. WHEN IS THE CONSTITUTION VIOLATED?

The second question that I think needs to be focused on at this conference is: when does the lack of funding of courts violate the United States Constitution? When does it violate the state constitutions? And perhaps to offer some direction for the discussion, I think there are two sub-questions here to be talked about: (1) when does the lack of funding violate the rights guaranteed by the United States and state constitutions; and (2) when does the lack of funding violate separation of powers?

Again, I will not be so presumptuous as to answer either of these questions, or even to try, but I would like to offer some initial thoughts. I think it is important to focus on the individual rights that exist in the United States Constitution, and in the state constitutions, that require adequate funding. There is a point where the lack of dollars is a violation of these specific rights.

Take the easiest example: the Sixth Amendment to the U.S. Constitution guarantees a right to counsel.⁹ The United States Supreme Court has always said this is a right to *effective* assistance of counsel.¹⁰ Every state has a similar guarantee under its state constitution.¹¹ But there is a point at which the lack of money to pay for public defenders and appointed counsel violates this right. In Mississippi it is estimated that a lawyer handling a capital case is paid an average of twelve dollars an hour. How is that not ineffective assistance of counsel? Each of you, chief justices and judges, know what you pay your appointed counsel and public defenders in your state. At some point the funds are so inadequate as to clearly be ineffective assistance of counsel. In New Orleans, one-third of the public defenders office was recently laid off. How can the public defenders office provide even the minimal representation assured by the Constitution?

The right to trial by jury is another example of a constitutionally guaranteed right where funding is essential. The Sixth Amendment guarantees a right to jury trial in criminal cases¹² and the Seventh Amendment guarantees the right to jury trial in civil cases in federal courts.¹³ Obviously, these rights require money for the court personnel who are there to administer the jury system; money, albeit pittance, to pay the jurors; and money to simply administer the jury system. Some courts have imposed moratoria on jury trials in civil cases as a way of cutting costs.¹⁴ This is clearly unconstitutional.

In fact, this was tried this in federal court in Alaska about fifteen years ago. The state decided as a way of dealing with a budget problem simply to have a moratorium on jury trials in civil cases. The United States Court of Appeals for the Ninth Circuit, in *Armster v. United States District Court for the Central District of California*, declared this unconstitutional.¹⁵ The words of Judge Stephen Reinhardt are worth quoting here. They are certainly applicable in any jurisdiction that faces a budget cut with regard to juries, but it transcends just this right; it goes to all rights guaranteed by the Constitution.

[T]he availability of constitutional rights does not vary with the rise and fall of account balances in the Treasury. Our basic liberties cannot be offered and withdrawn as "budget crunches" come and go. . . . [C]onstitutional rights do not turn on the political mood of the moment, the outcome of cost/benefit analyses or the results of economic or fiscal calculations. Rather, our constitutional rights are fixed and immutable.

9 U.S. CONST. amend. VI.

10 *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

11 *See, e.g.*, KY. CONST. § 11.

12 U.S. CONST. amend. VI.

13 U.S. CONST. amend. VII.

14 *See, e.g.*, Rickard & Robinson, *supra* note 5.

15 *Armster v. U.S. Dist. Court for the Cent. Dist. Of Cal.*, 792 F.2d 1423, 1425 (9th Cir. 1986).

. . . The constitutional mandate that federal courts provide civil litigants with a system of civil jury trials is clear. There is no price tag on the continued existence of that system. . . . We conclude that the civil jury trial system may not be suspended for lack of funds.¹⁶

Quoting the Ninth Circuit opinion, the North Dakota Supreme Court, in *Odden v. O'Keefe*, came to the same conclusion when there was an attempt to suspend jury trials.¹⁷ Interestingly, the Vermont Supreme Court, in *Vermont Supreme Court Administrative Directive No. 17 v. Vermont Supreme Court*, came to an opposite conclusion and found that the suspension of jury trials for lack of funds was constitutional.¹⁸ But how can that possibly be so? How can it be other than that Judge Reinhardt's words are right with regard to that constitutional protection?

More generally, due process of law requires that there be a forum to provide *prompt* redress when someone is denied life, liberty, or property. The Sixth Amendment requires a speedy trial in criminal cases. These rights too require adequate resources for the courts.

In fact, more generally, when considering individual liberties and the requirement of court funding, it is important to include the First Amendment and the right to petition government for redress of grievances. The Supreme Court has declared, "Certainly the right to petition extends to all departments of the Government."¹⁹ The right of access to the courts is indeed but one aspect of the right to petition.

I have focused on the United States Constitution, but it also must be remembered that *state* constitutions guarantee open and available courts. Many states have provisions which say exactly this., and other states have in their state constitutions "right to redress" clauses. These too require that courts be available and adequately funded.

There is another reason why there is a point at which the lack of funding of the courts becomes unconstitutional: separation of powers. The federal judiciary is a branch of government created by the Constitution. Article III, Section 1 makes it clear there will be a Supreme Court and such inferior courts as Congress from time to time ordain and establish. The judges of these courts are to be paid fixed salaries that cannot be decreased during their term of office.²⁰ Every state constitution, without exception, establishes a state judiciary, and this surely must include adequate funds to operate the state judiciary.

In discussing court funding issues, the difficult question is when does the lack of funding violate separation of powers? Courts have understandably

¹⁶ *Id.* at 1429–30.

¹⁷ *Odden v. O'Keefe*, 450 N.W.2d 707, 709–10 (N.D. 1990).

¹⁸ *In re* Vt. Supreme Court Admin. Directive No. 17 v. Vt. Supreme Court, 579 A.2d 1036, 1043 (Vt. 1990).

¹⁹ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

²⁰ U.S. CONST. art. III, § 1.

shied away from this question. It will be politically difficult for courts to hold that the lack of funding for their operations violates the Constitution at a time when all of the parts of government are starving for funds. But surely there is a point at which the lack of funding becomes unconstitutional.

In deciding when separation of powers is violated from a lack of resources, an important insight can be gained from one of the most famous law review articles ever written: Henry Hart's Foreword to the Harvard Law Review.²¹ His focus was on when Congress can constitutionally restrict the jurisdiction of the Supreme Court. In addressing this topic, he articulated what he called "the essential functions thesis." He said that Congress could not restrict Supreme Court jurisdiction in a way that would undermine the Court's ability to perform its essential functions. And so, for example, Congress could not restrict the ability of the Supreme Court to hear cases in a way that would undermine its ability to ensure the supremacy of federal law, the uniformity of federal law, and compliance with the Constitution. I would suggest that this principle can be applied here: that a legislature cannot so reduce the funding of the courts as to keep them from performing their essential functions. The focus would then need to be on defining the "essential functions" of the courts. But I do not think that would be a difficult conversation to have; the people in this room could come up with such a list in literally a matter of minutes. But I do think that, as a way to approach this separation of powers issue, Professor Hart's thesis is appropriate. The legislature cannot deny funding that keeps the courts from fulfilling their essential functions without violating the separation of powers.

III. WHAT CAN BE DONE?

The third and final major question that needs to be addressed over these two days is: What can be done about all of this? There is a need for such creative thinking with regard to solutions. Let me suggest here some questions, five in particular, that may be addressed in the discussion about solutions over these two days:

A. What can be done to increase the efficiency in the operation of the courts?

Recently the ABA Journal published a cover story that presented ten ideas proposing how courts can do more with less by reducing costs, increasing revenue, and getting more funding for the courts. I am not an expert with regard to any of these, so I am not the one to offer suggestions here. But one thing that occurs to me is that academics deserve a lot of blame for the lack of expertise in law schools.

²¹ Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

Recently, I was talking to a prospective donor to my law school who was interested in the possibility of creating an institute on judicial administration. I decided to research to see what other law schools have institutes on judicial administration. I found only a few in the entire country. NYU has a wonderful program that focuses on teaching judges. The University of Denver and some other schools have masters programs in judicial administration. But I cannot identify a single law school with a think tank that focuses on courts and court administration. If we are fortunate enough to receive this gift, it will include money for a chaired senior professor. So I decided to look to see if I could find a professor suitable for the chaired position who focuses on courts and court administration. Apparently there are few law professors in the country who specialize in this. What does that say about early twenty-first century American law schools when we have largely ignored the problem of courts and court administration?

B. What can be done to persuade legislatures to adequately fund the judiciary?

This question focuses on how to be more politically successful in the legislative system. It is inherently difficult for judges to lobby legislatures for more money. This responsibility inevitably must fall on the bar and its leaders.

There is a need to plan, nationally and locally, an effective campaign to accomplish this. This needs to be a coordinated and concerted effort to educate the public and legislators as to why adequate funding for the courts is essential. Perhaps this conference can be part of planning a strategy for this effort.

C. What can be done through litigation?

It seems inescapable that there will be a need for litigation challenging how the lack of funding of courts violates the rights that I enumerated and violates separation of powers. These will be very sensitive and difficult issues for courts to adjudicate because the courts will be adjudicating money for their own budgets. At a time when all other parts of government are being cut and education budgets are being gutted, undoubtedly it will be uncomfortable for judges to say, "But the courts have to be funded." And yet, for the reasons that I described, the United States Constitution and state constitutions require this.

This problem is not new. There have been instances in which judges have been courageous and said that "the constitution requires funding of courts." I would mention but a few examples. For instance, in Minnesota in the summer of 2011, there was an impasse between the governor and the state legislature. The Minnesota state government shut down for a period of several weeks. But Judge Bruce Christenson said the inherent judicial

power was such that the courts had to continue to operate even when the rest of government was shutdown.²²

And there is precedent for courts using the “inherent powers doctrine” to ensure funding of the courts. For example, the Pennsylvania Supreme Court, in *Commonwealth ex rel Carroll v. Tate*, held that the lack of funding for the Philadelphia courts violated the constitution.²³ The Supreme Court of Indiana, in *Carlson v. State ex rel. Stodola*,²⁴ used the inherent powers doctrine to say that the courts must be funded and that the failure to fund courts was a violation of the Constitution in 1966.

So I think one of the questions to be faced here and beyond is how litigation can be used to effectively fund the courts. In addition to the “essential functions” concept described above, it is also important to consider what some courts have called the “doctrine of reasonable necessity.”²⁵ This doctrine can be used to explain when courts must order the funding of the courts. Of course, like for essential functions, it will next be necessary to define what is necessary for the functioning of the courts.

D. What can be done in the long-term to assure better funding of the courts?

Every time there is an economic crisis the funding of the courts cannot decrease while litigants throughout the country suffer as they do now. We need to think about how we might come up with longer-term solutions. So, for example, we might move towards longer-term appropriation bills for the courts as we do for other parts of government. Might we amend state constitutions to guarantee a level of funding for courts? In California, as a result of the initiative process, so much of government has guaranteed funding under the constitution. This is not so of the courts. Should we move to that?

E. How are we going to ensure adequate taxes to pay for the services that are needed?

How are we going to convince people that government is not an evil? There is the need for the public to recognize that when people die, they must have their wills probated; when they go through a divorce, they need a court available; when a loved one is arrested, they need an adequate defense counsel and judge there to hear the case; when a litigant does not

²² James Nord, *Minnesota Courts Would Continue to Operate Even During Government Shutdown*, MINNPOST (June 28, 2011), <http://www.minnpost.com/political-agenda/2011/06/minnesota-s-courts-would-continue-operate-even-during-government-shutdown>.

²³ *Commonwealth v. Tate*, 274 A.2d 193, 199–200 (Pa. 1971).

²⁴ *Carlson v. State*, 220 N.E.2d 532, 536–37 (Ind. 1966).

²⁵ Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 233 (1993).

speak English, they need a translator who is an interpreter and so on? As I said, this transcends courts. It is really about convincing people that they need to provide the money for government for essential services.

CONCLUSION

The President of the ABA last year, Steven Zack, said that because of the funding crisis we have the potential to lose the rule of law in our country. It is real. I am so glad that he and the current President, Bill Robinson, have focused how to ensure adequate funding of the courts.

As this issue is discussed, it is important to recognize that reaching the crisis point occurs incrementally and not all at once. Major cuts this year follow crippling cuts last year, which follow severe cuts from the year before. Cumulatively, the effects are devastating.

We all know the quote from when Tammany Hall ruled New York politics that they had “the best judges that money could buy.” Another adage comes to mind when I think of our courts; as we say in the United States, “We get what we pay for.”

And while there is still heat in our courthouses, how many courtrooms are in the dark for days each month or altogether? While we do not have defendants sit in cages in courtrooms, in how many courthouses across the country will a security problem arise because the courts can no longer afford security staff? How great will the problem need to get before we really have compromised the rule of law? That is the question for this conference.

