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## **STATE COURT BUDGETING AND JUDICIAL INDEPENDENCE** *Clues From Oklahoma and Virginia*

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**In his historic commentary, *Democracy in America*, de Tocqueville (1835/1956) observed that an independent judiciary vested with the ability to impartially make rulings “forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies” (p. 76). Indeed, judicial independence in American politics has been hailed as one means to preserve individual liberty and minority rights versus the actions of the more majoritarian branches of government. Chief Justice William Rehnquist hailed judicial independence as “one of the crown jewels of our system of government today” (cited in Perry, 1999, p. 1). Given the trends that have increased state court administration (e.g., state versus local funding of courts and court unification), legal professionals and scholars of the courts have begun to assess an increase in the**

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magnitude of judicial independence (see National Center for State Courts, 1998; Wheeler, 1988). In addition, scholars have noted actions by the other branches that may threaten the independence of courts (Perry, 1999).

In an American Bar Association publication, Perry (1999) warned of “recent political events [that] have threatened to dim the jewel’s sparkle and reduce its worth in our constitutional structure” (p. 1). Such political events have been spurred by criticisms of judges for behaving like “activists” and/or legislating from the bench. These criticisms are usually leveled when political actors disagree with controversial decisions made by the courts and have opened the door for increased intervention by the more political branches of government. Unfortunately for the judicial branch, its independence appears remarkably vulnerable given the enormous powers of the other two branches. Chief executives and legislatures have the ability to appoint, block, delay, and reject nominations of judges based on ideological concerns (Goldman & Slotnick, 1997, 1999; Hartley & Holmes, 1997). The legislative branch has the power to limit the discretion and administrative functioning of courts through actions such as establishing sentencing guidelines, reforming the law of torts, and creating rules governing evidence such as rape shield laws (Perry, 1999, pp. 3-4; see also American Bar Association, 1997). Additionally, the budgetary authority of the other two branches affords them a powerful punitive weapon, which can be used in response to unfavorable court decisions (Bermant & Wheeler, 1995, pp. 845-857; Kaufman, 1999).

Perceived assaults on the independence of the judiciary have called new attention to how courts obtain their funding. With the movement in the 1970s and 1980s toward state court unification, there was also movement toward state, rather than local, funding of courts (Baar, 1975a; Tobin & Hudzik, 1993). One could argue, then, that state funding of courts has increased the reliance of courts on governors and state legislatures for their funding. However, little scholarly activity has surrounded the question of how courts negotiate the politics of budgeting in state arenas. Expanding our knowledge in this area is necessary if we are to understand fully how budgeting affects the ability of the judiciary to effectively play its vital role as an independent branch in American government. Through the use of elite interviews with state court administrators, executive budget officers, and legislative budget analysts in Oklahoma and Virginia, this article examines whether the independence of state courts is under assault by budgetary politics. Our evidence questions whether state executive and

legislative powers of the purse pose serious threats to the independence of courts.

### **JUDICIAL INDEPENDENCE AND STATE COURT BUDGETING**

In an essay on judicial administration and judicial independence, Russell Wheeler (1988, p. 36) observed a difference in the views of Hamilton and Madison toward the role of the judiciary in the American polity. In *The Federalist* No. 51, Madison argued that each branch of American government should have "a will of its own" (quoted in Wheeler, 1988, p. 36) whereas Hamilton in *The Federalist* No. 78, on judicial review, argued that the judiciary "may truly be said to have neither force nor will, but merely judgement" (quoted in Wheeler, 1988, p. 36). The difference here, according to Wheeler (1988, p. 36), is that Madison asserts an ideal of an independent judiciary with its own independent judgment, whereas Hamilton reminds us that the judiciary must rely on the other branches of government to assert its will. In the wake of the increase in the bureaucratization of courts, Wheeler argues that "judicial administration does not provide the courts with the capability to execute their judgements" but that it does "stand to provide the judiciary the strength to protect its independence [against] the other branches" (p. 37).

In budget politics, the tradition of the separate judicial "will" of Madison and the power of "judgement" referred to by Hamilton has provided the courts a considerable amount of influence over the budgeting power of the other branches. For example, the courts have affected the funding levels of many government programs through their rulings. Court decisions in such areas as busing desegregation, requirements for standing to sue, welfare eligibility, and prison conditions have forced legislatures and governors to shift resources between government programs (Axelrod, 1989; MacManus & Turner, 1993; Straussman, 1986). However, there have been arguments that assaults on judicial independence by other branches have hindered court power including that of obtaining the funds necessary to carry out judicial functions.

Judicial professionals and scholars have demonstrated Wheeler's (1988) assertion that effective administration can secure judicial independence and protect courts from dependence on other branches. Recently, there has been an organized campaign by advocates for the courts to avert assaults on the independence of the judiciary. Groups like

the American Bar Association and the American Judicature Society have highlighted threats against the courts and have called attention to the problems inherent in having an independent judiciary that is dependent on at least one of the other branches for its funding. Two examples include an editorial by the American Judicature Society and recent publications by the American Bar Association highlighting threats to judicial independence (American Bar Association, 1997; American Bar Association Division for Public Education, 1999; American Judicature Society, 1997). The American Judicature Society's Center for Judicial Independence includes "punitive cuts in the budgets of the federal and state judiciary" among its list of threats to the judiciary (Kaufman, 1999). American Bar Association publications detail similar concerns at the federal and state levels including a general lack of funding for the courts (American Bar Association, 1997; American Bar Association Division for Public Education, 1999). Evidence from the states suggests that these concerns have merit. The most recent examples include the New York chief justice filing suit against the governor and legislature to force them to provide adequate funding, and the Pennsylvania Supreme Court ordering the legislature to provide funding to the state's trial courts (Powers, 1993; Tobin, 1999).

### **THE FUNDING OF COURTS AND INTERBRANCH RELATIONS**

In general, studies on the politics of state court funding are limited, and works on how the branches interact to secure judicial funding are rare. Studies of state court budgeting, however, do exist. Some works have described and detailed the framework and process of state court budgeting (Baar, 1975b; Lim, 1987; Tobin, 1996a, 1996b). Other works primarily describe and advocate approaches that states have adopted to fund their court facilities (Tobin, 1995). There is also work that discusses the generation of revenues by courts and the appropriateness of using these fines, fees, and forfeitures (Bresnick, 1982, 1993; Dimond, 1993). A good deal of research also has analyzed the reform of shifting from local funding of state trial courts to unitary state budgeting systems (see Baar, 1975a; Stout, 1993; Tobin, 1996a; Tobin & Hudzik, 1993). Scant attention, however, has been paid to the question of how state courts negotiate the politics of budgeting with respect to the other branches.

Scholars have given some attention to the strategies used by federal courts to obtain adequate funding (Walker & Barrow, 1985; Yarwood &

Canon, 1980). It is interesting that these works suggest that the political nature of the federal budget process places courts at a disadvantage in their efforts to obtain ample funding, noting that Congress has little incentive to provide courts with generous budgets because courts do not hand out political pork or have an active constituency. As to the most common strategies used by courts, Yarwood and Canon (1980) found that the U.S. Supreme Court attempts to gain congressional favor by submitting fiscally conservative requests. They also found that justices often appear at budget hearings to lobby and add prestige to budget requests. Walker and Barrow (1985) found that federal courts attempt to maintain credibility with Congress by submitting conservative requests, providing justifications for all requests, and showing evidence of sound financial management. They also found that courts place judges on judicial budgeting committees who tend to be from states or districts with senators or representatives on the congressional appropriations committees and subcommittees. Thus, federal courts try to ensure that they will have friends on committees who will listen to their concerns. Finally, the federal courts also appoint committee members who have experience as state legislators or members of Congress. This guarantees that members of the judicial committees will have political knowledge of how legislatures operate.

Similar worries about the effectiveness of the courts in the political process have come from scholars of state court budgeting. Baar (1975b) states that the judicial branch is at the mercy of the executive and legislative branches when attempting to get resources. State courts must rely on governors and state legislatures, which have strong budgetary powers, to provide them with funding. These branches can control funding levels, write appropriations to limit and restrict court discretion, and hinder attempts by courts to shift money between accounts (Baar, 1975b).

Baar's (1975b) study also examined determinants of appropriations success for state courts. In a survey of executive budget officers, he found that deference to the judiciary as a third branch of government, realistic judicial requests, and good relations with the legislature were important factors in judicial budget success. However, Baar (1975b) also found that executive budget officers often viewed the courts as lacking budgetary competence. Interviews of executive officials stated that court budget success could improve if judicial officials would provide more justification for court needs and request more money.

In summary, the literature on court funding strategies suggests that courts are disadvantaged in the budgetary process, and their strategies for obtaining funds are primarily conservative and often emphasize the

independent nature of the judiciary as a branch. Reliance on the independent nature of the judiciary could be considered a political strategy that is intended to appeal to the other branches' sense of separation of powers. A lack of funding or even threats to decrease budgets, then, can lead to arguments that the majoritarian branches are attacking judicial independence.

#### **STATE COURT BUDGETING AND INTERBRANCH RELATIONS**

Threats to court budgets may, in fact, increase given the move from local to state funding. Past studies of state court budgeting by Baar (1975b) and Lim (1987) showed that state judicial systems primarily rely on local governments for much of their funding. However, recent legislative trends have moved state courts steadily toward state funding (National Center for State Courts, 1998, p. 7). There has been much debate about whether states should shift toward or away from state funding of courts (Tobin, 1996a). Additionally, court budgeting scholars have discussed the potential effects of state financing on judicial independence. For instance, Tobin and Hudzik (1993) argue that state funding may increase judicial independence:

At the roots of all the interbranch issues is the fundamental question of whether the judiciary is considered a separate branch of government or treated as an executive branch agency. State financing of trial courts highlights this issue and demonstrates that state financing makes the judicial branch a more visible and powerful entity. (p. 346)

One could also argue, however, that with the increased power of state courts over their own administration, there has also been an increased reliance on governors and state legislatures for court resources.

As alluded to earlier, the budgetary powers that can be used against the courts by the executive and legislative branches are considerable. Congress and most state legislatures have the authority to cut court spending in their appropriations bills and limit court spending discretion through the use of restrictive line items in those bills. Meanwhile, the president and most governors have the authority to alter court budget requests in their executive budgets and veto spending allocated to the courts in appropriations bills. It is well documented that governors and state legislatures are more than willing to use the budgetary powers at their disposal to force each other to submit to policy demands (see, e.g., Abney & Lauth, 1998; Clyncly & Lauth, 1991). An excellent example of this behavior is

displayed in the use of gubernatorial line-item vetoes. Abney and Lauth (1985) found that governors tend to use their line-item veto power more as a tool to influence legislators to support their policies than as an instrument of fiscal restraint. Given the propensity of governors and legislators to behave in such a manner, there is no reason to believe that they will not behave similarly when dealing with the courts. The courts, after all, influence policy through their rulings. One way for the executive and legislative branches to have a say regarding this judicial influence is by employing their budgetary powers. Threats to judicial budgets could persuade judges to take the concerns of the other two branches into account when making their rulings, just as line-item veto threats against legislative pet projects can persuade individual legislators to take gubernatorial concerns into account when voting on legislation.

Some argue that executive and legislative budgetary powers place the independence of the judiciary at the mercy of the executive and legislative branches. Others, however, have argued that such powers are simply "checks" and have emphasized that the powers of government are "shared" (see Fisher, 1988; Rosenberg, 1991). With such attention to threats to the independence of courts, it is remarkable that little empirical attention has been paid to the politics of funding courts.

One reason may be that the state procedures for budgeting can be complicated and are quite diverse (Tobin & Hudzik, 1993, p. 352). Without the basic knowledge needed to describe how budget actors interact at the state level, it is difficult to adequately form hypotheses about state court budget strategies and relations with other branches. The lack of basic information on how state courts strategically manage the executive and legislative processes of budgeting, then, necessitates more exploration. In fact, Tobin and Hudzik (1993) argued that the "full effects of state financing are likely to be uncovered only through in-depth case studies within individual states" (p. 352). Therefore, large-scale survey work to assess state court budget strategies is tantamount to putting the "cart before the horse."

This article examines whether the independence of state courts is under assault by budgetary politics. This study provides a comparative case analysis of state court budgeting strategies in the two states of Oklahoma and Virginia. The work is intended to explore an area of research that is both lacking scholarly attention and that addresses a contemporary problem. Do governors and state legislatures use their budget powers to threaten the independence of the judiciary? What weapons and strategies do state courts use to negotiate state budgetary politics?

## METHOD

The data for this article came from a series of elite interviews conducted with key members of the executive, judicial, and legislative branches in the states of Virginia and Oklahoma. We chose the states of Oklahoma and Virginia for two reasons. First, Oklahoma and Virginia have similar systems for funding their courts. Tobin and Hudzik (1993) classify their funding systems as “state financed with the exception of facilities and some other major expenditures” (p. 344). Approximately a quarter of the states were placed in this category by Tobin and Hudzik. Second, Oklahoma and Virginia also display an important difference that may make them useful for comparative purposes. The Oklahoma courts submit their budget requests to the legislature directly, whereas the Virginia courts submit their requests to the governor, who is free to make changes to it prior to sending it to the legislature. This represents a major difference between states regarding judicial budgeting. State judges and court administrators argue that as a separate branch of government, they should be permitted to submit their budget requests directly to the legislature. They complain that requiring the courts to submit their requests through the governor infringes on their independence (Baar, 1975b).

The similarities and differences of these state systems may uncover interesting propositions about how state-financed systems navigate the legislative and executive procedures of budgeting. Thus, our efforts attempt to meet the standards suggested by Tobin and Hudzik (1993), namely, that we need more in-depth case research and that research must be mindful of the vast differences in funding systems. They argue that “a sample of . . . about six states studied in some detail would offer valuable insight into experiences with state financing” (Tobin & Hudzik, 1993, p. 352). Although we do not explore beyond two states, the work is valuable as an effort to better link the fields of budgetary politics, court administration, and public law. Finally, the case comparison is primarily intended as exploration and groundwork for further study.

In Oklahoma, we interviewed the director of the budget division within the Office of State Finance (the governor’s budget office), the budget analyst in the Office of State Finance responsible for the judiciary, the director of the fiscal analysts in the House of Representatives, the fiscal analyst in the House of Representatives responsible for the judiciary, the director of the fiscal analysts in the Senate, the fiscal analyst in the Senate responsible for the judiciary, and the director of the Administrative Office of the Courts. In Virginia, we interviewed the budget manager and analyst



responsible for the Department of Planning and Budget (the governor's budget office), the fiscal analyst in the House of Delegates responsible for the judiciary, the fiscal analyst in the Senate responsible for the judiciary, and the executive secretary of the Supreme Court of Virginia (chief administrator for Virginia courts). The participants were selected because of the important roles that they play in establishing, justifying, analyzing, and approving the courts' budget requests.

The interview format consisted of open-ended questions designed to produce nonstructured responses. Each participant was promised that their responses would not be attributed to them personally. The mean interview time was 1 hour and 30 minutes. One author conducted all of the interviews in Oklahoma, whereas the other author conducted all of the interviews in Virginia. To deal with the potential problem of intercoder reliability, we shared notes and discussed the meaning of responses in detail. Even so, it is possible that similar respondent statements were interpreted differently or different respondent statements were interpreted similarly. This must be kept in mind when reviewing the findings of the article.

## FINDINGS

### THE BUDGET AS A WEAPON

One purpose of our study is to shed light on whether the governors and legislatures in Oklahoma and Virginia used their budgetary powers to threaten the independence of the judiciary. Officials from the three branches of government in both states were questioned whether budgetary powers or threats were used by executive and legislative officers in response to unpopular court rulings. Evidence from the interviews indicates that the executive and legislative branches in both states seem to respect the independence of the courts in this regard. None of the officials interviewed in either state could recall any attempts by the legislative or executive branches to use their budgetary powers to influence or respond to case rulings. Officials from each branch stated that no gubernatorial vetoes, legislative cuts, line item restrictions, or apportionment powers were employed to affect court verdicts. Additionally, judgeships were not cut (or threatened to be cut) from the budget in either state on the basis of how the courts had ruled. In fact, in Virginia, budget officials argued that the creation of judicial seats was routine, even in times of divided

government. The legislature and governor's office both argued that new seats were created when there was a demonstrated need (through a formula). They did, however, mention that fights between the branches did occur over individual appointments and confirmations.

Although the evidence from the interviews reveals that the governors and legislatures in Oklahoma and Virginia do not threaten to use their budgetary powers to influence court decisions, officials in both states did point out that this respect for the courts does not necessarily translate into support for the courts. Executive and/or legislative approval of the entire judicial budget request is not a foregone conclusion in either state. Members of both legislatures and the governor in Virginia are willing to make changes to the courts' requests when they believe that the judiciary is asking for more than it needs, or their perceptions of the needs of the judiciary differ from those of the courts. In Oklahoma, the major areas of contention between the courts and the legislature are salary increases, particularly for judges, and new positions. For example, several legislators in Oklahoma are concerned that salaries for judges are increasing at a faster rate than salaries for the rest of state government. Some members of the legislature have also become concerned in recent years with judicial autonomy over the spending of fines, fees, and forfeiture money collected by the courts at the district level (see below). These members would like to see more legislative control over such spending. In Virginia, the executive branch typically reduces the judicial budget from the amount requested and then presents it to the legislature. This is usually done because the governor believes that the courts ask for more than they truly need. The legislature ordinarily restores some, but not all, of what was subtracted by the governor. When queried on this point, several officials mentioned that the courts saw the legislature as an opportunity to increase their appropriations.

Although all of the officials in these states mentioned the importance of some deference to the courts on budgetary matters (i.e., because they are a separate branch), they mentioned the political opportunity cost of financing the courts. The reality is that every dollar spent on the courts is one dollar that cannot be spent on other policy issues (e.g., crime, education, capital projects). Governors and legislators often get more political "bang per buck" by spending dollars elsewhere. Several officials stated that this is why the courts are unable to get all of what they want during the appropriations process. There are many needs that the executive and legislative branches are trying to address, some of which are of more interest to their constituents.

The evidence discussed above reveals that the budgetary powers of the executive and legislative branches in Oklahoma and Virginia are not used to influence court rulings; however, these powers have been used to alter and/or reduce judicial budget requests as a result of disagreements over spending priorities. Although denying the judiciary additional funds for the latter reason may harm the efficiency and effectiveness of the courts, budget reductions do not necessarily constitute as great a threat to judicial independence as threatening budgets in response to court rulings. These findings beg the question of why the legislative and executive branches have not employed their budgetary authority as a weapon to influence unpopular rulings. This question will be addressed in the next section.

#### **SAFEGUARDS AGAINST BUDGETARY THREATS TO JUDICIAL INDEPENDENCE**

The interview data produced four explanations for why the courts in Oklahoma and Virginia have not been subject to political budgetary attacks by the executive and legislative branches: (a) respect for the independence of the judicial branch, (b) rules and procedures that benefit the judicial branch, (c) court budgetary strategies, and (d) important legislative allies of the judicial branch. The extent to which these factors are important varies between the two states.

#### **Respect for the Courts**

According to the officials interviewed, both of the governors and most members of the legislatures in Oklahoma and Virginia appreciate the importance of an independent judiciary. In fact, the independence of the judiciary is so respected that the budget requests of the judicial branch in both states are not scrutinized to the extent that agency requests are during the appropriations process. Although some members in the legislatures of both states at times complain about individual court rulings, the majority of members do not allow any budgetary intrusions into judicial prerogatives. As a result, what little contention there is between the courts and the other two branches of government focuses on fiscal concerns such as the size of pay raises for judges, rather than political concerns. Even in this regard, as one budget official in Oklahoma put it, "The legislature usually backs down when the judiciary starts screaming about money."

Officials in Virginia, even more so than in Oklahoma, stressed the important role that respect for the courts by the other branches plays in

protecting court budgets. These officials indicated that even during times of state budget crises, judicial independence is respected by the governor and legislature. One example of this occurred during the recession in the early 1990s, where the governor mandated budget cuts of discretionary spending for state agencies. The courts, however, were only *asked* to make these cuts because the governor saw a mandated cut as a threat to judicial independence. It is interesting that the courts cut their budgets by a smaller margin (3%) than did other agencies (ranging from 10-15%). When the courts did not cut to the level of other state agencies, there were no reprisals from the other branches. This indicates that the governor and legislature in Virginia place a great deal of importance on not disrupting the performance of court activities, even when being forced to make massive cuts in executive branch functions. In contrast, officials in Oklahoma admitted that the courts are often asked to make the same proportional cuts required of executive branch agencies during times of fiscal stress.

### **Rules and Procedures**

In Oklahoma, several budgetary rules and procedures have been established that work to the judiciary's advantage when protecting its budget. First, judges' salaries are mandated by statute. This forced the legislature to appropriate sufficient funds to cover the current salaries of the state's judges. Because salary and benefits make up approximately 91% of state appropriations for the courts, the legislature's discretion to reduce the judicial budget is limited. Should the legislature decide to cut court budgets by reducing the salaries of judges, it would first have to change existing law. Second, unlike agencies in most states, the judiciary is permitted to submit its budget requests for state appropriated funds directly to the legislature (this is done by the chief justice of the state Supreme Court). This allows the legislature to use the judiciary's original request as a starting point when making court funding decisions, rather than the recommendation of the governor (which may differ from the original judicial request) in his or her executive budget. As a result, the influence of the governor's recommendation on court appropriations is limited, thus enabling judicial officials to focus their lobbying efforts on the legislature.

Third, the court funding system limits executive and legislative oversight, and grants the judiciary a considerable amount of control and discretion over its spending decisions. Funding for Oklahoma's state courts comes from three principal sources: District-level collections (approximately 62.7% of funding for the courts), the state general fund (appxi-

mately 36.3%), and local government contributions (approximately 1.0%). District-level collections consist of fines, fees, and forfeitures collected by the district courts. Each district court is permitted to use the money it collects to fund district-level expenses such as juror fees, attorney fees, office supplies, telephone expenses, and equipment purchases. Any collections remaining after district expenses have been provided for are placed into a special fund called the State Judicial Fund (SJF). Money in this fund is earmarked to help pay the cost of state-level expenses but must be appropriated by the legislature. In fiscal year (FY) 1998, \$31.0 million in fines, fees, and forfeiture money was spent by district courts. Another \$22.0 million was put into the SJF. As stated above, state appropriated funds are used to cover the costs of judges' salaries and benefits. They are also used to pay for the salary and benefits of court staff, the Administrative Office of the Courts (AOC), judge travel, equipment, and operating expenses for the Supreme Court and Court of Civil Appeals. Monies for state appropriations are drawn primarily from both the general fund and the SJF.

The rules surrounding the use of court collections provide the judicial branch in Oklahoma with one of its most important budgetary advantages. Under this system, the district courts submit their budget requests for how they want to spend their fines, fees, and forfeiture collections directly to the chief justice of the state Supreme Court. The chief justice, with the assistance of the AOC, is responsible solely for reviewing and approving these requests; the governor and legislature play no role and are generally not provided with copies of the requests or detailed information about how the money is going to be spent. After approving the requests, the chief justice must provide the governor and legislature with an estimate of the amount of court collected funds expected to be available for the SJF (Estimate for the SJF = Estimated court collections – Estimated expenses at the district level). This estimate gives the governor and legislature an idea of how much money from the general fund will be needed to cover state-level court expenditures for the coming fiscal year.

This system of funding gives the judiciary a great deal of discretion over how it spends the fines, fees, and forfeitures money it collects at the district level. The judiciary believes that it has the right to spend its district-level collections any way it pleases. This, at times, causes hardships on the legislature by forcing it to appropriate more general fund revenues to the courts than it would normally like. Any increase in district-level spending by the courts reduces the amount available in the SJF for state appropriations to the courts. Because a large percentage of state

appropriations is mandated by law (e.g., judges' salaries), the legislature has little discretion to lower them and is forced to offset any decreases in the SJF with general revenues. As a result, the legislature is prevented from spending those revenues on projects important to it. An extreme example of this problem occurred during FY 1998.

In the FY 1998 supplemental appropriation, the legislature had to appropriate an additional \$3.3 million to the courts from general revenues. This became necessary because court officials apparently underestimated the contribution that would be made to the SJF for the fiscal year. This error occurred because court officials failed to properly account for increases in district-level expenditures due to a computer modernization program, raises for staff, increases in district staff levels, and new rules concerning court retirement funding. Once it became apparent during the fiscal year that the SJF would fall short of its projections, the legislature could do little more than either provide the funds from general revenues or shut down the court system by laying off court employees and furloughing judges. Events such as this caused some Oklahoma officials to complain that the system provides the courts with an unfair budgetary advantage, which can be used to draw resources away from other priorities in the state. Other officials maintained that the funding system provides the judicial branch with needed autonomy in determining how best to carry out its important functions. Whichever the case, the judiciary's management of the fund system has enabled it to sustain a considerable amount of control over its budget, which limits the ability of the legislature to use the budget as a weapon.

The Virginia case differs considerably from Oklahoma. Unlike Oklahoma, the judiciary in Virginia does not submit its budget request directly to the legislature. Instead, after putting together the budget request, the chief justice submits the request to the governor's Department of Planning and Budget. Here, the governor's staff has the power to review and alter the request prior to sending it on to the legislature as a part of the governor's executive budget document. Typically, governors in the state have been inclined to give the courts what they received the prior year and then consider additions to this base level. After receiving the governor's recommendation for the courts, the legislature serves as a sort of appeals board to which the judiciary can go to protect any funding from their request that the governor wishes to cut. This arrangement permits the governor in Virginia to play a more active role in court appropriations because his or her executive budget recommendation is viewed as a starting point from which the legislature can make changes. In contrast, the governor's

request in Oklahoma is frequently ignored by the legislature, and the courts' requests are viewed as the starting point. As a result, judicial officials in Virginia must be more attuned to gubernatorial prerogatives than their counterparts in Oklahoma.

Another major difference between Oklahoma and Virginia is the lack of control the courts in Virginia have over their funding sources. Like Oklahoma, most of the money the courts receive (approximately 80%-90%) is appropriated out of state funds by the legislature. The courts, however, do not receive any of the fines, fees, and forfeiture money that they collect directly. Interviewees agreed that most state officials do not want to create the impression that the courts are padding their budgets by increasing fines and/or fees (see Bresnick, 1982, 1993). For the most part, then, funds collected by the courts are disbursed to the state general fund from where they can be appropriated for any government purpose. Other sources of funding include local counties, a court automation fund, and a law library fund. Local counties varied in their support of local courts, but they are largely responsible for funding the physical plant of the court and sometimes contribute funds to aid local judges (e.g., conference money). Finally, like Oklahoma, judicial salaries are largely protected against cuts by law. The Virginia Constitution mandates that salaries of judges cannot be cut during their tenure of office. It is possible that a salary could be cut prior to a position being filled, but those interviewed found such a practice to be highly unlikely.

Overall, rules and procedures grant the courts in Oklahoma considerable protections against budgetary encroachments against their independence by the executive and legislative branches. In fact, rules concerning the SJF actually can be exploited by the courts to force the legislature to divert funding away from other priorities important to it to meet the spending demands of the judiciary. The rules and procedures that guide judicial budgeting in Virginia are not as court friendly. Theoretically, this makes the courts in Virginia more vulnerable to budgetary transgressions against their independence by the other two branches. In practice, however, such transgressions have not occurred, at least in recent times.

### **Court Budgetary Strategies**

Court officials in both Oklahoma and Virginia realize that public budgeting is a political process and that governors and legislators seek to use the budget to achieve political gain. It is no secret that executive branch agencies pursue various strategies to convince elected officials that their

programs should receive sufficient funding (Rubin, 1997). Recognizing that the executive and legislative branches hold the purse strings, state courts engage in a number of strategies to ensure that they receive adequate funding. The use of these strategies indicates the willingness of the judiciary to participate in the political process of budgeting to ensure that it receives sufficient resources and, more indirectly, to protect its independence against budgetary encroachments. This section describes some of the key budgetary strategies used by the courts in Oklahoma and Virginia and explains how those strategies can and are used to defend court independence.

Like most executive branch agencies, the courts in Oklahoma and Virginia lobby the governor and legislature in their states to support judicial budget requests. When engaged in lobbying activities, judicial officials from both states emphasize the importance of maintaining the autonomy of the third branch of government, stating that as a separate branch, the judiciary is entitled to an adequate level of funding without interference from the other two branches. Doing so is meant to instill in elected officials the notion that they have a moral obligation to fund the courts sufficiently to protect the balance of power between the branches of government. The need to protect this balance of power is enunciated particularly through the lobbying activities of the chief justices and sometimes other judges in both states. The participation of the chief justices and other judges affixes a certain amount of prestige to court budget requests and may sometimes awe elected officials into respecting and deferring to judicial independence when considering the budget. The chief justice in Oklahoma presents the judicial budget requests to the legislature personally and gives a speech concerning the state of the courts. On rare occasions, the chief justice and/or other judges have also been known to appear at the legislative appropriations hearings or lobby individual members of the legislature to emphasize the importance of funding particular activities. In Virginia, the chief justice does not present the budget personally to the legislature but does appear on behalf of the courts at committee hearings, personally lobbies members of the legislature, and indirectly lobbies the office of the governor. Officials in Virginia said, however, that it is rare for other judges to show up at legislative hearings, in part, because of the undesirability of appearing to be "playing" politics. Virginia officials did admit that indirect contacts between judges and legislators did occur and worked to the advantage of the courts. In Virginia, judges are appointed by the legislature, so there is often a history of close political contact between judges and legislators. For example, judicial appointments can be



sponsored by political friends in the legislature or by those who are well known in the local party. Additionally, the local courthouse is the center of politics in localities, and legislators, of course, spend much time with those at the courthouse when back in their districts. Such informal contacts between judges and legislators serve as a node by which to lobby.

A second strategy used by the courts in Oklahoma works to further diminish the governor's ability to alter judicial budget requests. The courts are required by statute to submit their budget requests to the governor. However, the courts frequently ignore these statutory requirements. As a separate branch of government, the judiciary believes that it is not bound to submit its requests to the executive branch given that the power of the purse rests with the legislative branch. The courts argue that the legislature does not have to submit a budget request to the governor and, therefore, it is not necessary for the judiciary to do so. The courts sometimes submit a copy of their requests to the governor as a courtesy, but the requests are seldom delivered in time for the governor to incorporate them into his or her executive budget. This does not work against the courts because the budgetary powers of the governor are somewhat weak,<sup>1</sup> and as stated above, the legislature usually ignores the recommendation of the governor when approving the court's budget.

The courts in Oklahoma and Virginia also engage in some of the same types of budgetary "shell" games employed by many executive branch agencies. For example, the courts employ strategies like budgeting for vacant positions they have no intention of filling, promising to spend money for a particular function and then transferring much of the funds to something else during the fiscal year, and asking for more than they really need in their requests. This sort of padding is done to help offset anticipated cuts in budget requests and provide the courts with more spending flexibility. If the governor or legislature attempt to cut judicial budgets in retaliation for court rulings or policy, then padding can be used by the courts to ensure that funding needs are met. For the most part, however, the courts in Oklahoma and Virginia pad to offset cuts due to fiscal reasons (e.g., the legislature wants the money to fund something else). Additionally, most officials in both states said that the courts do not engage in these practices as often or to the extent that executive branch agencies do. The judiciary in Oklahoma appears to be slightly more willing to play budgetary shell games, whereas the courts in Virginia seem to take pride in trying to show that they are not requesting more than they need. A likely explanation for the unwillingness of the courts in both states to play shell games with their budget requests is their desire to maintain their

credibility and thus sustain the respectful relationships that they have with the executive and legislative branches.

Mobilizing political allies outside of the legislature to lobby on behalf of the courts is another strategy that could be used to help the judiciary should its independence be threatened. The courts in Oklahoma and Virginia have practiced this strategy on rare occasion when, for fiscal reasons, their legislatures were less supportive than the courts would have liked. Unfortunately for the courts, they have few allies to turn to. Only two interest groups in Oklahoma have lobbied on the courts' behalf during the budgetary process: the Court Clerks Association and the Bar Association. The courts in Oklahoma have also turned to sympathetic governors in the past to help convince the legislature that court requests need to be met.

In Virginia, allies were used even less. The actors typically remarked that few others were interested in the needs of the courts unless it benefited them. The two groups that occasionally did lobby on behalf of court funding were the court clerks in Virginia and defense attorneys. The clerks lobbied for personnel and salary increases, whereas the defense attorneys typically lobbied for a higher per hour fee for representing indigent defendants. All actors agreed that the Virginia Bar rarely if ever came to the aid of the courts, because they were often lobbying for and against issues of direct concern to them (e.g., tort reform, bar requirements, etc.). This evidence suggests that the courts may not get much support from other groups should the governor or legislature assault their budgets for political reasons. However, it is also possible that because the courts have not been threatened in such a way, they have had little need to mobilize potential allies. Therefore, they have chosen to remain "above politics" in this regard.

A final strategy available to the courts in Oklahoma and Virginia is their ability to issue a *writ of mandamus*. Should the legislature in either state fail to provide the courts with enough funding to perform their duties, the chief justices in both states have the power to issue such a writ that forces the legislature to relinquish funds to the courts. Judicial officials in Oklahoma have on occasion pointed out to the governor and legislature that the state constitution entitles the judicial branch to receive adequate funding to carry out its responsibilities and that a writ of mandamus might be issued if state appropriations are not satisfactory to the courts. Such an order has not been necessary to date, but there is an undertone that a writ is always possible if the courts do not get enough of what they want. Chief justices in Oklahoma have used the threat of a writ sparingly, rarely warning directly that one will be issued if more funding is not forthcoming. In

contrast, Virginia officials reported that the judiciary in their state has never threatened to issue a writ of mandamus. It is possible that such threats are not necessary because, as “repeat players” in government, the other branches in Virginia recognize the courts’ power of judicial review and the ability to issue writs of mandamus. Short-term strikes by the other branches against the budgets of the courts might be viewed as irrational in the long term given that they must work together in the future.

Overall, the judiciary in Oklahoma appears to be more proactive in its use of budgetary strategies than the courts in Virginia. It is possible that the courts in Virginia play a more passive role because they feel more comfortable with the level of deference granted them by the other two branches and do not feel the need to press budget issues further. An alternative explanation is that the Virginia courts have fewer budget “weapons” and, therefore, fear that a more proactive use of strategies might irritate the more powerful branches.

### **Legislative Allies of the Courts**

A final factor, which plays a role in protecting the independence of the judiciary against budgetary threats, is the existence of important allies of the courts in the legislature. One important reason the legislature in Oklahoma is reluctant to use its budgetary powers against the courts is the large number of lawyers serving as legislators, particularly in the Senate. According to those interviewed, lawyers tend to be the biggest supporters of the courts in the legislature. The budget officers interviewed were split as to why lawyers are so supportive. Three of the seven Oklahoma officials speculated that lawyer members do not want judges angry with them when arguing cases in court. However, two others stated that getting on the courts’ bad side because of budgetary decisions is unlikely to harm a member’s practice. These officials argued that the strong support from lawyer members is more likely due to their experience with the courts in their private practices, giving them a greater respect for the independence of the courts and a greater knowledge and awareness of the courts’ needs. One official also suggested that several lawyer members support the courts during the budgetary process because they aspire to become judges some day. Whatever the reasons, lawyers in the Oklahoma legislature are strong supporters of court autonomy in the budgetary process. The Oklahoma Senate (26% lawyers) tends to be more supportive than the

Oklahoma House (12% lawyers). In fact, lawyers in the Senate, according to one budget officer, have been largely responsible for blocking a move by House members to limit court discretion over the use of court collected revenues.

In Virginia, lawyer support may also be a factor in legislative success; lawyers constitute 36% of House members and 25% of Senate members. However, budget actors in the state did not mention this specifically as being an important factor in securing judicial funding. Apart from the perceived interest in one day becoming judges, the Virginia legislature has the added connection of having selected the judges. Their past political experience with judges (e.g., the appointment of friends and law partners) might help ensure that courts are respected by the legislative body.

Legislative support for court budgets in both states can also be attributed to the political self-interest of members. One official in Oklahoma stated that legislative candidates seek the support of local district court officials, especially judges, when running for office. There was also evidence of this in interviews with officials of Virginia. As stated earlier, legislative candidates in Virginia often turn to the local courthouse, as the center of local politics, for support in the election. Once elected, the legislators continue to rely on courthouse officials for support and often work in local courthouses as attorneys. Legislators in both states also gain politically from supporting local court projects such as establishing video courtrooms in their local courthouses. These types of projects bring jobs and money to their districts. Although the dollar amounts for these projects may be small, they do provide legislators with an incentive to protect court budgets.

So it seems that both the political self-interest and high ideals of legislators play a role in preserving judicial independence. Some legislators who propose to cut court budgets in response to a particular ruling or court policy will be forced to confront colleagues who want to either protect judicial pork going to their districts or maintain good relations with influential local officials such as court clerks and judges. Perhaps it is more important that threatening the courts in this way may draw the ire of legislators in the law profession who might see such a move as morally and ethically inappropriate. This is an advantage that few if any executive branch agencies share with the courts because few agencies have similar ties with a profession whose members hold such a significant portion of the seats in legislative bodies.

## CONCLUSION

In this article, we examined the assertion that state courts are being held hostage by the budgetary powers of the other branches of government. Our interviews with officials from Virginia and Oklahoma produced no evidence that such a threat exists. Although the courts in both states do not get everything that they ask for in their budget requests, this does not necessarily constitute a threat to their independence. After all, officials in the executive and legislative branches at all levels of government often complain that they do not have enough resources to carry out their missions as effectively as they would like. No one argues that this somehow threatens the independence of those branches. Scarce resources are a fact of life in the public sector, and it is difficult to argue that the courts, because of their nonpolitical status, deserve all that they ask for.

Attacking court budgets for political reasons, however, would constitute a threat to judicial independence. We attribute the absence of such attacks in Oklahoma and Virginia to four factors: (a) respect for the judiciary, (b) rules and procedures favorable to the courts, (c) court budgetary strategies, and (d) legislative allies. It is interesting to note that the Oklahoma courts appear to be in a better position to defend themselves against budgetary assaults than are the courts in Virginia. This is because the rules and procedures in Oklahoma are extremely favorable to the courts, and the judiciary in Oklahoma is more aggressive in the use of the strategies available to it. Surprisingly, this has not resulted in greater transgressions against the judicial budget in Virginia. The Virginia judiciary seems to depend more on the respect it receives as an independent branch from the governor and legislature. Relying primarily on this respect may leave the Virginia courts more vulnerable to budgetary threats in the long run. However, one might want to consider the motivation behind executive and legislative respect for the judiciary in regards to the budget. The behavior of the other branches might be very rational here given that short-term strikes against the courts might lead to strained relations in the future. Additionally, the threat of judicial review and writs of mandamus, although they have never been used in Virginia, provide the courts with a couple of powerful weapons of their own.

Although political events in other arenas may be working to dim the sparkle of judicial independence, the results of our study indicate that the budgetary powers of the executive and legislative branches are not being used to diminish the luster of this "crown jewel" at the state level. For those who believe that the use of budgetary powers to influence court

rulings is a legitimate check on the powers of the judiciary, our findings reveal that this opinion is not necessarily shared by those who hold the seats of power in the executive and legislative branches. Budgetary powers, at least in Oklahoma and Virginia, are not used as a weapon against unpopular court rulings. Those who agree with de Tocqueville (1835/1956) that an independent judiciary vested with the ability to impartially make rulings “forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies” (p. 76), should take heart after reviewing our findings. Although no one should rely completely on the results of a single study of only two states, our evidence generates some very interesting propositions that could be tested in a larger study of state court budgeting. For example, interviews with the executive and legislative branches showed a tremendous amount of respect for the independence of the judicial branch. However, one wonders if such findings will hold true over time as states continue to rely more and more on state funding versus local sources (see Tobin & Hudzik, 1993). Additionally, this finding has a more significant meaning beyond budgetary politics and may signify that judicial independence is under less of a threat from other, nonbudgetary, types of political actions. Respect for judicial independence in the budget arena might translate to respect in other arenas as well.

Additionally, as an exploratory study, this article has set the groundwork for further research into state court activities during the budgetary process. Different models of budget submission and appropriation seem to show variation and raise questions as to how much the courts are at the mercy of the other branches. In Virginia, where SJFs do not exist, the courts are more limited in seeking resources. Courts may, then, look to other agencies and other states for models for improving funding levels. This study also reveals that the courts recognize the importance of playing an active role in gaining support for judicial operations in the political environment of public budgeting. Again, however, budget actors tend to believe that courts could do better in the political arena. For instance, Oklahoma and Virginia courts’ strategies are somewhat conservative when compared with other branches (e.g., making use of coalition building and lobbying). One factor here might be the tradition of the courts as being “above” or outside of politics. The Virginia example also reveals that institutional differences among states might predict the ability of courts to obtain funding (e.g., the Virginia method of judicial selection and retention of judges).

This inductive approach at studying state court budgeting has provided us with numerous research questions of interest to scholars of budgeting, public law, and American politics in general. What does state court budgeting look like when we analyze all 50 states? For instance, do state legislatures, courts, and governors behave as rational actors in the process of budgeting for state courts? What types of budget politics exist in states that primarily receive funds from local sources? Do courts receive less funding than other agencies given their position as a separate branch? Do courts behave less politically than other branches, and why? Finally, is the independence of courts in other states under attack via their budgets? Because our data come from only two states, more research needs to be conducted. It is possible that future research will find that court strategies and determinants of success will vary in different states. A survey of budget actors in the 50 states should take us further down the road of broadly understanding the politics of state court budgeting. Additionally, a larger sample of in-depth case comparisons may uncover variations in court strategies that exist internally. Tobin and Hudzik (1993) argue that future studies of this type could compare and contrast states with varying populations and varying systems of obtaining funds (e.g., state vs. local).

#### NOTE

1. The budgetary powers of the governor in Oklahoma are weakened by two factors. First, agencies are permitted to submit their budget requests directly to the legislature. Second, the governor does not have the power to remove most agency heads from office.

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