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COMMENTARY—FUNDING THE FEDERAL JUDICIARY

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Congress and the entire nation today face the undeniable need to impose rationality and prudence on the allocation of public funds. The functions of government that most need support must be identified before the requisite funds are allocated. The appropriations process is the means by which Congress makes these determinations.

The appropriations process for executive branch agencies is well-illuminated in the press, and has been the subject of scholarly analysis. Yet, while the judicial branch is vital to a free society, few citizens, indeed few lawyers, are at all familiar with the processes by which funds are provided for the operation of the judiciary.

As will be developed more fully in this commentary, some courts, relying on their inherent powers, have mandated the expenditure of funds beyond those appropriated to them, considering these additional funds to be essential to their proper operation. Regardless of the outcome, such judicial exercises are not exemplary but are illustrative of a breakdown in the appropriations process. Inevitably, they become the subject of prominent treatment in the daily press. The resulting cases present interesting, challenging questions of law, and generate scholarly comment, much of it critical.

Whatever view one takes of the inherent power of a court, and on this issue both judges and scholars are divided, there is unanimity in the opinion that "judicial appropriation by judicial mandate" is hardly a desirable procedure. Fortunately, there have been few such instances and none have occurred in the federal system.

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The publicity accorded these cases has not, however, brought attention to the judicial appropriations process; rather, it has focused only on the aberrations. If anything, these "pathological cases" serve to emphasize the need for better understanding of how the appropriations process should work and how it normally does work, at least on the federal level.

Perhaps the appropriations process for the courts has not been illumined because of the very small percentage of the total government appropriations dollar that is consumed by the judicial branch. The federal judicial budget request for fiscal year 1979, for example, was \$491,755,000; of the total federal budget request, it was less than one tenth of one percent.¹ Comparable figures will be found in the states.

These percentages, however, do not mirror in any way the co-equal role played by the judiciary in our tripartite system of separated powers. The importance of the judicial function makes it necessary to understand the process by which the legislature appropriates monies for the operation of the courts. This commentary will analyze an appropriation process that works especially well, the funding of the federal judicial system.

By way of introduction, it should be noted that the federal judicial budget contains the essential elements of the judicial budgeting process long recommended by careful students of court organization and judicial reform.² That is to say, it is a unified judicial budgeting system. The budget is prepared for submission to a central funding source—the Congress. Funding for the courts is not split among central and local authorities, as is true in the great majority of states.³

Moreover, the preparation and administration of the judicial budget is judicially controlled. There is no executive interference in the preparation or submission of the judicial budget; the federal courts' budget is prepared in one central source, the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, which is the administra-

¹ For a complete listing of the federal budget, see OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, 1979.

² Hazard, McNamara & Sentilles, *Unitary Financing and Court Budgeting*, 81 YALE L.J. 1286 (1972).

³ See Baar, *The Limited Trend Toward State Court Financing*, 58 JUD. 322 (1975).

tive policymaking body for the federal courts.⁴ While the law allows the Office of Management and Budget to comment upon the federal judicial budget request,⁵ this author is unaware that the executive branch has ever used this limited authority. This procedure stands in marked contrast to the situation in over half the states, where the executive branch may revise the judicial budget request before it is submitted to the legislature.⁶ This judicial autonomy in formulating a budget is vital to the separation of powers.

These circumstances suggest at least three reasons why it is important to discuss the federal judicial appropriations process. First, a review of the federal judicial appropriations process reveals the advantages of a judicial appropriations and budgeting system structured to allow the courts and the legislature the opportunity to consider the total judicial budget in a careful and rational manner. It is a process by which judicial personnel, through internal analysis, discussion, and professional staff back-up, determine what resources are needed to operate the courts. The justification for the federal judicial budget is carefully considered by the Congress, which through its committees and subcommittees, can explore the judiciary's needs in conjunction with judges familiar with the total federal judicial budget. This procedure allows for compromise and negotiation based upon rational considerations and a view of the total picture.

This capability for system-wide analysis has meant that the federal courts have not been plagued by the conflict suffered in several of the states where local courts have attempted to mandate the expenditure of additional monies from the local county boards that fund them. The best known auxiliary tool for increasing court finances is the doctrine of "inherent powers."⁷ The doctrine holds

⁴ See 28 U.S.C. § 331 (1976) which provides for the authority of the Judicial Conference and 28 U.S.C. § 605 (1976) which deals with the preparation of the federal judicial budget.

⁵ 28 U.S.C. § 605 (1976). This section provides that such budget requests "shall be included in the budget without revision, but subject to the recommendations of the Office of Management and Budget."

⁶ For an excellent discussion of the powers of state executive officials to review and revise judicial budget requests, see BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 25-54 (1975).

⁷ This theory was expounded forcefully by Colorado Supreme Court Justice Carrigan when he was a Denver attorney. See Carrigan, *Inherent Powers of the Courts*, 24 JUV. JUST. 38 (1973). See also J. CARRIGAN, NATIONAL COLLEGE OF STATE

that the constitutional necessity for an independent judiciary implies an inherent power in the courts to mandate that those who control the purse will provide the courts with the funds necessary to exercise the judicial function. Inherent powers lawsuits have been successful on the local level to secure funding for supplies and other relatively minor expenses, but they have not been used at the state level nor proved successful at the local level when large expenditures are at issue.⁸

In the final analysis, regardless of the forceful legal theory behind inherent powers lawsuits, they have typically been utilized only as last resorts, when negotiations with municipal budget officials offer no hope for compromise.⁹ That they must be used at all is unfortunate. Attempting to meet judicial needs by legal mandate inhibits planning, frustrates the development and consideration of sound budgetary policies, and sows conflict where there should be cooperation.¹⁰ Similarly inflexible is a proposal made several years ago by the late Michigan Supreme Court Chief Justice Kavanaugh, which would have imposed rigidity on judicial

TRIAL JUDGES OUTLINE ON INHERENT POWERS OF TRIAL COURTS TO PROVIDE NEEDED COURT PERSONNEL, FACILITIES AND EQUIPMENT (4th Rev. 1968), reprinted in INSTITUTE OF JUDICIAL ADMINISTRATION, STATE AND LOCAL FINANCING OF THE COURTS app. C (Tentative Report 1969).

⁸ Mention should be made of the recent opinion by the West Virginia Supreme Court of Appeals in *State ex rel. Bagley v. Blankenship*, 246 S.E.2d 99 (W. Va. 1978). At issue was the legislature's action reducing the judicial budget. The West Virginia Constitution provides that "no item [in the budget bill] relating to the judiciary shall be decreased . . ." W. VA. CONST. art. VI, § 51(B). When the legislature reduced five of the six items in the judicial budget request, and the Governor signed the bill, two citizens of West Virginia, as attorneys and taxpayers of the state, sought a writ of mandamus to compel the clerk of the House of Delegates to print a budget bill with the items restored. The court recognized, as did the judiciary in submitting the budget, that judicial salaries were subject to legislative approval and therefore that requested monies for salaries could be ministerially adjusted in light of legislative action to set the salaries, 246 S.E.2d 99 at 109, but the Court held that any other reductions were prohibited by the plain language of the Constitution. To the defense that the judicial budget lost its constitutional protection because it sought funds not reasonably necessary for its efficient and effective operations, the court responded that in West Virginia "the inherent power of the judiciary to determine what funds are necessary for its efficient and effective operations is substantiated by express provisions of the Constitution." *Id.* at 110. (In its opinion, the Court also disposed of other issues, including the requested disqualification of one member of the specially-composed Court, and certain pretrial discovery matters.)

⁹ BAAR, *supra* note 6, at 143-49.

¹⁰ Hazard, McNamara & Sentilles, *supra* note 2, at 1287-91.

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budgetary management by requiring the state to allocate a fixed percentage of total state revenues to the judicial branch.¹¹ The federal process suggests the advantages of compromise and planning rather than rigid guidelines and law suits.

A second reason for describing the federal judicial appropriations and budget process is that if there is a continued movement towards reducing the use of the local property tax to finance essential government services, operation of the state courts may become the responsibility of the state rather than the individual county. If unified judicial budgeting becomes the prevalent trend in the states, the federal experience can be a helpful model.

A third and final rationale for discussing the federal judicial appropriations process is simply because the process is crucial to the maintenance of the federal judicial process. It is evident that the federal court dockets are literally exploding with perplexing, sometimes provocative and nearly always complex legal topics. For example, in 1922, when Chief Justice Taft was urging Congress to adopt legislation creating what is now the Judicial Conference of the United States, the Supreme Court received 720 new filings. In 1977, 35 years later, the Court received almost 4,000 new positions, a sevenfold increase. Similarly, the caseload of the United States Court of Appeals has increased from 1,800 in 1922 to over 18,000 in 1976. Bankruptcy case filings have increased from 38,000 in 1922 to more than 246,000 in 1976. The criminal caseload of the District Courts has decreased from almost 61,000 defendants in 1922 to 53,000 defendants in 1976, but this is a statistical anomaly brought about by the repeal of prohibition.¹² If these numerous prohibition cases are not counted, the growth in criminal cases parallels the overall growth of the federal court caseload.

Accordingly, the federal courts system, especially the trial courts, must be responsive to the continuing growth of American society. At the same time, however, it is crucial that government expenditures be strictly monitored and restricted only to necessary programs. Let us now turn to a description of the little known judicial appropriations process that contributes so vitally to these ends.

¹¹ Discussed in BAAR, *supra* note 6, at 159-60.

¹² In the 1920's and early 1930's the criminal caseload of the District Courts was composed mostly of prohibition cases. These cases were processed much in the same expeditious manner that traffic violations are handled today.

I. THE JUDICIAL BUDGET — HISTORICAL PERSPECTIVE

To understand the background of the federal judicial appropriations process, we must retreat to the year 1922 when the Congress, at the urging of Chief Justice William Howard Taft, created the Conference of Senior Circuit Judges, now known as the Judicial Conference of the United States.¹³ Until 1922 the Supreme Court was the only organization within the federal judiciary that considered administrative problems facing the federal courts. Needless to say, the Court was, and still is, ill-equipped to perform these administrative tasks. It was Chief Justice Taft's idea that an annual meeting of the senior circuit judges would provide a forum that could address these problems in an institutional manner. The Conference was also given the authority to submit recommendations to the Congress regarding the needs of the courts.

In the Judicial Conference's early years, the Attorney General of the United States met with the Conference and handled some of its administrative affairs—at least those that could not be handled directly by the Chief Justice. This included preparation of the judicial budget, thus giving rise to a situation whereby the major litigator in the courts was also its budget officer. It soon became apparent, however, that the Judicial Conference and the federal judiciary should have its own administrative arm available on a full-time basis to deal with matters affecting the judiciary.

Finally, in 1939, nine years after Chief Justice Taft had been succeeded in office by Chief Justice Charles Evans Hughes, Congress passed the Administrative Office Act of 1939,¹⁴ creating the Administrative Office of the United States Courts and giving the Judicial Conference the managerial support necessary for administering the affairs of the judiciary. The Administrative Office now functions with a permanent staff of approximately 450, all based in Washington, D.C.¹⁵ Probably more important than any provision in the legislation creating the Administrative Office was the requirement that the Director of the Administrative Office "under the supervision of the conference of senior circuit judges, shall

¹³ The original creation was by Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838. In 1948, the name was changed in a general codification of federal judicial provisions; see Act of June 25, 1948, ch. 15, § 331, 62 Stat. 902. Statutory authority for the judicial conference is now found at 28 U.S.C. § 331 (1976).

¹⁴ Ch. 501, 53 Stat. 1223 (current version at 28 U.S.C. §§ 601-611(1976)).

¹⁵ For a brief discussion of the Administrative Office, see GENERAL SERVICES ADMINISTRATION, U.S. GOVERNMENT ORGANIZATION MANUAL 1978/79 86-87.

prepare and submit annually . . . estimates of the expenditures and appropriations necessary for the maintenance and operation of the United States courts . . . , and such supplemental and deficiency estimates as may be required from time to time. . . ."¹⁶ The budget had to have the Judicial Conference's approval and then, it was to be submitted to the Bureau of the Budget, now the Office of Management and Budget, to be "included in the Budget of the United States without revision."¹⁷ These provisions remain unchanged in their mandate.¹⁸

II. PREPARING THE BUDGET FOR THE FEDERAL JUDICIARY

Currently the work of preparing the budget for the federal judiciary commences in the Administrative Office of the United States Courts about 18 months prior to the start of the fiscal year for which the funds are to be allocated. Information on the courts' budgetary needs based upon current and projected workloads is accumulated, and then is submitted by the Director of the Administrative Office to the Judicial Conference's Committee on the Budget. The Committee, composed of federal district and appellate judges, is chaired by the Honorable Robert E. Maxwell, Chief Judge of the Northern District of West Virginia. This committee studies these proposals and puts the total budget in final form, prior to its submission for approval by the Judicial Conference.

This arrangement permits the various constituent units of the federal judiciary to debate and discuss among themselves what needs should be addressed in the budget request. One would not expect that all elements of the judiciary would have exactly the same view of how the federal judicial budget priorities should be ranked. However, this unitary budgeting system allows those various elements to debate and discuss overall judicial budget policy in a professional fashion. It stands in contrast to state systems in which judges throughout the state must convince separate funding sources on the local and state levels of their needs. As Professor Hazard and his colleagues observe, under unitary budgeting, the judges must assert their needs "by influencing the court administrator, chief justice, or planning committee of his fellow judges. This, in turn, implies a change in the types of persuasion that will

¹⁶ Administrative Office Act of 1939, ch. 501, § 305, 53 Stat. 1223.

¹⁷ *Id.*

¹⁸ See current version at 28 U.S.C. § 604 (1976).

prove influential, with greater weight given to professional and administratively rational considerations."¹⁹

Once the budget requests are approved by the Judicial Conference, they are then submitted to the Office of Management and Budget (OMB). This agency is charged with the responsibility of preparing the national budget, which is submitted by the President to the Congress in January of each year, to cover government operations during the fiscal year beginning the following October. Under the Federal Budget and Accounting Act of 1921,²⁰ as amended, the OMB has the authority to review requests submitted by executive agencies of government to determine whether the requests for funds are in accord with the overall national program of the President. In this regard the OMB performs the essential function of control over budget requests and has the authority to modify or reduce requests of individual agencies before submission to the Congress.²¹ Excepted from the OMB's power to modify are requests from the federal judiciary and from the Congress itself, although the agency does have the authority to comment on these requests.²² As mentioned above, this author cannot recall that the OMB has ever exercised its right under the law to comment on the budget of the federal judiciary.

III. THE WORK OF THE JUDICIAL APPROPRIATION SUBCOMMITTEES

After the annual budget is submitted by the President to the Congress in January of each year, congressional review of the budget begins. Under the present organization of Congress, the Appropriations Committee of the House of Representatives and the Appropriations Committee of the Senate are responsible for considering budget requests and for making recommendations to the two full houses of Congress. In turn, the Appropriations Committees have been broken down into subcommittees which examine various parts of the total national budget and make recommendations to the full Appropriations Committees and, ultimately, to the Congress. The subcommittee of the House Appropriations Committee which is charged with examining the budget of the federal judiciary is the Subcommittee on the Department of State,

¹⁹ Hazard, McNamara & Sentilles, *supra* note 2, at 1300.

²⁰ Ch. 18, 42 Stat. 20 (current version at 31 U.S.C. §§ 1-61, 71, 471, 581, 581a (1976)).

²¹ See 31 U.S.C. § 16 (1976).

²² 28 U.S.C. § 605 (1976).

Justice, and Commerce, The Judiciary and Related Agencies; the Senate subcommittee is also named the Subcommittee on the Department of State, Justice, and Commerce, The Judiciary and Related Agencies.

The judicial appropriation subcommittees hold hearings in which the Chairman of the Judicial Conference Committee on the Budget and the Director of the Administrative Office of the United States Courts are summoned to appear to give testimony and submit justification for the funds requested. Several Justices of the Supreme Court of the United States appear to explain the Court's request, and the Director of the Federal Judicial Center (the federal courts' research and development agency) appears on behalf of the Center.

Written justifications will have been submitted to Congress weeks in advance of the actual hearing, and they are reviewed by the members of the subcommittees and their professional staff. Because of this advance study and preparation, the hearings focus upon matters of concern to subcommittee members, which are predominately requests for funds needed to cope with increased workloads and new functions imposed upon the judiciary by law. Reviewing each of the separate appropriation items, and the written and oral justifications presented in support of them, is a substantial endeavor for each member of the subcommittees and the staff assistants.

Because the federal judicial budget is comparatively small, some may think it is passed over rather cursorily. It takes, for example, over four times as much money (over \$2 billion) to operate the Department of Justice as to operate the entire third branch of government. However, this author cautions against the cavalier assumption that legislators can meet their obligations if they review a budget of a half-billion dollars on a "once-over-lightly basis." The federal judicial budget proposal is a statement of the funding necessary to allow the federal judiciary to implement the constitutional promise of equal justice under law. It is prepared carefully and thoughtfully by the judiciary, and it deserves, and it receives, careful and thoughtful consideration by the Congress.

IV. A GENERAL BREAKDOWN OF THE FEDERAL JUDICIARY'S BUDGET

The budget for the federal judiciary totals approximately \$490

million for fiscal year 1979.²³ Over 90% of the appropriation, or more than \$450 million, is for the support and maintenance of the United States Courts of Appeals and United States District Courts. Approximately \$40 million of this appropriation goes to pay the salaries of judges and \$166 million for the salaries of the courts' support personnel including law clerks, secretaries, clerks and deputy clerks of court, probation officers and other clerical assistants. Fees of jurors amount to \$20 million annually; the salaries and expenses of public defenders, and fees paid to court-appointed counsel in criminal cases involving indigent defendants aggregate \$25 million. The miscellaneous expenses of the courts, including travel, telephone and other communications, stationery, forms, supplies and equipment total almost \$32 million. Salaries and expenses of United States Magistrates are \$19.4 million and the salaries and expenses of referees in bankruptcy total \$35 million. These figures illustrate that the bulk of the federal judicial appropriations is consumed by the courts that handle the greatest caseload.

Other costs round out the picture. The cost of operating the Supreme Court is over \$11 million, including \$1.5 million appropriated to the Architect of the Capitol for maintenance of the Court's building and grounds. The Court of Customs and Patent Appeals received an appropriation of about \$1 million; and the Court of Claims and the Customs Court are allocated approximately \$3 million and \$3.5 million respectively. The remaining 4% of the budget is consumed by the Administrative Office of the United States Courts, which received \$12.25 million, and the Federal Judicial Center, which was allocated \$8 million. Approximately \$107 million is allocated to pay rent for courtrooms, court facilities, furniture and furnishings.

V. CONCLUSION

The courts are properly regarded as the cornerstone of a society that prizes individual justice. Noble goals, however, are empty goals without attention to the development of sound and systematic administrative methods that are necessary to turn goals

²³ The judiciary's basic appropriations for the 1979 fiscal year (not including supplemental appropriations) are contained in the Department of State, Justice and Commerce, The Judiciary, and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-431, 92 Stat. 102, approved by the President on October 10, 1978.

into reality. The federal judicial budget process provides the opportunity for reasoned analysis, compromise, and negotiation, within the context of competing national priorities requiring the appropriation of public monies.

