



2012 Forum for State Appellate Court Judges

Justice Isn't Free: The Court Funding Crisis and Its Remedies

STRATEGIES FOR RESPONDING TO THE BUDGET CRISIS: FROM LEVERAGE TO LEADERSHIP

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Executive Summary

In section I, Professor Kelso describes the nature and extent of the court funding crisis, which has developed in several stages: initially in the mid-1990s, again in 2003-04, and most recently the continuing money crunch associated with the global recession. Although all government functions are threatened by budget shortfalls, the functions of the courts are particularly hard to adjust, as curtailing them can create public safety issues, trigger federal penalties, and actually reduce the state revenue that is generated by some court action. The current crisis has no certain end point, and indeed it may become a permanent feature of the judicial environment. Responding to it will require radical, strategic steps. These must include both radical improvements in court productivity at lower cost, and structural changes in the way courts obtain their funding.

Section II addresses the question of how more revenue can be brought into the courts, starting with the frank acknowledgement that courts typically do not enjoy a great deal of political leverage. Professor Kelso observes that courts have occasionally argued that they have (or should have) independent power to raise revenue, and that some courts have actually sued the executive or legislative branches of their state governments to try to force them to provide adequate funding. Even if these approaches are legitimate, however, they carry with them considerable political risk. A third possibility would involve raw trading of judicial decisions for political rewards, but Kelso rightly acknowledges that “[f]or a court to even take a single step down the dark alley of politically-motivated decision-making is to sacrifice its heart and soul.”

In section III, Professor Kelso considers a more legitimate route to the political leverage the courts need to sustain themselves: “strong leadership within the judicial branch that is able to

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communicate a non-partisan vision, mission and goals for a court system that serves the diverse needs of our population.” That advocacy must be addressed to the many other constituencies to whom the work of the courts is critical, and must be carried out in a unified manner. Judges must compose their internal differences and resolve to work together. They must then engage with justice system stakeholders for the long term, and must articulate a vision for the justice system that will induce the stakeholders to contribute some of their own political leverage to the courts’ cause. The vision Professor Kelso suggests is “service to the public with transparent performance accountability.” Courts need to show their commitment to service in ways that are visible to the public and are measurable. He points to metrics developed by the National Center for State Courts by which court performance can be judged.

Professor Kelso concludes that, in the current funding crisis, attempting to make the courts’ case by merely invoking age-old themes of access to justice and the protection of democratic government, while making common cause with the courts’ best repeat customers, will no longer work. The courts must provide better (and sometimes different) services than they have in the past, and they must do so at lower cost, with increased accountability. Judges must be the leaders in effecting this change.

I. Introduction

A. It’s a Crisis—No, It’s REALLY a Crisis

Over the last decade, it has become so commonplace in the public sector to refer to public budgets as being in a state of “crisis,” that many of us have become almost immune to the reality. Like the frog who doesn’t realize the temperature in the pan is slowly rising, every year’s “crisis” seems to become the new normal.

Nationally, the impact on court operations and services, and on access to justice, has been dramatic. Courthouses in many states have closed for one or two days a week. The number of judges and staff has been reduced notwithstanding rising population and caseloads. Even something as basic as office supplies have gone wanting. The Constitution Project issued a report in 2006 summarizing some of the most serious cutbacks in state court services:

Insufficient funding also led many courts to reduce the number and quality of important services that are in most states considered part of the judiciary’s responsibility and budget, and particularly services for vulnerable litigants and litigants with special needs. Examples of such programs include foreign-language and sign-language interpreters, mediators for Alternative Dispute Resolution programs, guardian *ad litem*s, counsel for indigent defendants, and other court-appointed specialists. Courts also had to limit or eliminate altogether important diversionary programs and specialized courts, such as domestic violence and drug treatment programs, and custody, drug, and other specialty courts, which many legislatures consider sensible public policy and have created to further important individual and societal benefits. Courts were also forced to raise case

filing or “user” fees and add surcharges, leaving many people literally unable to afford to seek justice.²

The budget reductions to the courts have come in several waves. One wave struck in the mid-1990s. A second wave struck in 2003 and 2004. A third wave—what appears to be more of a tsunami compared to the previous two—came with the global recession that began three years ago. The current recession, the deepest of any in over 50 years, is bringing its own set of cuts and challenges for courts around the country, but the cuts and the downturn somehow seem more devastating and permanent this time around.

We thought it was bad three years ago in California when the budget then enacted for Fiscal Year 2009-2010 imposed upon the judiciary substantial cuts affecting trial courts, appellate courts and the Judicial Council’s own operations and staff. When the total of permanent and one-time cuts were added up, along with certain increased costs that the courts had no choice but to pay, the Judicial Council found a deficit in the trial courts’ budget of around \$370 million (i.e., approximately 15% of the trial courts’ budget). Cutting within the judicial branch’s budget is difficult because around three-quarters of the trial court budget covers functions that cannot easily be reduced (e.g., expenditures for criminal cases cannot be cut because of public safety concerns and political pressures, expenditures for certain family law matters where federal penalties are triggered if case processing standards are not met cannot be cut because the federal penalties would exacerbate the budget gap, and expenditures for some high-volume courts that generate fees and fines cannot be cut because the fees and fines are much needed revenues).

Unfortunately, the unrelenting cuts keep on coming. Chief Justice Tani G. Cantil-Sakauye issued the following statement in response to the finalization of California’s 2012–2013 Budget Act:

Yet another austere state budget, affecting all Californians and all public sectors of our state, forces the judicial branch to absorb another \$544 million cut in the coming fiscal year—representing four straight years of cuts. I opposed these cuts because—when added to the judiciary’s cuts of prior years—I fear they will have a deleterious impact on the ability of the courts to provide timely due process to the people of California. However, the impact of these additional cuts may be mitigated somewhat by a number of changes now reflected in the final budget. The Governor and the Legislature faced hard choices in balancing the state budget, and I appreciate their working with us in these very difficult circumstances. I thank the judicial branch leaders and the lawyer groups who advocated tirelessly and collaboratively for judicial branch resources.³

Virtually every Chief Justice is now imploring his or her legislature for more resources to support access to the courts. The National Center for State Courts has a list of budget-related quotes from State of the Judiciary addresses in 2011 and 2012. The very first quote, from the Chief Justice of Alabama, is typical: “The Court System at all levels must be adequately funded.

² THE CONSTITUTION PROJECT, THE COST OF JUSTICE: BUDGETARY THREATS TO AMERICA’S COURTS 3 (2006), available at <http://www.constitutionproject.org/pdf/36.pdf>.

³ California Courts, Press Release, *Chief Justice Issues Statement Regarding the 2012-13 Budget Act*, available at <http://www.courts.ca.gov/18519.htm>.

Simply put, civilized society depends on the Court System, and the Court System depends upon you, the Legislative branch, to fund us so that we can carry out our constitutional duties.”⁴ This is about as direct a plea for budget support as you can imagine.

B. Likely Scope and Duration of Crisis

A sure sign of how broad and deep the most recent cuts are is that we have run out of words adequately to describe the carnage. Suffice it to say that this is unlike anything that anyone involved in judicial administration has ever seen. The word unprecedented probably says it all.

As for the duration of the crisis, that is open to a wider range of opinion. On the one hand, there are those who are confident that, although the recovery is slow, a recovery will happen, just as it always has. Revenues to the public sector will be restored and court budgets will recover. In other words, the current pain is plenty painful, to be sure, but it is still only temporary.

On the other hand, there are those—and I count myself in this group—who believe that we have entered a more permanent environment of little to no growth in the GDP and no substantial increases in public sector revenues as a percentage of GDP. Without a significant expansion in either the GDP or the percentage of GDP devoted to tax revenues, public sector budgets will continue to be tight, particularly because of the demographics of our population (i.e., the expansion in the portion of the population that is aged and not working) and what appear to be inevitable increases in health care costs. In other words, the current pain is more likely to be a permanent feature of the judicial environment.

Even if us pessimists turn out to be wrong in the long run (and I will be pleased if that happens), the short-run has lasted long enough, and appears likely to last long enough into the future, so that strategic action by state and federal courts is necessary to deal with the immediate problem. We can’t treat this as a minor bump in the road. This is an environmental threat that calls for radical, strategic steps.

We must focus on both costs and revenues. We must continue to reduce expenditures while still providing quality judicial services, and we must do our best to secure for the courts adequate resources to support those quality services. We need action to reduce costs and to support revenues.

C. Cutting Expenses While Improving Productivity: Radical Transformational Change

In their paper, Dean Broderick and Professor Friedman summarize many of the steps that courts can embrace as part of a radical transformation of court operations and processes. I agree with all of their suggestions. Courts need to rethink from the ground up the services that are offered to the public and the way in which those services are delivered. We have to move beyond the traditional model of every dispute being resolved by presentation to a jury in a courtroom.

⁴ National Center for State Courts, *State of the Judiciary Quotes Related to Budgetary Issues*, available at <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/State-of-the-Judiciary-Quotes-Related-to-Budgetary-Issues.aspx>.

Disputes come in all shapes and sizes, and there is no reason that courts can't provide dispute resolution services in corresponding shapes and sizes.

To begin, trial courts can establish specialized divisions for different types of disputes. Family courts are a good choice because so many of the litigants in family law disputes are unrepresented, and they require special assistance and treatment. Business courts on the model of New York and California are also a good idea because they concentrate those cases before judges who can be specially trained and equipped to handle the style of litigation that we see in business cases.

But courts should go beyond just having specialized tribunals. We need the flexibility to provide dispute resolution services that are radically different from what we have traditionally offered. Those services need to be accelerated and readily available to the public. Broderick and Friedman are right in warning that the Tweet-generation isn't going to wait years for cases to get resolved. We need to get serious about how to resolve cases at Internet speed, perhaps resolving disputes on the Internet itself. Injured plaintiffs shouldn't have to wait three to five years for judicial processes to grind slowly towards a remedy. Defendants shouldn't have to wait three to five years to determine whether that contingent liability is going to go away or turn into a judgment.

Technology certainly holds some promise towards accelerating court processes. However, the courts have generally been relatively slow to adopt even those information technology systems that rather obviously would help reduce costs and improve productivity. But technology solutions are just the beginning. Courts need to be open to totally new ways of deciding cases. Don't automate a process that no longer serves the public's needs. Change the process. That is how best to retain the public's support for court operations, and that public support can then be turned to support court budgets.

D. Radical Transformation on the Revenue Side

If the challenge of radical transformational change in court operations isn't hard enough for you, let's turn to the revenue side. It is possible to make structural changes to the way courts are financed which would significantly reduce the likelihood of recurring court budget crises. Here are a few of the possibilities, some of which have been adopted in a few states:

- Direct presentation of the courts' budget to the legislature, which bypasses the governor (who otherwise would trade court dollars for other programs), and puts the legislature in the position of having to cast difficult votes to reduce court funding;
- Enact a constitutional amendment that requires the legislature to provide adequate funding for court operations (a provision which could form the basis for a lawsuit to support court budgets);
- Enact a constitutional or statutory provision authorizing court judgments to reimburse the courts for otherwise unfunded mandates imposed by the legislature; and

- Enact a constitutional or statutory provision authorizing the courts to raise court fees without the approval of the governor or legislature (but be careful what you ask for here, because the governor and legislature may simply decide to reduce funding from general revenues and force the courts to raise court fees).

Each of these structural changes would make it easier for courts to control their own budget destiny. However, each of these changes would require the governor and legislature to cede control over a significant piece of the budget—not something that is likely to happen, particularly right now when budgets are stressed.

For the remainder of this paper, we shall turn away from structural changes to consider the revenue and budget problem from a more practical, political perspective. From this perspective, we want to understand why the courts, a co-equal branch of government, have become a regular target for budget cuts and whether there is anything the courts can do about that problem as a practical matter.

II. The Revenue Problem

Earlier this year, the governor of one state met with the chief justice of that state's supreme court. As they were talking about the difficult budgets the courts had suffered in recent years and the equally difficult budgets facing the courts in the near future, the governor made an accurate, sobering observation: "The problem the courts have is you don't have any leverage."

In the world of politics, power is everything, and there are really only two ways of amassing power. The first is to occupy a position in government that has power granted to it by a constitution or statute. If you don't occupy such a position (or work for someone who has such power), the second way of amassing and maintaining power is through the process of leverage. Leverage is the process of amplifying what little power or influence you may have by using the modern tools of politics: coalition building, grass roots organizing, communication, and, last but certainly not least, campaign contributions to those who have the power.

In some ideal world very far from this planet, it might be that simply asserting that you are a coordinate, co-equal branch of government would be enough for a governor and legislature to do the right thing. Leverage would not be important, and the courts would not need to think about independent powers to allocate funds to themselves, because the governor and legislature would be true constitutional partners and would reliably make a sufficient appropriation.

We do not live in that ideal world. Perhaps it is because the percentage of lawyers who now serve in legislatures has dropped in recent decades. Perhaps it is because our civic education has failed us. Perhaps it is because the growth of the modern administrative state—which includes the growth of administrative law judges who look very much like judicial branch judges—has so confused the special role of the independent judiciary that courts look to governors and legislators like just another bureaucratic entity.

Finally, and perhaps closest to the truth, when budgets get tight, and they have been cyclically tight around the country for a decade or so, every dollar spent on courts is a dollar that

has been taken away from schools, health programs, welfare programs, and public safety. In this environment, being a co-equal branch of government can take you only so far.

So what is a court to do?

A. Courts Do Not Have Independent Power to Raise Revenues (or Do They?)

First, let's briefly reconsider the idea that courts do not have independent power to raise revenues. Courts could avoid the "we don't have leverage" problem altogether if courts possessed the power to raise revenues for themselves.

The traditional wisdom is that, absent an express constitutional provision, courts have no authority to order appropriations, even appropriations to keep the courts' own doors open. This traditional wisdom finds its grounding in fundamental separation of powers principles and is mirrored in court doctrines dealing with sovereign immunity.

Notwithstanding these objections, some scholars and judges believe the judiciary should assert its "inherent power" to compel funding from the political branches. Indeed, courts claiming such an inherent power have even pursued litigation against legislative and executive branches to mandate greater appropriations.⁵ Such suits are rare and often involve individual courts and political bodies at the county or city level. Nevertheless, the inherent power argument places the judiciary in direct conflict with the other two branches, raising profound questions of constitutional authority.

When all is said and done, litigation does not appear to be a particularly hopeful way of securing appropriations, and it certainly carries high risks politically. This does not mean that the litigation option should be cast entirely to the side. When it comes to finding leverage to support court budgets, it may help to have in the background the possibility of a "nuclear litigation option," something that a willing governor and legislature might help you avoid by bumping up the appropriation just a bit—just enough to avoid judicial Armageddon.

B. Courts, By Themselves, Do Not Have Much Political Leverage

When you put aside the litigation option, the governor who said, "You don't have much leverage," seems to have hit the nail on the head. After all, what do the courts have that could possibly be used as leverage against a governor or a legislature?

⁵ Most notably, in 1991 the Chief Justice of New York sued the state's then-governor Mario Cuomo, asserting that the judiciary had the inherent power to compel funding for a co-equal branch of government. The case was settled out of court. *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany Cty. filed Sept. 27, 1991). See also *Commonwealth ex rel. Carroll v. Tate et al.*, 442 Pa. 45 (1981); *Lavelle v. Koch*, 532 Pa. 631 (1992); Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994); Walter E. Swearingen, *Note, Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?* 14 PACE L. REV. 153 (1994); *Note, The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983); Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?* 92 KY. L.J. 979 (2003-2004) [hereinafter Buenger].

The courts' primary functions are to decide cases and interpret the law. Many cases involve purely private disputes. But a large portion of the docket involves cases where the government is a party and where governmental and political interests are at stake. The most significant cases involve constitutional interpretation and the power of judicial review.

Can there be a legitimate connection between judicial decisions and the politics of gubernatorial or legislative support for the judicial branch?

It is risky even to pose this question, so strong are the policies of judicial independence, separation of powers and the impartiality of the courts. Courts are supposed to decide cases according to the law, not in order to curry favor with another branch of government or the public. For a court to even take a single step down the dark alley of politically-motivated decision-making is to sacrifice its heart and soul. Even presidents, governors and legislators expose themselves to substantial criticism if statements about a court can reasonably be interpreted as threats of retaliation for a past decision or threats of retribution for a future decision. Notwithstanding such criticism, however, the stakes are high in politics, and those high stakes every now and then drive presidents, governors and legislators to cross the line. President Obama's statements several months ago about the constitutionality of the Affordable Care Act are just the most recent example of this type of inter-branch tension.

That, at least, is the conventional wisdom. Yet there are a handful of examples where one or more members of the United States Supreme Court may have seriously contemplated the purely political consequences of an important constitutional question as a factor in rendering a decision. The great Chief Justice John Marshall, for example, appears to have been ready to give up the power of judicial review if so doing would have ended Congress's efforts to impeach Justice Chase. During the New Deal, the famous "switch in time," may have avoided President Roosevelt's court-packing plan. And just this year, there is speculation that Chief Justice John Roberts may have had political and public perception considerations in mind when casting his vote in favor of the constitutionality of the Affordable Care Act.

There are not many examples of courts engaging in this type of *quid pro quo* decision-making, and for good reason. It is a very dangerous game that threatens to undermine the very integrity of court decision processes and the notion of an independent judiciary. So let us put aside connecting decisions in individual cases to court budgets. That territory is just too dangerous to navigate.

Needless to say, courts cannot engage in what is probably the most effective form of lobbying: making campaign contributions.

That leaves us with communications-oriented lobbying (i.e., judges meetings with governors and legislators) on matters of court budgets and judicial administration. Lobbying of this sort is generally well-accepted, so long as the courts keep the subject matter to court budgets and judicial administration. But our recent experience is that this type of lobbying has not prevented devastating cuts to the courts. There is always room for more communications, for a better-honed message, and for a state chief justice and other judicial leaders to reach out to the public through editorial boards and such.

For the remainder of this article, however, I want to propose a new approach that legitimately engages other key political groups which, unlike the judiciary, can engage in the full range of lobbying activities. These other groups, if appropriately engaged by judicial leaders, can function as independent expenditure organizations, directing a small part of their lobbying resources in support of the courts, without directly entangling the courts with the other branches of government.

III. Leverage from Leadership

Since courts do not have much independent leverage, they must look to other players in the political process who do have political leverage. Fortunately, the work of the courts is so important to so many important constituencies, that there is no shortage of justice system stakeholders each of which potentially could deliver a small part of their leverage for the benefit of the courts.

How can the courts most effectively engage with these other justice system stakeholders to generate long-term support for a strong, independent, properly resourced judiciary?

The answer is, by exercising strong leadership within the judicial branch that is able to communicate a non-partisan vision, mission and goals for a court system that serves the diverse needs of our population.

A. Get Your Own House in Order

“Get your own house in order.” “Make sure your ducks are in a row.” Or more famously, “A house divided against itself cannot stand.”

These all express the hard reality that an organization which is struggling with internal factions and divisions is in no position to project or leverage anything positive externally. Every attempt to project or leverage ends up reminding others of the factions and divisions. The only thing that can be projected in these circumstances is organizational chaos and political weakness.

Of the three branches of government, governors and presidents have the easiest time in lining up their ducks since the ducks serve at the pleasure of the governor or president. A duck that gets out of line doesn't stay around for too long. Within the legislative branch, there are arguably more independent players, but party discipline has historically been a powerful organizing principle. Within the judicial branch, although the courts are structured hierarchically for the purpose of deciding cases, when it comes to judicial administration, there can be as many differing views as there are judges. The Chief Justice may be the titular leader of the branch, but every independently elected judge believes that his or her decision is as good as any other judge's decision. That is part and parcel of what it means to be independent.

This can create a real obstacle to any attempt to leverage court budgets through leadership. If there are serious divisions among judges within the judicial family, at every step of the way, judicial leadership will be dogged by questions reflecting the internal disagreement and

dissension. And these ongoing questions will beg legislators to ask why they should provide additional funding to a judicial branch that isn't sure what it wants to do and what direction it intends to move.

These are not just abstract, academic musings. In the last two years in California, we have witnessed a virtual meltdown within the judicial branch as a group of dissident judges self-organized with the precise mission of fighting initiatives and decisions made by former Chief Justice Ron George and former Administrative Director of the Courts William Vickrey, both of whom have been widely recognized around the country as some of the nation's most progressive court leaders. The group of dissident judges rallied support around several difficult decisions that the Chief, Mr. Vickrey and the Judicial Council made during the most recent set of budget cuts. Those decisions included:

- Instituting furlough days within the judicial branch (which have existed in one form or another in the executive branch for three years running);
- Closing courts one day a month;
- Continuing to spend money developing and preparing to implement a statewide computer case management system;
- Planning and beginning to implement a \$6 billion capital improvement campaign for trial courts; and,
- Continuing to grow and implement other statewide programs and initiatives at a time when trial courts individually were suffering staff reductions and other cuts.

When Chief Justice George announced his retirement several years ago, it triggered a feeding frenzy of the dissident judges, and through crafty politicking, much of which involved coordinating with one of the unions representing trial court employees, successfully unleashed a torrent of mostly unjustified criticism at the Administrative Office of the Courts, which is the bureaucracy that managed the statewide initiatives approved by the Judicial Council.

The dissidents of course say they are just bringing mismanagement to light, and if the Chief Justice and the Judicial Council would simply follow *their advice*, all would be well. And until that happens, the dissidents promise to stay on the scene, vocally opposing whatever the Chief Justice and Council decide to do.

The powerful soliloquy by defense counsel near the end of *The Caine Mutiny* comes to mind. At the end of the day, there can be only one captain on a ship, and your job as an executive on the ship is to support your captain, because if you don't, your captain is nothing and *you* are nothing. It's one thing to air disagreements within the judicial family. That is healthy and a necessary part of getting the house in order. And the Chief Justice and other judicial leaders need to listen to dissenting views and genuinely consider the merits of those dissenting views. It's quite another thing to take those disagreements out into public after the Chief Justice and other judicial leaders have rendered a judgment. That is destructive to the health of the branch.

We all understand that the strongest judicial opinions are unanimous. The 5-4 decisions from the United States Supreme Court or, even worse, those frustrating 4-1-4 decisions, are weak. The same thing happens in the field of judicial administration, only the effect is amplified. A Chief Justice ultimately needs the full support of judges within the branch in order to lead successfully. Dissidents need to make their case within the judicial family, but then fall in line when final decisions are made.

B. Engage Long-Term with Key Justice System Stakeholders

When the judicial house is in order, the next step is to engage with key justice system stakeholders. These are the organizations that represent users of the court system. There are literally scores of these entities. It is not enough to embrace the organized bar, the specialty bar associations, the plaintiff and defense bar, and prosecutors and defense counsel. From a political perspective, these are the “usual suspects,” and every court has already engaged with these groups. The *real* users of the court system—as opposed to those who regularly work within, and make their living from, the court system—are the hundreds of millions of people and business who, every year, find themselves in court and find their lives and their businesses significantly affected by what the courts do. This much larger group of users needs to be the target for engagement, and there are literally scores of organized lobbying groups that represent different segments of this large group of users.

The engagement here has to be for the long-term. Short-term engagements carry significant risks of turning into what may easily appear to be quid pro quo trade-offs. “You help me with the court budget, and I’ll see what I can do for you on that piece of legislation working through the legislature.” The basis for the engagement has to be something other than short term gain, and it really should focus on the fundamental importance of an independent judiciary to each and every one of us. All of us at one time or another need a place to go where we can feel confident the game has not been fixed in advance. Where the scales truly are balanced, and where justice truly is unbiased (blind in the sense that all comers are treated equally and fairly). Everyone has a stake in an impartial and independent judiciary.

C. Clearly Articulate a Justice System Vision

Stakeholders will follow only if the courts’ leaders are able clearly to articulate a compelling vision for the judicial system. This has to be a vision that convincingly answers the question, “why should I spend more money to support the judiciary at the expense of other, very important public priorities?”

Judicial system visions have generally consisted of two major components: First, all court leaders include within their vision the foundational elements of independence, impartiality and access. The “we are a separate and co-equal branch of government” theme is usually tied to these three foundational elements. Second, many state courts over the last two decades have embraced one or more elements of the judicial reform program set forth by Roscoe Pound over a century ago, emphasizing unification, flexibility, conservation of judicial power and responsibility. These principles have supported, among other things, moves toward state-level funding of trial courts,

unification of local trial courts, and greater concentration of power and responsibility at the state level (which have often been resisted by local court leaders leading in a few instances, as in California, to persistent dissent). Many states have also embraced technology reforms, although state courts have tended to be late to the party when it comes to using information technology systems to transform operations and improve public access.

In my view, these two components have pretty well played themselves out as a reliable basis for maintaining or securing additional resources for the judicial branch. I am not suggesting that we entirely drop these themes, particularly the foundational elements of independence, impartiality and access. But I am suggesting that a vision that is limited to these two components no longer gives a convincing answer to the “Why should I give you more money?” or “Why shouldn’t you share in the cuts the same as everyone else?” questions.

In short, we need some new themes.

D. A Suggested Vision: Embrace Service to the Public with Transparent Performance Accountability

We all know that there are now large areas of law where the bar and the bench are no longer providing good service to the public. The middle-class no longer can afford ordinary legal services. As a result, among other things, family law courts are overwhelmed with unrepresented litigants. But it is not just family courts that suffer. Small businesses can ill afford any type of trip to the courthouse, whether as plaintiff or defendant. And if small businesses become too frequent a target as defendants in certain classes of cases, legislatures sometimes put restrictions on plaintiffs to prevent what are allegedly baseless lawsuits. Most significant of all, everyone suffers when courts are so starved for resources that civil litigation slows to a crawl. Justice delayed is justice denied.

These are the type of issues—lack of representation, expense of litigation and justice delayed—that should resonate with the public and with a large number of organized lobbying groups. These are the problems that our judicial leaders should commit themselves to correcting under the general umbrella theme of “service to the public” or “customer service.” I don’t mean “service with a smile” type of customer service. I mean genuinely improving the performance of the courts on matters that are of genuine importance to its users. Wal-Mart is not successful because of smiles and store ambience. It is successful because you can get what you want at a very low price. That is what consumers, whose own budgets have taken a hit over the last twenty years, are looking for.

A second theme—which works well in connection with the customer service theme—is accountability for results through transparent performance measures. Today, no legislature can afford to devote more resources to an activity (or spare an activity from further cuts) unless it can assure itself that the resources are going to be well managed, well spent and that the promised results will actually occur. The best way of making and keeping this promise is by adopting easily measurable performance criteria and routinely reporting on the progress in meeting previously promised performance goals. The courts need to embrace the risks associated with public accountability based on performance measures and goals.

Performance review and public feedback mechanisms offer one example of an alternative approach to judicial accountability. Turning the focus to long-term solutions and issues, and away from the immediate, short-term budget crisis, will be possible only if the judiciary can clearly demonstrate that it holds itself publicly accountable for disciplined, responsible short-term management of branch operations. Courts should fully embrace public performance measures that identify both the strengths and weaknesses of current operations and that can be used to make sensible budget allocation decisions. The judicial branch needs to make a commitment to transparent governance and fiscal credibility. This is how public trust and confidence can be developed, and it is that trust and confidence, more than any short-term lobbying tactic or advantage, that will serve the judicial branch well in attracting support from stakeholder groups and in dealing with the sister branches of government.

In 1997 the National Center for State Courts (NCSC) published the Trial Court Performance Standards (TCPS). These standards measure court performance along five dimensions: (1) access to justice, (2) expedition and timeliness, (3) equality, fairness, and integrity, (4) independence and accountability, and (5) public trust and confidence. These standards provided the foundation for the development of CourTools, a set of ten trial court performance metrics designed to help state courts demonstrate “effective stewardship of public resources.”⁶ Performance review measures like CourTools can “demonstrate public accountability and sound management of the judiciary as a public institution.”⁷ At the very least, performance review systems merit further consideration by court leaders and policymakers to help them begin to think anew about how the judiciary can attract key political support from its justice stakeholder groups while also being held accountable to, but remaining independent of, the other two branches.

E. Secure Stakeholder Support for Strategic Vision and Branch Plans

Securing stakeholder agreement on the justice system vision and associated strategic action items—whether service to the public and accountability through performance measurement, or some other vision developed by judicial leaders—should not be a rushed process. All parties will need time to work through the implications of the courts’ vision and goals. Remember, this is not a short-term approach, so plan on a substantial comment period and time for the courts to digest all comments received and to make appropriate revisions in response to the comments. And then recirculate for another round of comments.

It is during this iterative process of securing support for the branch’s vision and plans that court leaders can communicate to stakeholders the courts’ need for the stakeholders’ support when it comes time for the governor and legislature to approve the budget for the courts. Not all

⁶ National Center for State Courts, *CourTools: Giving Courts the Tools to Measure Success*, available at http://www.ncsconline.org/d_research/CourTools/Images/CourToolsOnlineBrochure.pdf.

⁷ Buenger, *supra*. See also Rick S. Rager, *Courts and the Public Interest: A Call for Sustainable Resources*, Institute for Court Management, Court Executive Development Program: Phase III Project (May 2002), available at http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2002/courts_and_the_public_interest.ashx; John K. Hudzik and Alan Carlson, *State Funding of Trial Courts: What We Know Now*, 43 JUDGES’ JOURNAL 11 (Summer 2004); Daniel J. Hall, Robert W. Tobin, and Kenneth G. Pankey, Jr., *Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis*, 43 JUDGES’ JOURNAL 5, (Summer 2004), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=203>.

stakeholders will be equally enthusiastic about providing that support, but securing that support is the key to leveraging the courts' leadership through its various stakeholder groups. The stakeholder groups are the ones that can actually lobby the governor and legislature using the full set of lobbying tools at their disposal, and they are the ones that actually do possess leverage. If each stakeholder can be convinced to use just a little bit of their leverage, the combined result can be a potent lobbying force.

IV. Conclusion

The traditional themes and the usual suspects are no longer delivering stable, adequate court budgets. As stewards of the judicial system, we know that the most recent round of budget cuts are directly and substantially reducing access to justice, which inevitably will translate into decreased public confidence in the courts, in government and in respect for the rule of law. Yet the cuts keep on coming.

Now is the time for judicial leaders and key stakeholders to reinvent our judicial system for current conditions in society. We must embrace reforms that deliver better and sometimes different services at reduced cost. We must embrace a new model of accountability for performance that will convince court users to provide much needed political support for court budgets. We need a justice system renaissance.

Above all, now more than ever, we need judges to assert themselves as leaders in defense of a justice system that has been the envy of the world and that, creatively and courageously led, will not only weather the current budget storms, but can emerge on the other side stronger than ever, and with a clearer vision of service to the people under our constitutional system of government.