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THE JUDICIARY'S INHERENT POWER TO COMPEL FUNDING: A TALE OF HEATING STOVES AND AIR CONDITIONERS

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I. INTRODUCTION

In the winter of 1902, the Nevada Supreme Court was perhaps more aware of the cold than usual. When the legislative board responsible for appropriations refused the court's request for chairs and carpet, the court thought about the possibility that the legislature might one day also refuse to pay for heat. And then what would the court do? With this in mind, the court went ahead and purchased the chairs and carpet and then ordered the board to pay the bill.[1] In doing so, the court stated:

> If this board has the absolute control, as claimed, then, by refusing to furnish the courtroom with a stove or other means of heating, could it obstruct the court in its jurisdiction during a greater part of each year.

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1. State *ex rel.* Kitzmeyer v. Davis, 68 P. 689, 690 (Nev. 1902).

> By refusing tables it could prevent the court making records required by law. To assume that the legislature did confer any such absolute power upon the board is to assume that the legislature possesses unlimited power of legislation in that matter, — that it could by hostile legislation destroy the judicial department of the government of this state.[2]

II. THE PROBLEM OF COURT FUNDING

What is a court to do when the legislature[3] refuses its budget request? Is the court to simply roll over or can it somehow react? What if the legislature pulls the purse strings so tightly that it effectively chokes the court? How can the judicial branch of government assure itself of the resources necessary for its own efficient functioning?

In Texas and throughout the nation, state courts have wrestled with these questions. When they do, the ensuing disputes involve more than a conflict between two named parties. They force a confrontation between the very branches of government themselves: the judiciary vs. the legislature.

Although the problem of court funding has been simmering in Texas for years, it has become a boiling kettle in recent times. Within the past year alone, Texas judges have resigned because of "inadequate wages."[4] Richard N. Countiss, formerly a justice on the Seventh Court of Appeals, stated his position in fairly blunt terms: "I am tired of being the lowest-paid lawyer in the courtroom."[5] Of the nine justices on the Texas Supreme Court, three resigned in 1988 and one publicly weighed the possibility.[6]

Texas is not alone with this problem. The American Bar Associa-

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2. *Id.* at 690-91.

3. Throughout this article, the word "legislature" is used to refer to both state and local legislative bodies.

4. *See*, Resignation letter to Governor Bill Clements from Rudolph S. "Rudy" Esquivel, Associate Justice, Fourth Court of Appeals (June 16, 1988).

5. *See Texas Supreme Court Judges to Make Their Case on Low Pay*, Dallas Times Herald, June 26, 1988, at B7.

6. Chief Justice John Hill resigned effective January, 1988 and Justice Robert Campbell quit in February, 1988. Justice James Wallace left the court in September, 1988, stating that his son, an attorney with five years experience, was making more money than he. During the summer of 1988, Justice Franklin Spears contemplated resigning and cited money as the main reason. Hight, *Fiscal Attraction*, Austin-American Statesman, June 29, 1988, at B1. In March of 1989, Justice Spears announced that he would not seek re-election in 1990, citing a desire to earn more money as a key reason. San Antonio Express-News, Mar. 14, 1989, at 6-A, col. 6.

tion recently conducted a survey of judges across the nation and concluded that inadequate judicial compensation was a major problem in attracting and retaining qualified judges.[7] Nationwide, the gap between public and private compensation has widened during the past two decades.[8]

Not only are the salary levels for judges themselves a problem, but the salary levels of court employees are also a problem. Indeed, much of the case law in this area involves disputes over employees' salaries because judges have sometimes been willing to go to the mat for their employees even when they would not do so for themselves. In order to work efficiently, judges need good support staff. Secretaries, court reporters, clerks, staff attorneys, and janitors are *all* important people in the process of administering justice. Courts do sensitive, serious work and they must be able to attract and retain dependable, competent employees.

Basic equipment is a problem. The Texas Supreme Court now works with word-processing equipment that is completely outdated. When a machine breaks down, the repair person must go to a word processor "junkyard" to scavenge parts because replacements are no longer manufactured. Meanwhile, the machine remains inoperable for days at a time. The possibility of updated software suitable for the court's equipment is mere fantasy.

This equipment problem at the supreme court is merely one example. Trial courts statewide are in need of state-of-the-art computer systems to track and manage complex litigation.[9] Even simple things that many private practitioners take for granted are often not provided for judges. Hand-size recorders, file cabinets, and bookshelves are all hard to come by at times. Some courtrooms across the state

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7. Raven, *Maintaining a Quality Judiciary: The Need for Adequate Compensation*, 74 A.B.A. J. 8 (1988). Texas ranks fifteenth among the states in salaries paid to judges on the highest courts. Hight, *Fiscal Attraction*, Austin-American Statesman, June 29, 1988, at B1. This ranking may not look so bad until one considers that even New York, which is at the top of the pay scale, has salaries which are considered inadequate. Witt, *Are Our Governments Paying What It Takes To Keep the Best and the Brightest?*, GOVERNING, Dec. 1988, at 30, 32. A New York commission set up to study the salary problem recently recommended immediate raises merely to restore 1968 purchasing power and declared, "[i]t is unconscionable to demand such sacrifice of our public servants and their families." Witt, *How Much Personal Sacrifice is Enough?*, GOVERNING, Dec. 1988, at 39.

8. Witt, *How Much Personal Sacrifice is Enough?*, GOVERNING, Dec. 1988, at 39.

9. Hill, *State of the Judiciary Message*, 48 TEX. B.J. 344, 346 (1985).

remain in permanent states of disrepair. Many judges would be happy with nothing more than a roof without leaks.

In short, judges do not work in a vacuum. The efficient functioning of the courts depends to a large degree on the level of funding provided by the legislature.[10] Secretaries, courtrooms, tables, desks, chairs, books, paper, and electricity all cost money. Without these basic resources and equipment, judges would not get much work done. The judicial process would simply grind to a halt.

III. INHERENT POWER TO COMPEL FUNDING

In order to address problems of funding, courts have relied on the doctrine of inherent powers.[11] Almost every state that has considered the question has affirmed the proposition that a court has the inherent power to compel the expenditure of those public funds which are reasonably necessary for the court to function.[12] Thus, the doctrine is premised on self-preservation.[13]

A. *Constitutional Foundation for the Doctrine*

The judiciary is not merely an agency of the legislature,[14] but is instead a constitutionally established separate, independent, and coequal[15] branch of government.[16] As such, its preservation as an in-

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10. Judicial appropriations amount to approximately one-third of one percent of the state's budget. Local governments supplement funding for the local courts. *See* 59 TEX. JUD. COUNCIL ANNUAL REPORT 13, 57 (1987); *see also* Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 524 (1988)(discussing "abysmal" funding for Texas court system).

11. This doctrine also provides the basis for such things as the court's power to punish for contempt, *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976); the court's power to compel the presence of witnesses, *Burttschell v. Sheppard*, 123 Tex. 113, 116, 69 S.W.2d 402, 403 (1934); the court's power to control its own judgments, *Cohen v. Moore*, 101 Tex. 45, 46, 104 S.W. 1053, 1054 (1907); and the court's power to correct its own records, *Coleman v. Zapp*, 105 Tex. 491, 494, 151 S.W. 1040, 1041 (1912); *see also* Eichelberger v. Eichelberger, 582 S.W.2d 395, 398-99 n.1 (Tex. 1979)(discussing many other applications of inherent powers doctrine).

12. Only the state of Alabama has expressly rejected the doctrine of inherent powers. Morgan County Comm'n v. Powell, 293 So. 2d 830, 837 (Ala. 1974).

13. The power to punish for contempt has been described as the most important use of inherent powers and the self-preservation root of inherent powers can be understood most easily in this context. Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 976 n.5 (1972). In order to preserve its own power and effectiveness, a court must be able to punish for contempt of its orders. Likewise, a court must be able to preserve its own continued functioning by compelling the necessary funding.

14. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986).

15. The fact that the judiciary is often referred to as the "third" branch of government may imply to some that it is third in importance. This implication has no constitutional basis.

dependent force is critical to our whole tripartite structure of government.[17] By the very fact of its creation as a separate branch of government,[18] the judiciary *must* have the power to assure its own continued functioning.[19] As the Pennsylvania Supreme Court explained:

> Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches — the Executive, the Legislative and the Judicial.[20]

Another court explained the necessity for the doctrine more succinctly by stating that the power to control what the court spends "ultimately becomes the power to control what the court does."[21] Thus, the courts cannot cede to the legislature total control over court funding because to do so would effectively give to the legislature the power to destroy the judicial branch of government.[22]

The denomination of the judiciary as the "third" branch undoubtedly derives from its establishment in article III of the United States Constitution while the legislative and executive branches are established in articles I and II. *See* Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 80-81 & n.3 (Tex. 1988)(Spears, J., concurring).

16. The Texas judiciary derives its power from article V, section 1 of the Texas Constitution. TEX. CONST. art. V, § 1 (1891, amended 1980).

17. One judge has traced the history of the inherent powers doctrine all the way back to the Magna Charta with its first attempts to restrain royal prerogative and secure the independence of the judiciary. Morgan County Comm'n v. Powell, 293 So. 2d 830, 851 (Ala. 1974)(Heflin, C.J., dissenting).

18. The Texas Constitution differs from that of the United States and of many other states in that it contains an *express* separation of powers mandate. TEX. CONST. art. II, § 1. Yet even in those constitutions which lack an express provision, the separation of powers doctrine is fundamentally implied by the very structure of the documents.

19. Apart from the constitutional creation of the judiciary and the separation of powers doctrine, courts have sometimes found more explicit constitutional authority for their power to compel funding. *See* Carlson v. State *ex rel.* Stodola, 220 N.E.2d 532, 536 (Ind. 1966)(state constitutional provision that "[j]ustice shall be administered freely, and without purchase; completely and without denial; speedily and without delay" held to invalidate statute giving local council veto over judicial budget).

20. Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 199 (Pa.), *cert. denied*, 402 U.S. 974 (1971).

21. State *ex rel.* Arbaugh v. Richland County Bd. of Comm'rs, 470 N.E.2d 880, 881 (Ohio 1984).

22. Some might argue that the judiciary steps into the legislative arena when it concerns itself with funding. However, for the judiciary to intrude to the extent of compelling its own funding does little to actually weaken the legislative branch itself and is a slight intrusion

Courts must frequently rule on the legitimacy of legislative acts. In doing so, the courts perform a constitutional function; they serve as a check on the possible abuse of power by another governmental branch. If courts are to provide that check, they cannot be the supplicant of or subservient to any other branch of government, but instead must ferociously shield their own independence. For this reason, almost all courts have recognized the doctrine of inherent powers, for how independent could a court possibly be with the fear of financial strangulation hanging over it?[23]

B. *Nature of the Disputes*

Cases which bring to life this dormant power of the judiciary to compel funding often arise from disputes over relatively minor expenditures; yet the underlying issue of inherent powers is not at all trivial. In Massachusetts, a fight over nothing more than an $80 tape recorder and $6 worth of tapes led to a constitutional confrontation.[24]

When there was no court reporter available, a Massachusetts trial judge was suddenly faced with a problem. He talked with the parties scheduled to appear before him and obtained their consent to use a tape recorder. Across the street from the courthouse was an appliance store called O'Coin's. The judge interrupted the hearing just long enough to send someone to the store for a tape recorder and three tapes. The total price was $86. The judge forwarded the appliance store's invoice to the county treasurer and attached a letter certifying that the tape recorder was a necessary expense of the court. The county treasurer refused to pay the bill, and O'Coin's itself sued for relief.

Before the Massachusetts Supreme Judicial Court, the county treasurer and commissioners argued that the trial judge had absolutely no authority to contractually bind the county for the payment

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compared to the possibility that the legislature could otherwise destroy the whole judicial branch.

23.[M]embers of a legislative body or council . . . may desire from time to time to pull the purse strings too tight upon the operations of some court which falls within its disfavor. The courts frequently have to rule upon the acts or refusal to act of those controlling the purse strings in rendering justice. Threats of retaliation or fears of strangulation should not hang over such judicial functions.

Carlson v. State *ex rel.* Stodola, 220 N.E.2d 532, 536 (Ind. 1966).

24. O'Coin's, Inc. v. Treasurer of County of Worcester, 287 N.E.2d 608, 610-11 (Mass. 1972).

of goods or services; they insisted that the county alone had the power. However, the Massachusetts high court completely rejected the county's contentions and held: "[A]mong the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel."[25] The court explained its position by stating that it would simply be "illogical" to interpret the constitution as creating a judicial department while at the same time denying to judges the power to determine the basic needs of their courts.[26] The court expressly noted that it did not matter whether or not there was any prior appropriation for the expenditure.[27] It was enough that the expense was necessary; that fact alone conferred on the judge the power to arrange for the purchase and order payment. "Such authority," the court stated, "*must* be vested in the judiciary if the courts are to provide justice, and the people are to be secure in their rights, under the Constitution."[28]

In discussing the types of things appropriate for a court's exercise of inherent powers, the Indiana Supreme Court emphasized in the *Fifer* case that courts have the "right to quarters appropriate to the office and personnel adequate to perform the functions thereof."[29] Twenty-one years later, the City Court of Gary, Indiana, apparently got fed up with its "quarters" and forced the city to face the music. By writ of mandamus, it ordered the city to provide funding to repair such things as holes in the walls of the women's restroom, inoperative urinals in the men's restroom, broken door locks, a broken public address system, and torn and ragged tiles, upholstery and drapes.[30]

Another court invoked its inherent powers to order the installation of more modern phone service in the courthouse,[31] and another ordered the purchase of chairs and carpet.[32] In Wisconsin, it was a lack

25. *Id.* at 612.

26. *Id.*

27. *Id.*

28. *Id.* (emphasis added).

29. Noble County Council v. State *ex rel.* Fifer, 125 N.E.2d 709, 714 (Ind. 1955).

30. Gary City Court v. City of Gary, 489 N.E.2d 511, 513 (Ind. 1986). In affirming the lower court's funding order, the supreme court expressly noted that the city's revenues were low and that money was scarce. *Id.* Nevertheless, the court's needs could not be neglected. *Id.*

31. State v. Superior Court of Marion County, 344 N.E.2d 61, 65 (Ind. 1976).

32. State *ex rel.* Kitzmeyer v. Davis, 68 P. 689, 690 (Nev. 1902).

of air conditioning that led to a major confrontation.[33] One summer day, a trial judge simply directed the local appliance store to install a $250.00 window air conditioning unit in his courtroom.[34]

Many courts have taken the legislature to task on matters relating to court personnel. One of the earliest inherent powers cases involved the appointment of a janitor for the Wisconsin Supreme Court.[35] The janitor performed not only the usual janitorial duties but also assisted the judges in fetching and reshelving library books for them. When another state official attempted to remove the court's janitor from his job and appoint someone else to the position, the court refused to allow such a usurpation. In its opinion, the court emphasized the serious nature of the court's work and stated as follows:

> In the appointment of janitors heretofore much attention has been paid to the character and habits of the applicant, and to ascertaining that he was a trustworthy person. In his capacity as assistant having charge of the rooms and the furniture and seeing that they are kept in neatness and order, he has daily access to the desks of the justices, in which are always to be found opinions, papers, documents and other things of importance and value, and as to which strict noninterference or secrecy is to be maintained. He is in a position to observe and to learn many things of an official nature which ought not to be spoken of, and which the interests of the public and of suitors and the ends of justice positively require should not be. An over-curious and obtrusive and at the same time garrulous, leaky or corrupt assistant, would be the source of the greatest public disorder and mischief.[36]

In concluding that the court had the absolute power to appoint its own janitor who could not then be removed by another state official, the court stated as follows:

> It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it.[37]

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33. State *ex rel.* Reynolds v. County Court of Kenosha County, 105 N.W.2d 876, 880 (Wis. 1960).

34. *Id.*

35. *In re* Janitor of Supreme Court, 35 Wis. 410, 410-11 (1874).

36. *Id.* at 415-16.

37. *Id.* at 419. In a similar view, the Kentucky high court held that it alone, and not the

In asserting the inherent power to hire their own staff, some courts have also insisted on the power to fire court employees. In *Mowrer v. Rusk*,[38] two municipal court judges brought a declaratory judgment action against the city.[39] They sought to establish their own authority to hire and discharge employees of the court. In a summary judgment order, the trial court ruled that, although the municipal judges did have the inherent power to hire and fire employees, that power was subject to the protections afforded employees under the city's merit system ordinance. On appeal, the New Mexico Supreme Court disagreed and held that court employees could not be included in a general merit system ordinance because, as a matter of constitutional law, the judiciary must directly control court personnel.[40]

Numerous courts have insisted that the courts must not only be able to hire and fire their employees, but must also be able to fix their salaries.[41] Eighty years ago, the Montana Supreme Court explained its view on this matter by stating that "since the qualifications of the individual desired is determined in a measure by the amount of compensation paid for his services, the power to fix the compensation is also a necessary power [of the court]."[42] In Colorado, a group of district judges determined to set fair salaries for their employees made an investigation of the prevailing wage scale for secretaries in other gov-

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governor, had the power to fill a vacancy in the clerk's office pending an election. *In re* Appointment of Clerk of Court of Appeals, 297 S.W.2d 764, 766 (Ky. Ct. App. 1957). At the time, the Kentucky Court of Appeals was the highest court of the state. In Georgia, the conflict arose when county commissioners for Twiggs County refused to pay for a mere two weeks' worth of temporary clerical help for the Twiggs County Superior Court. Grimsley v. Twiggs County, 292 S.E.2d 675, 676 (Ga. 1982). The Georgia Supreme Court affirmed that the trial court was within its power in hiring the help and in ordering the county to pay for it. *Id.* at 678.

38. 618 P.2d 886 (N.M. 1980).

39. *Id.* at 893.

40. *Id.* Other cases asserting that the judiciary must directly control court personnel are *Holohan v. Mahoney*, 480 P.2d 351, 353 (Ariz. 1971)(en banc), and *Massie v. Brown*, 513 P.2d 1039, 1040 (Wash. Ct. App. 1973), *aff'd*, 527 P.2d 476 (Wash. 1974)(en banc).

41. *See, e.g.*, McAffee v. State *ex rel.* Stodola, 284 N.E.2d 778, 782 (Ind. 1972); Noble County Council v. State *ex rel.* Fifer, 125 N.E.2d 709, 713 (Ind. 1955); *In re* Court Reorganization Plan of Hudson County, 391 A.2d 1255, 1259 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 396 A.2d 1144 (N.J.), *cert. denied sub nom.*, Clark v. O'Brien, 442 U.S. 930 (1979); Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 80 (Tex. 1988)(Spears, J., concurring and joined by four additional justices); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 109 (Tex. 1981); Zylstra v. Piva, 539 P.2d 823, 827-28 (Wash. 1975)(en banc).

42. State *ex rel.* Schneider v. Cunningham, 101 P. 962, 964 (Mont. 1909).

ernmental agencies, businesses and industries in the area.[43] From the information they compiled, the judges agreed upon the salaries to be paid to their own secretaries, and then they delivered the salary schedules to the county commissioners and asked that the salaries be approved and funded. The county commissioners refused to fund all of the salaries and the district judges brought a writ of mandamus against them. Another judge was assigned to hear the case, but all of the facts were presented by written stipulation. The trial judge granted the writ of mandamus in favor of the district judges, and the county commissioners took an appeal to the Colorado Supreme Court. That court defended the independence of the judiciary and held that the district judges were empowered to fix the salaries of their secretaries and that the county commissioners had a ministerial duty to provide the means for payment of such salaries.[44]

Not only have salaries for court employees been mandated under the inherent powers doctrine, but courts have also used the doctrine to order payment of fees for attorneys appointed to defend paupers.[45] Several courts have even held that, if a court is required to retain counsel in order to exercise its inherent powers, it may also obtain attorney fees under the inherent powers doctrine as a reasonably necessary expense of the court.[46]

As can be seen, most inherent powers cases involve particular expenditures. However, the landmark case of *Commonwealth ex rel. Carroll v. Tate*[47] involved a court's attempt to force funding of its entire requested budget. The presiding judge of the Court of Common Pleas of Philadelphia sued Philadelphia's mayor and city council to try to compel the city to fund the court's requested budget. A special judge was designated to hear and decide the case, and he ordered the city to fund those budget amounts that he found to be rea-

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43. Smith v. Miller, 384 P.2d 738, 739 (Colo. 1963)(en banc).

44. *Id.* at 741. *Smith v. Miller* had a significant impact on the State of Colorado. The case was a major impetus in changing Colorado toward a system of exclusive state funding for the courts. Having lost the discretion that formerly accompanied their own funding power, county officials were willing to relinquish the power entirely and supported the shift to exclusive state financing. *See* C. BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 144 (1975).

45. Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405, 413 (Ind. 1940).

46. Gary City Court v. City of Gary, 489 N.E.2d 511, 513 (Ind. 1986); Seventeenth Dist. Probate Court v. Gladwin County Bd. of Comm'rs, 401 N.W.2d 50, 61 (Mich. Ct. App. 1986); Young v. Board of County Comm'rs, 530 P.2d 1203, 1206 (Nev. 1975).

47. 274 A.2d 193 (Pa.), *cert. denied*, 402 U.S. 974 (1971).

sonable. On appeal, the Pennsylvania Supreme Court affirmed and expressly recognized that the judiciary has the inherent power to mandamus the payment of sufficient funds out of the public treasury for the efficient administration of the judicial branch of government.[48] The court expressly recognized the "deplorable financial conditions in Philadelphia," but stated nevertheless that such conditions could not interfere with "the constitutional mandate that the judiciary shall be free and independent and able to provide an efficient and effective system of justice."[49] The court held that the only limitation on the court's inherent power to compel funding was that its budget requests must be "reasonably necessary."[50] However, the court displayed a broad view of what might constitute "reasonably necessary." It indicated that merely because something had not been essential in the past did not mean that it might not be necessary in the present or future. The court made clear the "*new* programs, techniques, facilities, and *expanded* personnel" might well be necessary for the court to meet its constitutional mandate of providing an efficient judicial system.[51]

C. *Forms of Action*

Because of the non-routine nature of these funding disputes, the cases involving inherent powers arise in many different ways. A mandamus proceeding is the most frequently used form of action. The theory behind these mandamus actions is that the public officials with control over funding have a ministerial duty to appropriate the needed resources to the court.[52] Sometimes, it is a judge or group of judges who institute the action.[53] In other instances, court personnel

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48. *Id.* at 198.

49. *Id.* at 199. A concurring opinion, however, criticized the court for not considering what was "reasonably necessary" within the context of the city's financial plight. *Id.* at 204 (Jones, J., concurring).

50. *Id.* at 198.

51. *Id.* at 199.

52. *E.g.*, Smith v. Miller, 384 P.2d 738, 741 (Colo. 1963)(en banc); McAfee v. State *ex rel.* Stodola, 284 N.E.2d 778, 782 (Ind. 1972); Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405, 413 (Ind. 1940); State *ex rel.* Kitzmeyer v. Davis, 68 P. 689, 691 (Nev. 1902); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa.), *cert. denied*, 402 U.S. 974 (Pa. 1971); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 109 (Tex. 1981); District Judges of the 188th Judicial Dist. v. County Judge, 657 S.W.2d 908, 909 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.).

53. *See, e.g.*, Smith v. Miller, 384 P.2d 738, 739 (Colo. 1963)(en banc); McAfee v. State *ex rel.* Stodola, 284 N.E.2d 778, 780 (Ind. 1972); Carlson v. State *ex rel.* Stodola, 220 N.E.2d

desiring to be paid an increased salary designated by the court have asserted mandamus actions.[54] In a more unusual action, an appliance store which had provided goods to the court brought a mandamus action seeking payment of its invoice.[55] As such, although brought in the form of a mandamus, it was actually a suit for payment of debt.

Usually the mandamus action originates in the trial court and presents itself by appeal to the state's highest court.[56] However, this is not always the case. In *Young v. Board of County Commissioners*,[57] a trial judge, seeking to force the county to accede to his budget requests, filed a writ of mandamus petition directly with the Nevada Supreme Court.[58] That court appointed a special master to hear and resolve the factual disputes.

Declaratory judgment actions are another common mode for testing a court's exercise of inherent powers.[59] In one such case, the dispute actually had its origins in a contempt hearing, but in order to avoid contempt, the county commissioners agreed to comply with the court's funding order and, then sought declaratory relief afterwards.[60]

In Missouri, a quo warranto action was used.[61] The state attorney general, on behalf of a juvenile court judge, instituted the suit to oust the county officials from usurping the rights and duties of the juvenile

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532, 533 (Ind. 1966); Azbarea v. City of N. Las Vegas, 590 P.2d 161, 161 (Nev. 1979); State *ex rel.* Kitzmeyer v. Davis, 68 P. 689, 690 (Nev. 1902); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 194 (Pa.), *cert. denied*, 402 U.S. 974 (1971); District Judges of the 188th Judicial Dist. v. County Judge, 657 S.W.2d 908, 908-09 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.); *see also* Grimsley v. Twiggs County, 292 S.E.2d 675, 676 (Ga. 1982)(clerk of court instituted mandamus action).

54. Noble County Council v. State *ex rel.* Fifer, 125 N.E.2d 709, 711 (Ind. 1955); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 104 (Tex. 1981); *see also* Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405, 407 (Ind. 1940)(attorneys who defended pauper sought mandamus to compel county to pay for their services).

55. O'Coin's, Inc. v. Treasurer of County of Worcester, 287 N.E.2d 608, 610 (Mass. 1972).

56. *See* Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 109 (Tex. 1981).

57. 530 P.2d 1203 (Nev. 1975).

58. *Id.* at 1204.

59. *E.g.*, Mowrer v. Rusk, 618 P.2d 886, 888 (N.M. 1980); Zylstra v. Piva, 539 P.2d 823, 824 (Wash. 1975)(en banc). See also *O'Coin's, Inc. v. Treasurer of County of Worcester*, 287 N.E.2d 608, 615 (Mass. 1972), which did not arise as a declaratory judgment action but in which court stated that a judge could enter an ex parte order to compel payment of expenses and asserted that for those occasions when county officials have legitimate doubts as to such an order's validity, they could seek declaratory relief.

60. Board of Comm'rs v. Eleventh Judicial Dist. Court, 597 P.2d 728, 729 (Mont. 1979).

61. State *ex rel.* Weinstein v. St. Louis County, 451 S.W.2d 99, 100 (Mo. 1970)(en banc).

court. The Missouri Supreme Court held that the juvenile court had the power to determine its own needs as to personnel and to fix their salaries and that the county officials were ousted from proceeding in any manner inconsistent with the juvenile court's power.[62]

In one Texas case, a licensed attorney filed suit seeking an exercise of the court's inherent power in order to reallocate space in the courthouse.[63] The court recognized that attorneys had standing to bring this type of suit because the legal profession has an interest in administration of the system of justice.[64]

An Ohio case had its origins in an eviction order.[65] The court decided that it needed additional space in the courthouse and, with an ex parte order, directed the sheriff to evict the county auditor from the space which his office was occupying.[66] The county auditor filed for a writ of prohibition directly with the Ohio Supreme Court, but that court denied the writ and upheld the lower court's action.[67]

Occasionally, inherent powers cases begin as contempt proceedings. A judge hands down an ex parte funding order and, when it is disobeyed, proceeds by exercising his contempt power. For example, in New Jersey, the assignment judge of Hudson County, acting in his administrative capacity in implementing the reorganization of the courts, issued sixteen orders relating to new personnel and their salaries.[68] When the county officials failed to implement the orders, the judge issued show cause orders against the county officials. The assignment judge himself conducted the hearing.

On appeal, the county officials argued that they had been denied due process because of the judge's failure to disqualify himself.[69] However, the appellate court declared that the judge was acting in an

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62. *Id.* at 102.

63. County Comm'rs Court of Dallas County v. Williams, 638 S.W.2d 218, 219 (Tex. App.—Eastland 1982), *writ ref'd n.r.e. per curiam*, 655 S.W.2d 206 (1983).

64. *Id.* at 221.

65. Zangerle v. Court of Common Pleas of Cuyahoga County, 46 N.E.2d 865, 865 (Ohio 1943).

66. *Id.* at 866.

67. *Id.* at 872; *see also In re* Courtroom and Officers of Fifth Branch Circuit Court, Milwaukee County, 134 N.W. 490, 491 (Wis. 1912)(lower court's ex parte order enjoining county supervisors from moving court into insuitable quarters held valid).

68. *In re* Court Reorganization Plan of Hudson County, 391 A.2d 1255, 1257 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 396 A.2d 1144 (N.J.), *cert. denied sub nom.*, Clark v. O'Brien, 442 U.S. 930 (1979).

69. *Id.*

administrative role and not in a judicial role and that the hearing itself was not essential, but was merely sensible.[70] The court stated that the show cause orders merely served as the mechanism for granting the county an opportunity to be heard and further explained as follows:

> [A]ppellants were granted a hearing as a gratuitous gesture and Judge O'Brien did not undertake to decide a justiciable controversy; nor did he sit in review of his own action. He simply used the public forum of a courtroom to hear the views of the county officials and to express his reasons for the issuance of the administrative order. This fully accords with fundamental fairness in this area of judicial administration . . . .[71]

Similarly, in *Mays v. Fifth Court of Appeals*,[72] a Texas court used its contempt power as a means of compelling funding.[73] Pursuant to a statute allowing district judges to set court reporters' salaries, district judges in Dallas County ordered five percent salary increases for their court reporters. When the county commissioners court funded only three percent raises, the judges ordered the commissioners court to direct the county treasurer to cut payroll checks reflecting the full five percent raises. The commissioners court refused to do so, and the district judges issued show cause orders. Before the contempt hearing could take place, the commissioners court sought mandamus relief from the court of appeals, and that court ordered the district judges to vacate their orders.[74] The district judges then sought mandamus relief from the Texas Supreme Court which held that the district judges had acted appropriately and ordered the court of appeals to vacate its writ of mandamus.[75] Although the court's opinion focused on the express statutory authority granted the judges,[76] a concurring opinion which garnered five votes stated that even in the absence of statutory authority, the court's inherent power to ensure adequate funding would allow district judges to order salary increases for court

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70. *Id.* at 1258.

71. *Id.*

72. 755 S.W.2d 78 (Tex. 1988).

73. *Id.* at 79.

74. Dallas County Comm'rs Court v. Mays, 747 S.W.2d 842, 847 (Tex. App.—Dallas 1988)(original proceeding).

75. Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 79 (Tex. 1988).

76. Just a few months after handing down its opinion in *Mays*, the Texas Supreme Court considered an almost identical case, and in a per curiam opinion, emphasized again that where statutory authority expressly authorized the judges' actions, they did not even have an obligation to prove the reasonableness of their funding orders. Duncan v. Pogue, 759 S.W.2d 435, 435-36 (Tex. 1988).

reporters.[77]

A particularly messy Wisconsin case also had its origins in a show cause hearing.[78] A county judge had ordered a window air conditioning unit to be installed in his courtroom. The county purchasing agent, Richard Lindgren, sent a letter to the judge telling him that he did not have any authority to order an air conditioning unit installed and that other courtrooms in the building managed fine without air conditioning. Lindgren sent a copy of this letter to the appliance store where the judge had made the purchase and to the chairman of the county board. The judge viewed Lindgren's actions as directly countermanding the judge's own authority to order the air conditioning installed. He ordered Lindgren to appear and show cause why he should not be held in contempt. Lindgren did appear but refused to plead, and the court held him in contempt.

The next day, after the other judges in Kenosha County disqualified themselves, Lindgren, represented by the Kenosha County district attorney's office, applied to the municipal court of Racine County for a writ of habeas corpus. Lindgren was admitted to bail. The county judge was then so angry that Lindgren had been released from jail that he issued an order to the sheriff of Kenosha County to appear and show cause as to why he should not be held in contempt for failing to keep Lindgren in his custody.[79] At the hearing, the judge found the sheriff in contempt and ordered the coroner of Kenosha County to take custody of the sheriff and confine him to jail.

At this point, the state attorney general stepped in and petitioned the Wisconsin Supreme Court to invoke its supervisory control over inferior courts and to straighten out the mess. Upon hearing the case, the Wisconsin Supreme Court first described it as a "tragedy of errors" and recognized the problems in the conduct of almost all the parties.[80] However, ultimately the court did conclude that the county judge had jurisdiction to conduct an ex parte proceeding to determine whether air conditioning was necessary to efficiently function as a

77. *Mays*, 755 S.W.2d at 80 (Spears, J., concurring).

78. State *ex rel.* Reynolds v. County Court of Kenosha County, 105 N.W.2d 876, 878 (Wis. 1960).

79. The Wisconsin Supreme Court noted that the beleaguered sheriff was between Scylla and Charybdis — i.e., in contempt of the county court if he released Lindgren and in contempt of the municipal court if he did not. *Id.*

80. *Id.* at 880.

court and to order the air conditioning installed.[81]

Most inherent power cases involve disputes between local judges and local legislative authorities such as counties or cities. However, a few such cases have originated in the state's high court. In these instances, there really was no proceeding of any type. The high court simply took it upon itself to write an opinion and hand down an order.[82] In *State ex rel. Kitzmeyer v. Davis*,[83] the court's bailiff instituted an action on behalf of the court as an original proceeding in that court. Thus, in effect, the high court itself instituted the proceeding, and ultimately ordered the state comptroller to draw up a warrant for payment of the court's expenses.[84]

D. *Standards and Burden of Proof*

The court's inherent power to compel funding is not an absolute power. In roughly equivalent terms, most courts have held that a court can compel funding only for those expenditures which are "reasonably necessary" for the court's efficient and effective functioning.[85] Although most courts have applied this standard in a fairly conservative manner so as to secure funding sufficient to maintain the status quo, the standard is broad enough to allow courts to compel funding for entirely new resources.[86] As demands on courts evolve, the courts may find that new technological innovations are "reasonably necessary" when, ten years earlier, they were not even contemplated. Computer programs and more highly skilled personnel may be every bit as

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81. *Id.* at 885.

82. *In re* Appointment of Clerk of Court of Appeals, 297 S.W.2d 764, 765 (Ky Ct. App. 1957); *In re* Janitor of Supreme Court, 35 Wis. 410, 419 (1874).

83. 68 P. 689 (Nev. 1902).

84. *See also* State *ex rel.* Schneider v. Cunningham, 101 P. 962, 963, 965 (Mont. 1909)(state supreme court issued writ of mandamus against state auditor based upon petition of its stenographer).

85. Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 199 (Pa.), *cert. denied*, 402 U.S. 974 (1971); *see also, e.g.*, Seventeenth Dist. Probate Court v. Gladwin County Bd. of Comm'rs, 401 N.W.2d 50, 61 (Mich. Ct. App. 1986); Azbarea v. City of North Las Vegas, 590 P.2d 161, 162 (Nev. 1979); *In re* Court Reorganization Plan of Hudson County, 391 A.2d 1255, 1259 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 396 A.2d 1144 (N.J.), *cert. denied sub nom.*, Clark v. O'Brien, 442 U.S. 930 (1979); State *ex rel.* Arbaugh v. Richland County Bd. of Comm'rs, 470 N.E.2d 880, 881 (Ohio 1984).

86. *See Carroll*, 274 A.2d at 199; *see also* Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 988 (1972)(under *Carroll* standard, court might order funding for such things as counsel for indigents, investigators to aid counsel for indigents, court masters, and arbitrators and counselors in juvenile and domestic courts).

critical to courts today as heating stoves were to the Nevada court in 1902.[87]

Some courts have been more emphatic about restricting the judiciary's use of inherent powers. These courts have required that the expenditures for which funding is compelled be "essential" or "absolutely necessary."[88] Courts have generally rejected any requirement that emergency conditions be demonstrated before allowing funding to be compelled.[89]

As a practical matter, whether there is any real difference between what is "reasonably necessary" and what is "essential" is not clear. However the standard may be articulated, higher courts usually affirm lower courts' funding orders. The political constraints associated with the doctrine cause most judges to limit its use to relatively conservative demands and discourage any extravagance.[90] It is, in a sense, a "last ditch" doctrine.[91] Most courts first try diligently to achieve their ends through the standard legislative budgeting process. In reading some of these cases, the frustration that judges feel with that process is almost palpable.[92]

The burden of proof seems to be more critical in assessing the legitimacy of a court's use of inherent powers than does the actual standard articulated. Some courts have placed the burden on the court seeking to exercise its inherent powers to prove that its expenditures are reasonably necessary,[93] but other courts have placed the burden

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87. *See* Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 82-83 (Tex. 1988)(Spears, J., concurring).

88. Venhaus v. State *ex rel.* Lofton, 684 S.W.2d 252, 255 (Ark. 1985); Grimsley v. Twiggs County, 292 S.E.2d 675, 677 (Ga. 1982).

89. *See* Seventeenth Dist. Probate Court v. Gladwin County Bd. of Comm'rs, 401 N.W.2d 50, 58-59 (Mich. Ct. App. 1986).

90. *See* Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 978 n.13 (1972).

91.The very conception of inherent power [in the court] carries with it the implication that its use is for occasions not provided for by established methods .... When, however, these methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not until then does occasion arise for the exercise of the inherent power.

State *ex rel.* Hillis v. Sullivan, 137 P. 392, 395 (Mont. 1913).

92. *See* State *ex rel.* Reynolds v. County Court of Kenosha County, 105 N.W.2d 876, 880-82 (Wis. 1960).

93. *See* Beckert v. Warren, 439 A.2d 638, 648 (Pa. 1981).

on the party opposing a court's budget request.[94] The Colorado Supreme Court held that, unless the legislative authorities could show that the judges' budget requests were arbitrary, capricious, unreasonable or unjustified, they had a ministerial duty to provide the means for funding.[95] Likewise, the Indiana high court stated it would not disturb a lower court's exercise of inherent powers unless it were shown that the court had abused its discretion.[96]

Some courts have placed a high burden on the judiciary by requiring that a court seeking to exercise its inherent powers prove its case by clear and convincing evidence.[97] The Washington Supreme Court overturned a lower court's mandamus order compelling funding on the grounds that the record did not demonstrate by "clear, cogent and convincing" proof that the additional funds were reasonably necessary.[98] In justifying the imposition of such a strict burden, the court expressed concern about the possibility that an unreasoned assertion of power to determine and demand its own budget would be a threat to the image of and public support for the courts.[99] Whatever the burden of proof, these courts have at least required that a record be made so that the evidence can be evaluated on appeal.[100]

In some states, orders compelling funding have been viewed as little more than administrative orders. Courts in these states have concluded that judges have the power to decide for themselves what funding is necessary and to compel it by ex parte order. In these instances, the burden winds up being placed on the party who violates the court's order and who must then show cause for why he should

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94. *E.g.*, Smith v. Miller, 384 P.2d 738, 742 (Colo. 1963)(en banc); State *ex rel.* Arbaugh v. Richland County Bd. of Comm'rs, 470 N.E.2d 880, 881 (Ohio 1984).

95. *Smith*, 384 P.2d at 741-42.

96. Noble County Council v. State, 125 N.E.2d 709, 717 (Ind. 1955); *see also* O'Coin's, Inc. v. Treasurer of County of Worcester, 287 N.E.2d 608, 615 (Mass. 1972); *Arbaugh*, 470 N.E.2d at 881.

97. Grimsley v. Twiggs County, 292 S.E.2d 675, 677 (Ga. 1982); *In re* Salary of Juvenile Director, 552 P.2d 163, 174 (Wash. 1976)(en banc).

98. *In re Salary of Juvenile Director*, 552 P.2d at 175.

99. *Id.* at 172.

100. *Grimsley*, 292 S.E.2d at 677; Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 877 (Iowa 1978)(en banc); Employees and Judge of the Second Judicial Dist. Court v. Hillsdale County, 378 N.W.2d 744, 750-51 (Mich. 1985); *In re Salary of Juvenile Director*, 552 P.2d at 175, *In re* Courtroom and Officers of Fifth Branch Circuit Court, Milwaukee County, 134 N.W. 490, 495 (Wis. 1912).

not be held in contempt.[101]

The Texas Supreme Court has not yet fully articulated the burden of proof to be applied in Texas cases. However, it is at least clear that so long as there is statutory authorization of some type, a funding order will have a presumption of validity.[102] In two recent cases, the court construed a statute authorizing district judges to increase court reporters' salaries by up to ten percent.[103] The court held that so long as the salary ordered was within the statutory ten percent, the judges did not even need to make a showing of reasonableness.[104]

One Texas court of appeals has attempted to articulate the burden of proof to be applied when a judge is acting purely pursuant to inherent powers and without any statutory authority. That court held the judiciary to a "high standard" and placed on the judges "the burden of showing that the funds sought to be compelled are essential for the holding of court, the efficient administration of justice, or the performance of its constitutional and statutory duties."[105] Thus the court adopted a standard of essentiality rather than reasonable necessity and placed the burden of proof on the judiciary rather than on the party opposing funding. Ruling that there was no reversible error, the Texas Supreme Court refused to grant writ, but it remains to be seen whether the court will actually adopt the standard as articulated.

Whatever the legal burden of proof, the ultimate burden in these circumstances will always rest on the judiciary. In the final analysis, a writ of mandamus is only a scrap of paper. If a court acts arbitrarily or unreasonably, it invites criticism. If the executive branch of government refuses to enforce a court's funding order, then the court could find itself committed to an unenforceable order.[106] This could

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101. *E.g.*, Board of Comm'rs v. Eleventh Judicial Dist. Court, 597 P.2d 728, 729 (Mont. 1979).

102. Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 79 (Tex. 1988); Duncan v. Pogue, 759 S.W.2d 435, 435 (Tex. 1988); *see also* Commissioners Court of Lubbock County v. Martin, 471 S.W.2d 100, 106 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

103. *Mays*, 755 S.W.2d at 79; *Duncan*, 759 S.W.2d at 435.

104. *Mays*, 755 S.W.2d at 79; *Duncan*, 759 S.W.2d at 435. The situation in *Duncan* is particularly interesting because the district judge had increased the court reporter's salary by ten percent each year for six preceding years as well. Pogue v. Duncan, 753 S.W.2d 255, 257 (Tex. App.—Tyler), *rev'd*, 759 S.W.2d 435 (Tex. 1988). Still, even in this context, the court held that the judge was not required to show that his order was reasonable.

105. District Judges of 188th Judicial Dist. v. County Judge, 657 S.W.2d 908, 910 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.).

106. In both Michigan and Pennsylvania, the legislative bodies effectively ignored court

do serious damage to the court's prestige and effectiveness.[107] However, the court ought not allow its fear of this possibility to paralyze it into inaction. Overly crowded dockets and delayed justice also cause the public's respect for the judicial process to diminish. Ultimately, the citizenry will be the final arbiters of any interbranch confrontation, and for this reason it is incumbent on the judiciary to make clear its needs and its long history of patience.

IV. CONCLUSIONS

In state courts across the nation, the judicial branch has agonized in search of principled rules and procedures for dealing with these funding confrontations. The cases are replete with language directing courts to exercise judicial restraint in this area, and it is obvious that courts invoke this power only with great reluctance. But, however hesitant the judiciary may be to exercise its inherent powers, ultimately the judiciary must keep its own house in order. Chronic problems of funding must be resolved.

Certainly, interbranch cooperation is to be preferred over interbranch confrontation. However, the judiciary's voluntary cooperation with the legislative branch cannot be mistaken for a surrender of power. Justice Franklin Spears of the Texas Supreme Court said it best when he explained:

> Although the judiciary retains the inherent power to compel necessary funding, a spirit of mutual cooperation is unquestionably the people's best guarantee of a constitutional government. Rather than being a source of contention, the judiciary's insistence on its own inherent powers can open an avenue for greater cooperation among the branches of government. Only by recognizing each other as equals can we effectively communicate.[108]

Another legislative session is in progress and we must hope that the legislature gives due consideration to the needs of the judicial branch.

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orders compelling financing for the judiciary. *See* C. BARR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 147 (1975).

107. A reenactment of the judicial predicament that followed upon *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), would be painful. When President Andrew Jackson was asked what effort the executive department would make to back up the Court's mandate, he reportedly said, "John Marshall has made his decision; now let him enforce it." E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 194 (1919).

108. Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 83 (Tex. 1988)(Spears, J., concurring).

We, of course, recognize that the allocation of scarce public resources is a complex and difficult task. However, no matter what other political and economic considerations may raise their heads, the legislature cannot continue to neglect adequate funding of the judiciary.[109] Unlike state agencies, courts cannot reduce services; they are constitutionally mandated to administer the judicial power of the state.[110]

It is not merely the judiciary's own power to function that is at stake. And it is certainly much more than a question of judicial glorification. The inherent power of the courts is a power in the public interest. Over 200 years ago, James Madison explained in his *Federalist* papers that a tripartite form of government was the people's best protection against tyranny.[111] It is the duty of the courts to act so as to preserve the constitutional framework and to assure that the tripartite structure remains intact. By exercising their inherent power to compel funding, the courts not only preserve their own on-going existence as an independent branch of government, but also preserve for the people their security and freedom within a constitutional government.

109. Budgeting entails competition for available public funds. Courts have traditionally been hampered in their dealings with the legislature by the lack of an effective lobby.

110. For Texas courts, see TEX. CONST. art. V, § 1 (1891, amended 1980).

111. THE FEDERALIST No. 47 (J. Madison).