The Use of Inherent Powers to Obtain Court Funding

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Greg Hurley
National Center for State Courts
Williamsburg, Virginia

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As I contemplated and even began this project, I was largely oblivious to the amount of time and effort that would be required to complete it. I would like to thank my wife Elena, who was very patient and recognized that I was physically present although at times so absorbed that I was intellectually not. Additionally, I would like to thank my co-workers at the National Center for State Courts who provided not only direct assistance but also carried some of my workload while I worked on this. My cousin George Hurley was also very helpful in keeping me focused and reducing my anxiety as I trudged through the daily research and writing. Last, I would like to thank the guys on my hockey team. I think they realized that some of the time I spent in the penalty box was probably more the result of frustrations with the project than events on the ice.

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Abstract

This project is dedicated to surveying the literature on the use of inherent powers to compel court funding, to exploring the judicial attitudes towards these action and to determining if the source of funding impacts these attitudes. The literature makes it clear that it is undisputed that courts have this inherent power, but the source of said power is unclear. There are some legal scholars that argue that state courts have the "inherent power" to compel court funding based on the judiciary being established as a tripartite and coequal branch of government in their state constitutions. There are other legal scholars that argue that the basis is purely pragmatic, that is that courts need to function in our society and to accomplish that they need money. Overall, the case law does not clearly define the source of power for actions against funding authorities to compel court funding. It is noted that actions against county governments to compel court funding do not have the same constitutional dimension as actions against state governments because the county is not a "co-equal branch" of government and therefore does not have the same duty towards the judiciary as the executive and legislative branches do.

A review of the literature on this issue made it clear that there had not been any published research that explored judicial attitudes towards the use of inherent power to compel courts to adequately fund the judiciary. However, it did appear by the number of appellate cases coming from states that have a county based funding system to fund their trial courts was much higher than states that have a state funding system for their trial courts. From this fact it was hypothesized that judges in county funded trial court

system may be far more willing to bring an action against their county than judges in state funded trial court system would be to bring an action against their state. There are two significant presumptions in this theory. First, that the number of published appellate court actions actually has a correlation with the attitudes of judges. The second presumption was that the perception of judges regarding their current budgetary situation in the states chosen to be surveyed was similar.

The research also sought to determine if there were any differences in attitudes of judges towards bringing an action to compel court funding based on whether there was a pre-existing mechanism in place to resolve. It was hypothesized that having a board or panel in place to resolve funding disputes may actually encourage judges to bring this type of action.

There were a total of 400 surveys sent to judges in four states, Connecticut, Missouri, New Jersey and Ohio. Judges were randomly selected to receive the survey, 100 surveys were sent to judges in each state. All of the judges were general jurisdiction trial court judges although some had specific court assignments. The states were selected so that two states have primarily state court funded trial courts and two states have primarily county funded trial courts. The states were further divided as to whether or not they had a pre-existing mechanism for resolving trial court funding disputes.

The 400 surveys were sent in a conventional form via U.S. Mail. It was believed that the response rate would be better using this method than using an electronic means. A total of 113 surveys were returned, giving a response rate of 28%, 111 of which were returned completed and were used in the analysis of this project.

This research strongly suggests that judges from states with county funded trial court systems are more likely to consider the use of bring an action to compel their funding authorities to appropriately fund them than judges are from states that have state funded trial court systems. The research was not able to correlate judges in states with pre-existing mechanisms for resolving funding disputes as encouraging the filing of these types of actions. In fact, the data suggests that judges in states that do have a pre-existing mechanism for resolving court funding disputes may be less like to consider filing this type of action. The research was unable to reach any conclusions on this question for states with state funded trial courts due to a limited response rate from one state.

This project recommends that states which have primarily county funded trail courts create a pre-existing mechanism for resolving court funding disputes, assuming they don't already have one. A commission or panel that is in place to hear these cases should be able to expeditiously resolve these matters. The empirical evidence from this research suggests that having a commission or panel available may encourage the parties to resolve their own funding conflicts, which is of course the best possible outcome. It is further recommended that the structure of any commission or panel be as evenly balanced as possible between participants who represent the interests of the funding authorities and participants who represent the interests of the judiciary.

Introduction

The National Center for State Courts provides a variety of services to assist state courts with almost every conceivable aspect of court administration. This includes educational programs and collections of resources that are available electronically and in printed form. The organization also has a "help desk" function which is primarily housed within the Knowledge and Information Section, this is where the author is employed. It started to become clear by the summer of 2008, that many judges and court administrators were experiencing significant anxiety concerning their fiscal health. A high percentage of calls received by the Knowledge and Information Section were either directly on funding/budgetary issues or were targeted towards locating information to reduce the cost of a specific court function. However, to the best of the author's knowledge, no question was received regarding compelling funding authorities to appropriately fund a court.

In October of 2008, a member of the Institute for Court Management asked the author to conduct a brief survey of the resources available on the use of inherent powers to obtain court funding. The internal funding for said survey was limited to three hours, so the survey from its very conception was designed to be brief. However, even from this very brief analysis of the resources and the case law, three points were immediately clear. First, inherent powers actions to obtain court funding come from judges and not court administrators. This point was observed to be almost universally true, although the reasons for this are beyond the scope of the paper. Second, actions against the state funding authority as opposed to actions against county funding authorities are relatively rare. And third, when a pre-existing mechanism is in place to

resolve court funding disputes, these types of actions occur at a much higher frequency.

The judicial attitudes associated with the use of inherent powers to obtain court funding has not been studied or addressed in the literature. By reading the available case law, it is possible to get a reasonably clear impression of the attitude of appellate courts towards these kinds of actions. The literature as a whole does a good job of identify whether the plaintiff judge or the funding authority has the burden of proof. It also identifies what the standard of proof is. However, what the case law and other literature can not explain is at what point judges as a whole would consider the use of inherent powers as a funding weapon. Or, what percentage of judges would even consider its use.

This project seeks to explore not only the existing structures and protocols courts are required to navigate to utilize inherent powers to compel court funding, but the judicial attitudes that surround its use. It is unclear whether judges as a whole would even consider the use of inherent powers. For those that would, it is unknown what the causative events might be before they would resort to this action. We do not know what percentage if any judges take the position that it is their role as a court leader to protect and defend their segment of the judiciary by insisting that an adequate level of funding be present to sustain the court as an institution. It is not known if judges feel that taking this type of action would be detrimental to their careers on the bench. It is hypothesized however, that the answers to these inquiries may vary based on whether the judge responding is from a court funded largely by the county or the state. Additionally, there may be some significant variance in attitudes based on whether the responding state comes from a jurisdiction that has a pre-existing method for resolving

court funding disputes. This project will seek to define the triggering situations which may cause a judge to file an action to compel appropriate court funding, analyze the variance in those attitudes based on the level of government proving funding to the court and the existence of a pre-existing resolution system.

This research is divided into several sub headings. The "Literature Review" has both a general discussion of the use of inherent powers to compel court funding and a state specific component. It should give the reader enough of a basis on the current status of the law and other publications to put the rest of the project in context. The states that were selected and some of the other methods used to survey the judges will be explained fully in the "Methods" section. The aggregate results of the surveys will be reported in the "Findings" section and the results are broken out in a number of different ways to highlight characteristics of the data. Finally, the "Conclusions and Recommendations" section will report what the author believes the research shows and recommendations as to avenues of further research.

Literature Review

It is undisputed in the literature and case law that courts have the "inherent authority" to take actions in their adjudicative and administrative roles which go beyond any constitutional or statutory authority which has been conferred upon them. It is also undisputed that this power is necessary to effectuate the fair and timely administration of justice. Courts need the power to maintain discipline and decorum in the courtroom, resolve procedural issues when there is no statute or rule available, maintain their independence from the executive and legislative branches, and ensure that sufficient resources are available to function effectively. Although there is a significant body of literature devoted to inherent powers generally, there is a surprisingly small amount of literature that is focused on the topic of the use of inherent powers to compel funding for courts. This is not surprising because a review of the case law nationally suggests that the concept of inherent powers has been used sparingly as a method to attempt to force funding authorities to comply with the courts financial requests.

The definition of the term and the threshold financial crisis required for its successful application and even the legal basis creating the authority are all unsettled in the literature. The best definition is from Justice Marian Opala of the Oklahoma Supreme Court in Winters v. City of Oklahoma City.[1] Justice Opala wrote,

> "State courts claim as "inherent to them" those powers which, though neither granted to, nor withheld from them by the state constitution and not found in any other source of law, must nevertheless be concede to the judiciary as a separate department of government because their exercise is deemed absolutely essential for the performance of the court's constitutionally mandated mission."

There are two theories that identify the source of the power state courts can

[1] Court in Winters v. City of Oklahoma City, 740 P.2d 724 (1987).

claim when asserting inherent powers. The first is based on their state constitution. The state constitution in all states creates three branches of government. The judicial branch is either explicitly or implicitly a co-equal branch of government, just as it is under our federal system. The judicial branch has neither the legislature's power of taxation of the executive's power of the sword. Under this tripartite system, the judiciary is reliant on the other two branches of government to provide for its financial needs. Just as the executive and legislative branches of government rely on the judiciary as a check and balance on their powers. This is a fundamentally different claim for funding than a department or division of government, such as a division of highways, can make.

The second theory to justify the concept of inherent powers is that courts must have the authority to do things that are needed and necessary to accomplish their adjudicative and administrative roles. This theory is not reliant on any implicit or explicit constitutional provision. Rather, it is purely pragmatic. However, the theory is of practical importance for courts that have a statutory basis for their creation, rather than a constitutional basis. Under this theory a court can claim that it cannot fulfill its adjudicative functions without adequate funding. This theory is not as strong as the first theory because it leaves the court making a claim for funding that is not substantially different than a claim that could be made by any other department or division of government.

The literature is clear that under both theories, the use of inherent powers should only be effective to obtain funding to support the core or essential functions of the court. Under the first theory, the court needs adequate funding to have the ability to hear and

decide all of the cases that come before it in a timely manner.[2] This will include having the appropriate staffing to accomplish the administrative duties of the court, to maintain files, to identify and summon jurors, to provide security and possibly to maintain a clean and dignified facility. Court activities that are important but non-essential such as educational and civic outreach programs probably need to be eliminated from the budget before a court resorts to utilizing inherent powers to obtain court funding.

There are some states that have statutory or rule based methods to handle funding disputes. Missouri has a statutory scheme. This system appears in two locations in the Missouri Code, in the chapter titled "County Finances, Budget and Retirement System" and in "Supreme Court and Courts of Appeal". They are Missouri Revised Statute 50.640 and Missouri Revised Statute 477.640, respectively. The two statutes dovetail together nicely. Missouri Revised Statute 477.640 creates a "Judicial Finance Commission." The commission must have seven members of which three "shall be members of the county governing body." The Judicial Finance Commission's current membership has three members of county governing bodies and they are all the presiding commissioners of their respective counties. There are also three state judges on the commission and a federal district judge.

The court funding procedure is clearly identified in Missouri Revised Statute 50.640. The court is first required to follow the correct procedure that all other offices, departments, etc. follow to put the county on notice of their budgetary needs. The Code states,

[2] Ernie Friesen identified eight "Purposes of Courts" that are a timeless reminder of the essential functions that courts provide society, http://www.nacmnet.org/CCCG/toolboxes/powerpoint/IT-Toolbox_1.5Hour_Slides.ppt .

> "The estimates of the circuit court, including all activities thereof and of the circuit clerk shall be transmitted to the budget officer by the circuit clerk. The estimates of the circuit clerk shall bear the approval of the circuit court."

Once this has been received, the county budget officer can only adjust the amount in the budget with consent of the court.

The Code goes on to state,

> "If the county governing body deems the estimates of the circuit court to be unreasonable, the governing body may file a petition for review with the judicial finance commission on a form provided by the judicial finance commission after the estimates is included in the county budget. An amount equal to the difference between the estimates of the circuit court and the amounts deemed appropriate by the governing body shall be placed in a separate escrow account, and shall not be appropriated and expended until a final determination is made by the judicial finance commission under this subsection."

It is important to note that the legal standard appears to be "reasonableness." The burden of filing an action is on the county funding authority, if they fail to do so the courts request for funding is automatically approved. Additionally, the commission can refuse to hear the case. Historically, it does not appear that this has ever happened.

Appellate review is possible in the Missouri system. The Code states,

> "Upon receipt of the written opinion of the commission or upon refusal of the commission to accept a petition for review, the circuit court or the county governing body may seek a review by the supreme court by filing a petition for review in the Supreme Court within thirty days of the receipt of the commission's opinion. If a petition for review is not filed in the Supreme Court, then the recommendation of the commission shall take effect notwithstanding the provisions of section 50.600, R.S. Mo. If the commission refused to review a petition and no petition is filed in the Supreme Court, the circuit court budget is approved as submitted to the county governing body. The Supreme Court shall consider the petition for review de novo."

The following state courts of last resort opinions provide a glimpse of the responses of several court systems to inadequate funding. In the past few decades, the cases that reach these high courts tend to render opinions on funding disputes with

county level funding authorities. From a technical standpoint, these case are not "inherent authority" cases as their authority is typically statutory, see Buenger, Michael, "Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times", (2003). However, the Supreme Court of Ohio has consistently taken the position that budget battles with county commissions are inherent authority cases. The theory of inherent authority in county level funding disputes is hinted at by the high courts of Michigan and Pennsylvania but is not the underlying basis of their opinions.

In Ohio, a judge that is not satisfied with the budget appropriation has both the power of contempt in his/her own court as well as the ability to file a writ of mandamus in the Supreme Court of Ohio. The judge enjoys the luxury of the court's budget being presumed to be "reasonable and necessary." The county commission must give priority in funding the court. This funding authority can claim impossibility as an excuse. However, although the standard has never been defined for this defense, the county would need to demonstrate that other funded enterprises in the county would be unable to provide statutorily mandated functions.

Pennsylvania and Michigan place the burden of proving a disputed funding amount is necessary and reasonable with the demanding judge. Judges in those states may utilize writs of mandamus to bring the funding issues before the appellate courts. However, the Supreme Court of Michigan strongly hinted that litigation over minor disputes should not be initiated. The Court by administrative order requires judges to file disputes with the Michigan State Court Administrative Office and directs that office to mediate the dispute. Only after 30 days following this notification may the judge seek

redress through the courts. The Supreme Court of Pennsylvania has shown extreme deference when working with the legislature. It ordered that the state begin to pay all costs of the state court system based on a state constitutional ruling. The court then waited nine years before taking further action. Additionally, Connecticut Supreme Court has demonstrated an unwillingness to encroach on the legislative branch, even when confronted with an access issue with a constitutional dimension.

Connecticut

Pellegrino v. O'Neill, 480 A.2d 476 (1984).

The issue in this case was whether the Supreme Court of Connecticut had the authority to order the legislature to appoint additional trial judges so a civil case backlog could be reduced. The compliant alleged that the plaintiff's constitutional right "to justice without delay in the disposition of civil jury cases" was violated by backlog. The Court concluded that to order the legislature to create additional judgeships would violate "the basic principle of separation of powers."

Michigan

Employees v. County of Hillsdale, 378 N.W.2d 744 (1985).

This opinion is based on two consolidated cases in which trial judges had issued administrative orders requiring counties to pay for supplemental staff costs. The court concluded that Michigan statutory law does not authorize a trial judge to compel funding authorities to make expenditures. Further, that the appropriate remedy for a trial judge is to file an action and bear the burden of proof of why the disputed additional expenditure is necessary. This opinion and the dissent contain a detailed analysis of

the interaction of the doctrines separation of powers and inherent powers. It also very strongly suggests that suits over minor funding issues not be initiated by the court. Finally, the court announced the adoption of an administrative order which requires courts to file disputed funding situations and documentation with the state court administrator. The state court administrator then has 30 days to attempt to remedy the dispute before courts can file an action.

Grand Traverse County v. Michigan, 538 N.W.2d 1 (1995).

In this case, 76 counties and a few local jurisdictions sued to be relieved of their obligation to pay for trial court operations. They based their argument on two distinct theories; the first was a statute that required the legislature to gradually appropriate funds to begin fully funding the courts. The court concluded this legislation was merely an authorization to appropriate and not an actual appropriation. The second argument was that a state constitutional provision created "one court of justice." The court concluded that this was in the constitution to give the Supreme Court of Michigan more administrative authority over the courts and not to require state funding of all court operations. The court also looked to the states 130 year history of local court funding and ruled that full state funding of the courts was not justified. The court did call for all three branches of government "to reform the state's system of court funding."

Ohio

Johnston v. Taulbee, 423 N.E. 2d 80 (1981).

A state statute required juvenile judges to get their budgets approved by the county

commission. If the county commission decided to appropriate less than requested, as occurred in this case, the judge's recourse was to file a writ of mandamus with the court of appeals. The Supreme Court of Ohio concluded that this statute was unconstitutional. The opinion discusses inherent powers and separation of powers. The court stated "the 'purse power' over judicial administration, unconstitutionally restricts and impedes the judiciary in complete contradiction of our rudimentary democratic principles."

In re Furnishings, 423 N.E.2d 86 (1981).

This is a procedural case. The trial judge in this case issued an ex parte order directing the county commission pay for furniture and other equipment in a courthouse. He scheduled a contempt hearing but prior to it being heard, the original ex parte order was appealed. The Supreme Court of Ohio ruled that the ex parte order was not final and therefore not appealable. This case demonstrates that courts have the power of contempt in Ohio to enforce their inherent powers.

NOTE: This case was decided the same day as Taulbee and the two should probably be read together.

Lake County v. Hoose, 569 N.E2d 1046 (1991).

In this case a juvenile court judge filed a writ of mandamus against a county commission asking that they be ordered to fund his court at the level he requested. The court places the burden on the county commission to prove that the requested funding was either "unreasonable or unnecessary."

Wilke v. Hamilton County, 734 N.E.2d 811 (2000).

Judge Wilke issued two orders in 1999 and 2000 directing the county commission to

fund additional employees to work in his probate court. These orders were supported by staffing studies that were done by the NCSC. When the commission refused to grant funding, he filed a writ of mandamus with the Supreme Court of Ohio. The court found that a "court's funding orders are presumed reasonable, and the board bears the burden to rebut that presumption". Additionally, "this presumption emanates from the separation-of-powers doctrine because courts must be free from excessive control by other governmental branches to insure their independence and autonomy." The court also ruled that a statute which required a judge to file a writ of mandamus with a court of appeal was unconstitutional as the Supreme Court of Ohio has original jurisdiction. Dellick v. Sherlock, 796 N.E.2d 897 (2003).

In this opinion the Supreme Court of Ohio has consolidated two cases, one from probate court and one from the juvenile court of one county. In both cases, judges filed a writ of mandamus with the Ohio Supreme Court asking for enforcement of their budget orders. In this case, it was clear that the county was experiencing a budget crisis. However, the court found that the county commission was obligated "to appropriate annually such a sum of money as will meet the administrative expenses" as determined by the judge. They also found that court budgets must be given priority over budgeting for all other county offices. Last, the court considered that commissioners claim that it was impossible for them to fully fund the courts. They indicated that before they would consider that defense, the county would have to show that other county offices would not be able to perform statutorily mandated duties. The commissioners did not prove this.

Pennsylvania

Allegheny v. Commonwealth, 534 A.2d (1987).

In this case, various counties sought relief from state statute which ordered them to ~~to~~ fund the common plea court system. Their argument was that the 1968 Pennsylvania Constitution vested judicial power in a "unified court system" and the use of county funding creates "dissention and conflict which produces fragmentation." The court ruled that local funding is inconsistent with the constitutional provision requiring a "unified court system" and is therefore unconstitutional.

Lavelle v. Koch, 617 A. 2d 319 (1992).

President Judge Lavelle of the Carbon County Court of Common Pleas sued the County Salary Board for appropriating less for salaries than he had requested. This action was brought as a writ of mandamus and has a discussion of inherent powers. It indicates that only when the "legislature's denial of funds genuinely threatens the administration of justice (thereby violating the constitution) may the judiciary exercise its inherent power to compel funding." The standard was further defined as "reasonable necessary" for requesting more salary funding. In this case, the plaintiff/judge could not prove the salary money was "reasonably necessary to attract and maintain qualified people." The judge received no reimbursement for his own litigation expenses.

Association v. Commonwealth, 681 A.2d 699 (1996).

Nine years after Allegheny v. Commonwealth, the legislature still had not enacted a state funding system for the Pennsylvania court system. The Pennsylvania State Association of County Commissioners sued in a mandamus action invoking the original jurisdiction of the Supreme Court of Pennsylvania seeking to be relieved of their burden of funding the courts. The legislature defended that the "speech and debate" clause of

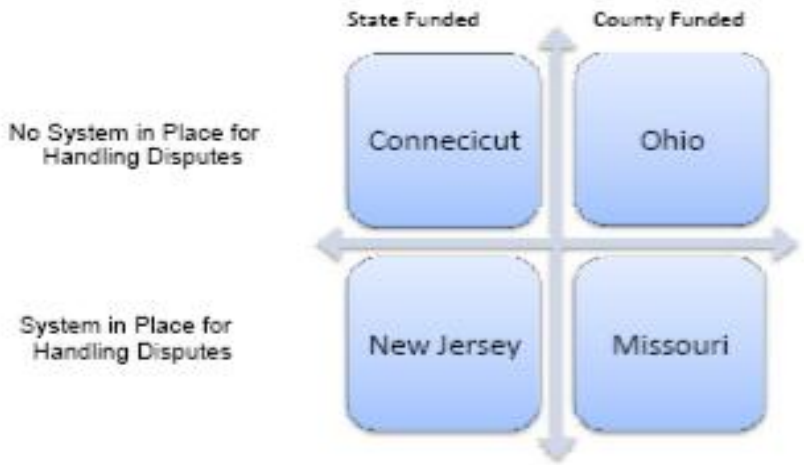
the state constitution precluded litigants from compelling the legislature to enact a law. The court reasoned that in order to preserve the constitutionally mandated separation of powers, “the courts posses the inherent power to require such necessities to be furnished and to direct payment therefore out of the public treasury.” The court granted the writ which gave the legislature about 18 months to enact appropriate legislation.

From this review of the cases and the literature, this author hypothesized that judges in states with counties as the primary funding source for trial courts may be far more like to file actions to obtain adequate court funding than their counterparts in states with primarily state funded trial courts. Further, that states that have a pre-existing mechanism for dealing with court funding disputes may be actually encouraging these actions to be filed. It is noted that this hypothesis is based to a significant extent on reviewing the appellate court actions available nationally. However, because not all cases are appealed and not all appellate opinions are published, this hypothesis does have an obvious weakness. On the other hand, it did appear to have enough validity to form the basis of this project. Further, there has not previously been a study to determine how the structure of the court’s funding system impacts judicial attitudes towards compelling court funding. This information is relevant in the current economic crisis and could be beneficial to both judges and policy makers.

Methods

The goal of this project was to identify the previous usage of inherent powers as a mechanism to obtain state court funding, to review the procedural and tactical considerations for its use and to determine the judicial views and attitudes surrounding it. It clearly isn't feasible to attempt to survey and study all 50 states. However, an initial survey of the case law and literature made it clear that there were two critical factors that appeared to determine the likelihood of whether inherent powers litigation was brought. The first is whether or not the primary funding source for the court was from the county or the state. The second determining factor seemed to be whether or not there was a pre-existing statutory or rule based system for handling funding disputes. Finally, there was an additional factor used to identify the states to be studied, it was whether or not there was some case law on the issue.

State Selection by Funding Source and Pre-Existence of Mechanism for Handling Court Funding Disputes
Figure 1



The above graphic depicts the states studied. The columns divide the states into their primary funding source for their courts of general jurisdiction, which is either state

or county. The rows identify whether or not the state has a pre-existing mechanism for resolving court funding disputes with the funding authority. For example, Missouri general jurisdiction courts receive the majority of their funding from county funding authorities and there is a pre-existing dispute resolution system in place.

The variance in the source of funding and the existence or lack of a funding dispute process is built into this project so that any the judicial attitudes being surveyed may be compared based on these factors. It is hypothesized that judges in jurisdictions in which the county is the primary funding source may be more likely to have a favorable attitude towards the use of inherent powers to compel state court funding. Additionally, it is hypothesized that having a system in place for handling budget disputes may actually encourage judges to file them.[3]

One hundred judges in courts of general jurisdiction where selected to be surveyed for this project. The selection of judges was only from courts of general jurisdiction, as opposed to supplementing courts with specialized jurisdiction or limited jurisdiction, to standardize the respondents from each state as much as possible. [4] It is beyond the scope of this project to determine if judges from courts of general jurisdiction may have a different view of the use of inherent powers than judges from limited jurisdiction courts, for example. In three of the four states, the judges were selected by using the 2009 edition of *BNA's Directory of State and Federal Courts, Judges and Clerks*. In the fourth state, Connecticut, a web directory[5] was used as the above noted

[3] The author does not take a position on whether this is a positive or negative situation.

[4] General jurisdiction judges with specific assignment were still considered general jurisdiction judges for the purposes of this project.

[5] State of Connecticut Judicial Branch, http://www.jud2.ct.gov/judsearch/judsup.asp .

publication did not contain a complete listing. The pages for each state were photocopied and the name of each judge was cut out. One hundred judges were then randomly selected. This method should provide a truly random sample. In preparing the actual mailing list, it was obvious that there was a mix of both urban and rural courts in the sampling for each state. The surveys were mailed via First Class U.S. Mail, along with a cover letter addressed to each judge explaining the nature of the project.[6] A self addressed stamped envelope was also included. The author believed that while online surveys are easier and cheaper to deploy, the respondents in this survey may be more likely to be responsive to a conventional survey. The author has this opinion as a result of talking to a number of judges about surveys and their attitudes towards surveys received via email.

A cover letter was sent explaining the project along with the survey tool. Both the cover letter and the survey tool were printed on 24lb, grey paper. This was designed to look professional but also to standout on a desk or on the top of an "in box". It was hoped that this may help increase the rate of responses by subtly reminding judges of the survey when they glance across their desks. A stamp was chosen for the return envelope that had a Christmas scene on it rather than the generic flag, in the hope that it may slow judges down long enough from their other tasks that they might take a moment to fill out the survey.

The cover letter contains a paragraph that explains that the specific data from individual judges will never be released. Rather, the data will only be distributed in aggregate form such that the actual responses of individual judges cannot be

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[6] Appendixes A and B contain a sample of the cover letter and the survey instrument.

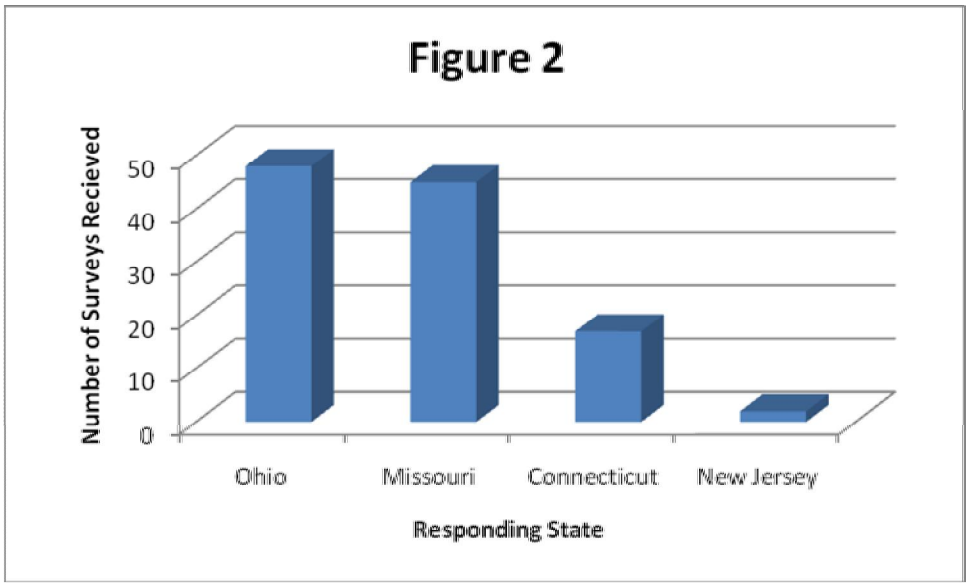
determined. It was felt that this promise of anonymity was critical to both getting a reasonable rate of participation and to get the most candid responses possible. The author did provide one inducement for participation in the survey. The cover letter explained and the survey instrument reiterated that judges that wanted to identify their email address would get an electronic copy of this paper when it was completed.

The survey instrument was intentionally designed to be only ten questions so that it could be filled out in 3-5 minutes. This shorter length of survey was designed to get the maximum response rate possible. The entire survey is on one side of two sheets of paper. The survey was fully deployed using U.S. Mail on the morning of December 28, 2009. The cover letter indicated that responses should be mailed by January 11, 2009. A total of 113 surveys were returned, two were not filled out and they will be disregarded for the purposes of analyzing the results.

The surveys were analyzed by dividing them into four groups, one for each of the states being surveyed. The state could be easily identified because the survey itself identified the state in which the survey was sent in 8pt typeface at the end of the survey. Each answer in each survey was manually counted and tabulated using pen and paper. The style of the questions was primarily yes/no so tabulating the results was not difficult, although it was time intensive.

Findings

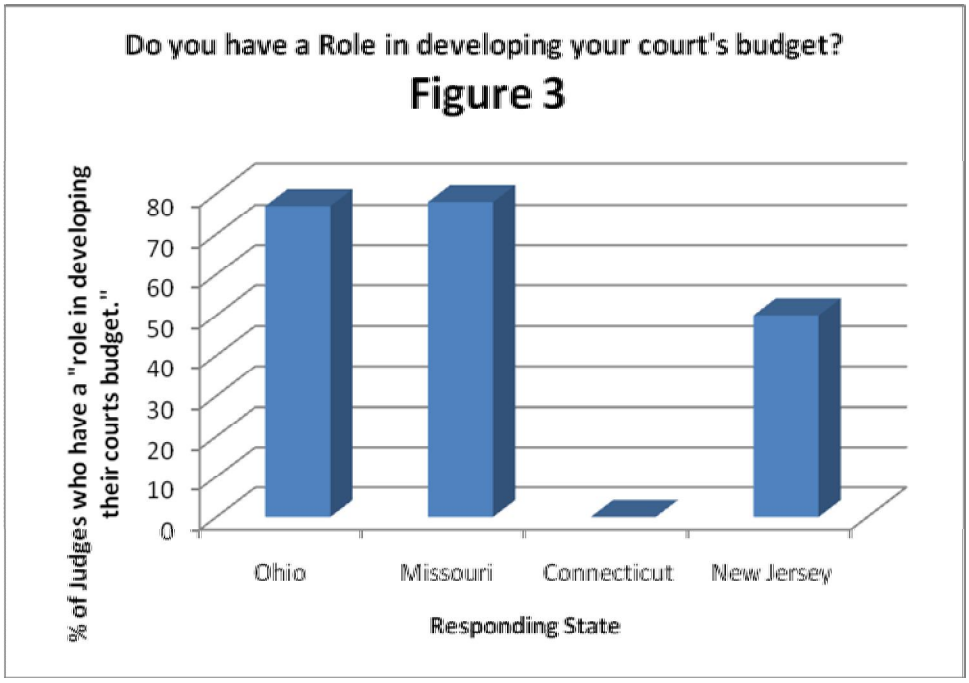
As previously stated, there were 111 surveys that were returned completed. There was one survey from Connecticut and one from Ohio that were returned without any responses. Those two surveys will not be considered in any of the calculations in the project. Figure 2 below depicts the number of completed surveys received from each state. There were 48 from Ohio, 45 from Missouri, 16 from Connecticut and 2 from New Jersey.[7]



Question 2 of the survey asked judges, "Do you have a role in developing your court's budget?" Of the judges who responded from Ohio, 37 of the 48 answered affirmatively that they did in fact have a role in developing the budget. In Missouri, 35 of the 45 indicated that they had a role. None of the Connecticut judges answered affirmatively and from New Jersey's very limited responses one judge answered affirmatively and one judge responded that he/she did have a role. Figure 3 below

[7] The sample from New Jersey is so limited that it is not possible to make any conclusions about the opinions and attitudes towards the use of inherent powers to compel court funding from that state.

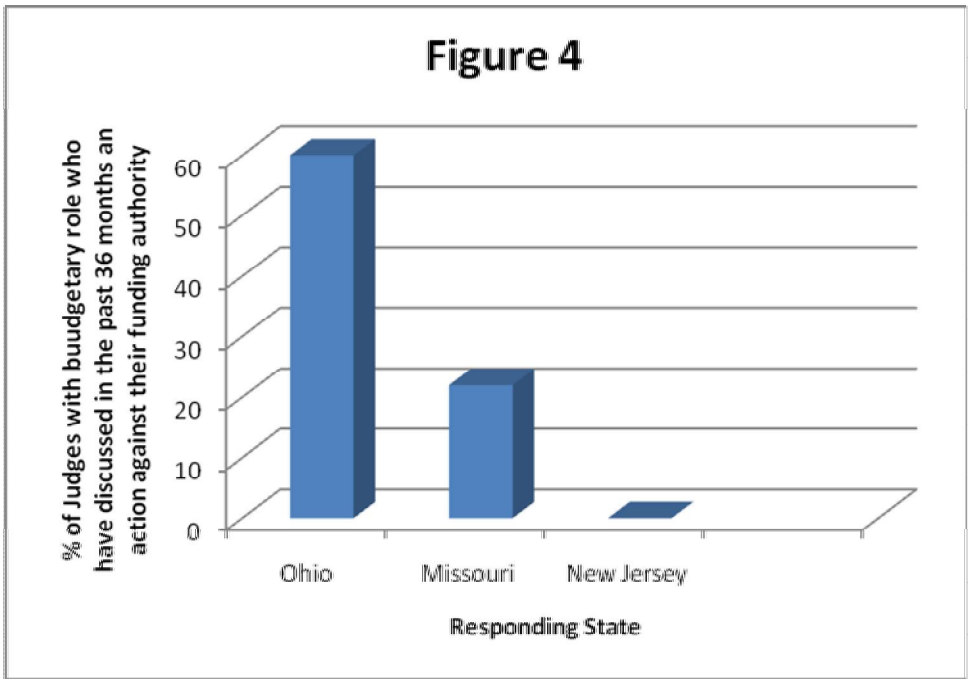
depicts the percentage of judges that identified affirmatively that they had a role in developing their courts budget as a percentage of total responses expressed by state.



The survey also asked responding judges, “In the past 36 months, have you discussed the possibility of bringing an action against your funding authority to compel them to provide adequate funding for your court with another judge or court administrator?” The response to this question is important for the purposes of this project only if the responding judge previously identified that he/she had a role in developing their courts budget. Judges with a budgetary role are presumed to have a higher degree of motivation and influence in taking budgetary actions, and it is presumed that their conversations are more likely to be expressive of planning for possible future actions. Of those judges that responded affirmatively that they had a budgetary role in their courts, 21 from Ohio also indicated that they had a conversation in the past 36 months with another judge or court administrator discussing the

"possibility of bringing an action" to compel adequate court funding. In Missouri, there were eight judges that answered affirmatively to both questions. Only one judge from New Jersey responded that he/she had a role developing the budget but also indicated that he/she had not discussed an action to compel court funding. There were not any responding judges from Connecticut that indicatec that they had a budgetary role. Expressed as a percentage, 60% of Ohio judges that stated they had a budgetary role in their court also indicated in the past 36 months with another judge or court administrator discussing the "possibility of bringing an action" to compel adequate court funding. In Missouri, the percentage was 22% for the same calculation.

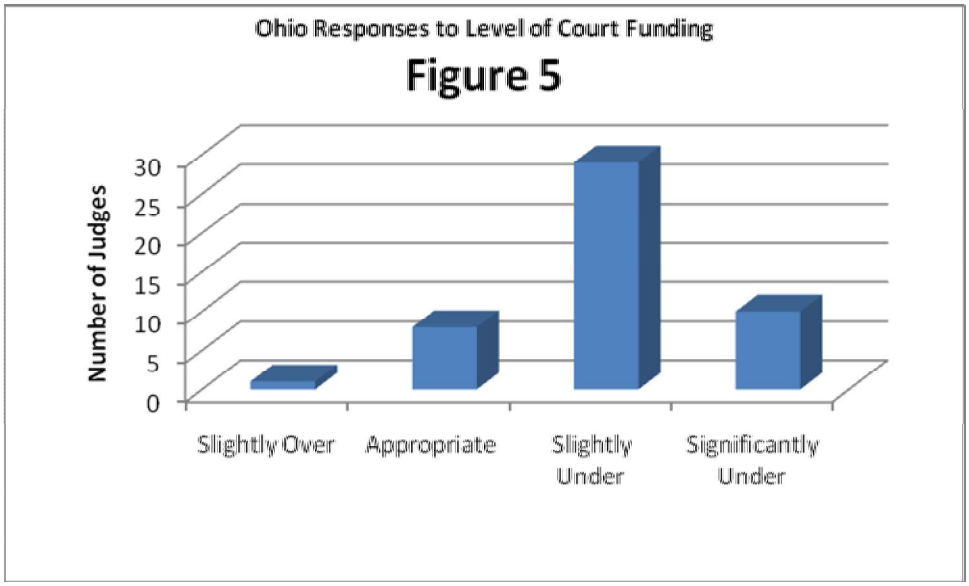
Figure 4 depicts the percentage of judges in each state that said they had discussed "the possibility of bringing an action" against their funding authority to compel adequate court funding from the number of judges that indicated that they had a role in developing their court's budget. It is also important to note that in Connecticut and Missouri there were judges that indicated that they did not have a role in developing the courts budget but had a conversation in the past 36 months regarding the possiblity of filing an action to obtain appropriate court funding. There were three judges from Connecticut that responded in this manner and eight from Missouri.

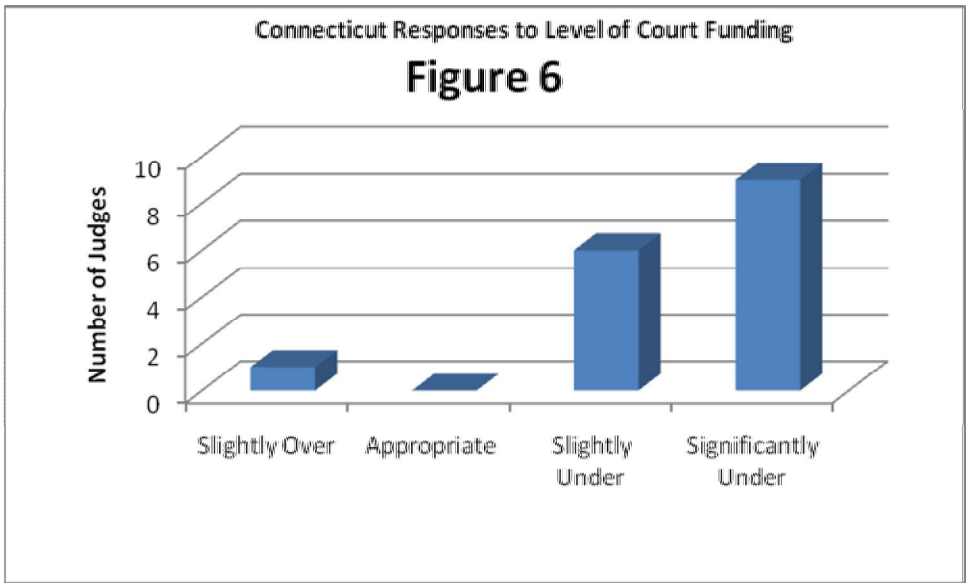


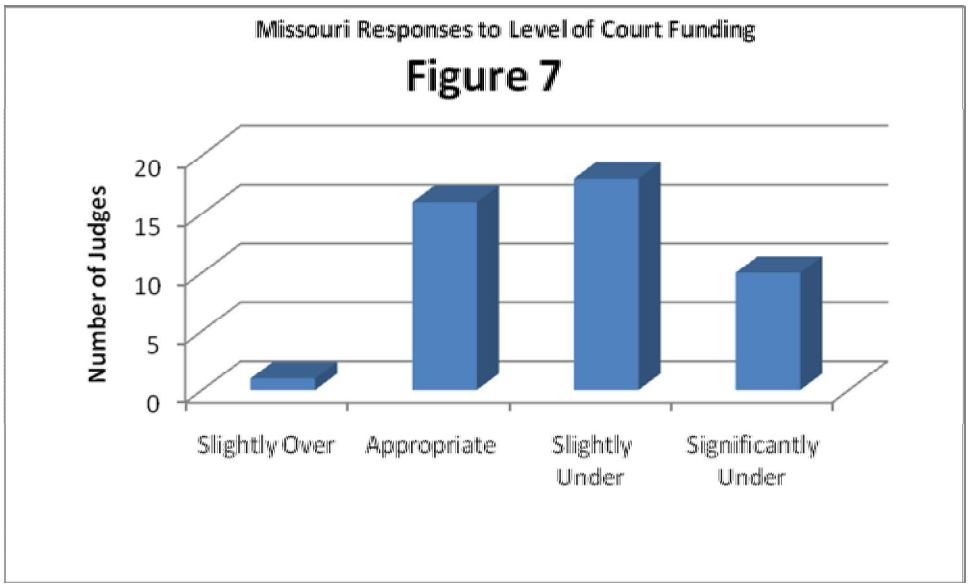
It is assumed that discussions regarding filing actions to compel court funding will only take place in court systems in which a funding dilemia or crisis is actually taking place. The Survey asked judges, "How would you describe the current funding in your circuit/district?" and asked them to circle one of five choices that were provided. The choices were "Significantly over funded", "Slightly over funded", "Appropriately funded", "Slightly under funded" or "Significantly under funded." All 111 judges that responded to the survey, responded to this question. The responses of all of the judges to this question are relevant to this project because it is presumed that any judge would know if their court was appropriately funded. No judge reported that their court was significantly over funded so this possible response is not depicted in Figures 5, 6 and 7 below. Figures 5, 6, and 7 report the responses from Ohio, Connecticut and Missouri[8], respectively. A graphic was not developed for New Jersey as there were only two

[8] Thirty four of the forty five Missouri judges responding indicated that the level of funding in their state was "Appropriate" or "Slightly Under" funded. This represents 76% of the total responses.

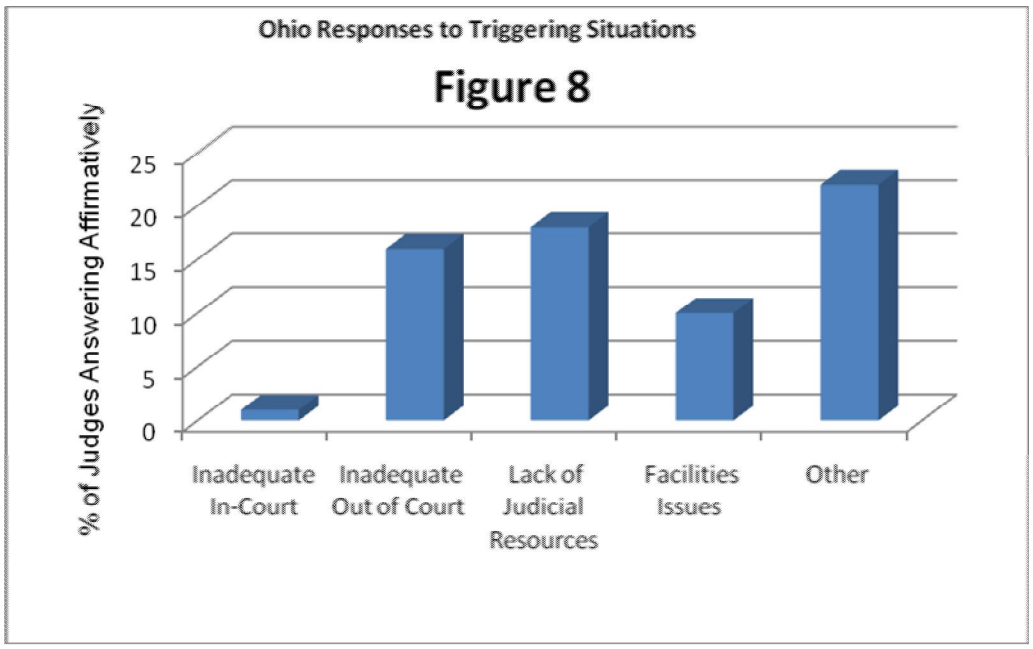
responses. In that state, one judge responded that the funding level was “appropriate” and the other indicated that the court was “slightly under funded.”

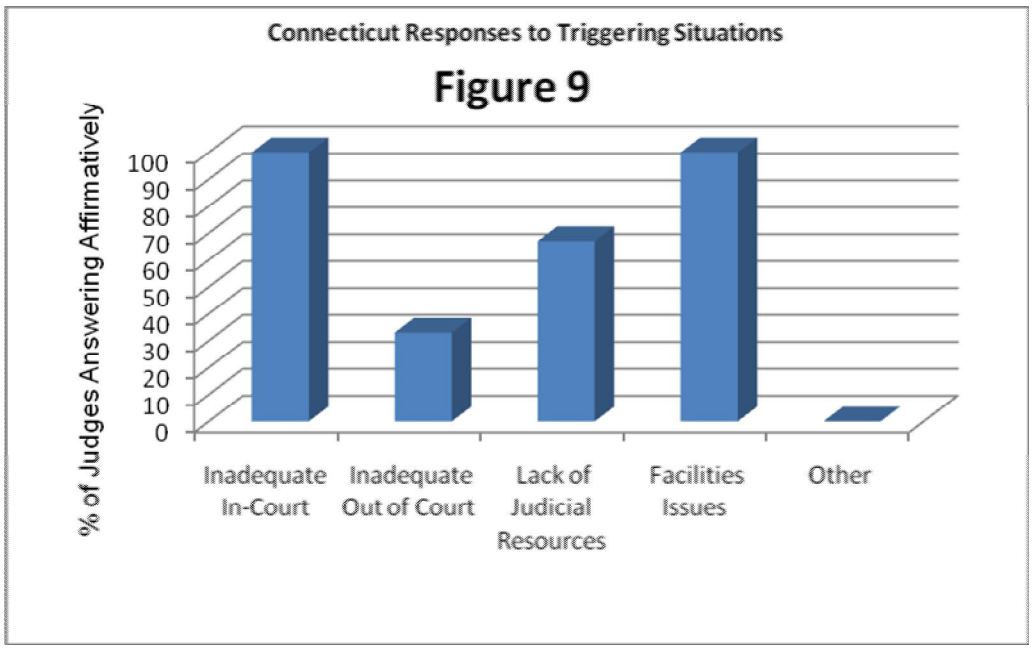


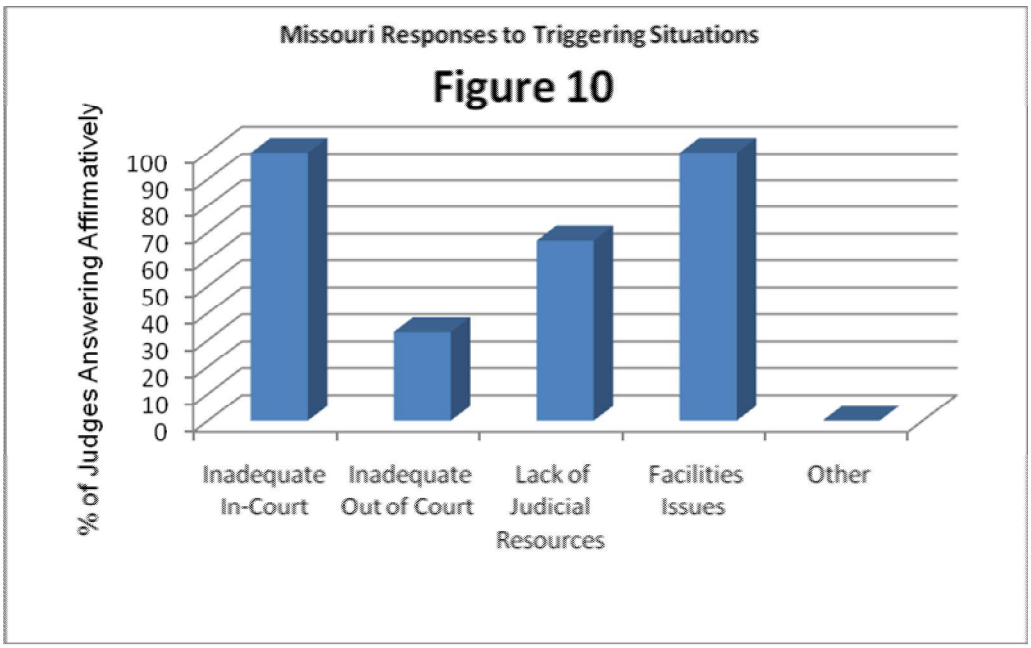




It is presumed that most judges that have had a conversation regarding filing a funding action with another judge or a court administrator have at least one specific concern that would cause this conversation. It is acknowledged that occassionally a judge may be a "passive participant" in a conversation and not actually be considering this type of action. However, the survey collected information regarding the types of situations judges might consider to be triggering causes for filing actions to obtain court funding. Judges that responded that they had a conversation with another judge or court administrator regarding the possibility of filing a funding action were asked to select one or more of five choices. The choices were, "Inadequate staff to perform court functions", "Inadequate staff to perform out of court functions", "Lack of resources to fulfill adjudicative needs of judges, for example, lack of access to updated caselaw/statutes", "Inadequate or unsafe court facilities" or "Other, please explain." Figures 8, 9 and 10 portray the results for Ohio, Connecticut and Missouri, respectively. A chart was not prepared for New Jersey due to the limited number of responses.


Ohio Responses to Triggering Situations
Figure 8
% of Judges Answering Affirmatively
25
20
15
10
5
0
Inadequate In-Court
Inadequate Out of Court
Lack of Judicial Resources
Facilities Issues
Other


Connecticut Responses to Triggering Situations
Figure 9
% of Judges Answering Affirmatively
100
90
80
70
60
50
40
30
20
10
0
Inadequate In-Court
Inadequate Out of Court
Lack of Judicial Resources
Facilities Issues
Other


Missouri Responses to Triggering Situations
Figure 10
% of Judges Answering Affirmatively
100
90
80
70
60
50
40
30
20
10
0
Inadequate In-Court
Inadequate Out of Court
Lack of Judicial Resources
Facilities Issues
Other

Conclusions

It is unquestioned in appellate cases and in the literature, that state courts have the right to compel their funding authorities to appropriately fund them so that they may fulfill their core functions. Legal scholars differ as to whether they view this "inherent power" as being established by the state constitutions which establish the judiciary as a coequal branch of government within a tripartite system. Alternatively, some legal scholars argue that the basis is pragmatic; courts have duties to fulfill and even absent any constitutional or statutory authority and must be able to force the hands of funding authorities so those duties may be accomplished. Justice Opala's wrote,

> "State courts claim as "inherent to them" those powers which, though neither granted to, nor withheld from them by the state constitution and not found in any other source of law, must nevertheless be concede to the judiciary as a separate department of government because their exercise is deemed absolutely essential for the performance of the court's constitutionally mandated mission."[9]

This quote is probably the best summation of the theory in U.S. case law. However, regardless of the view legal scholars and appellate judges have as to the source of inherent power to compel court funding, all of them agree it exists.

A review of the case law suggested that there were a significantly higher number of appellate cases coming from states which have trial court systems that are primarily funded by their counties as opposed to trial court systems funded primarily by the state. The existence of a high number of appellate court opinions on this issue in states with county funded trial courts suggests that judges in those states are more willing to bring this type of action than judges serving in states with primarily state funded trial courts. This of course presumes that trial courts which are primarily state funded have similar

[9] Infra footnote 2

budget issues to courts which have county funded trial court systems. However, the attitudes and willingness of judges to actions to compel court funding had not previously been studied. The research conducted within this project is limited but does strongly suggest that whether a judge will file an action to compel to court funding is tightly correlated with the type of funding his or her court receives. Judges in county funded trial court system are far more likely to consider filing an action and likely far more likely to actually do so.

There were two states surveyed in this project that primarily have state funding for their general jurisdiction courts, they are Connecticut and New Jersey. The other two states surveyed were Missouri and Ohio, general jurisdiction courts in those states are primarily county funded. One immediately obvious point is that judges in the states surveyed that have largely county funded courts returned the surveys at a much higher rate than judges from states in which the courts are largely state funded. To illustrate this point, 100 surveys were sent to judges in each state. There were no surveys that were returned as "undeliverable." There were 48 surveys returned from Ohio and 45 surveys returned from Missouri. Connecticut and New Jersey, which are largely state funded, returned 16 and two, respectively.[10] It seems reasonable to conclude that judges from states with largely county funded general jurisdiction courts are more interested in this issue than judges from largely state funded courts.

This may not be surprising in light of the fact that there were no judges from the 16 judges from Connecticut that responded that indicated that they had a role in preparing the court's budget. It is hypothesized that judges who have some role in the

[10] The author has no explanation for why only two responses were received from judges in the state of New Jersey.

budget preparation process would be more likely to respond to a survey regarding this issue than judges who have no budgetary role within their court.

This project compared judge's attitudes towards the level of court funding they were receiving. Figure 6 demonstrates that the majority of responding judges in Connecticut felt that their courts were "significantly under" funded. This attitude is contrasted with Figures 5 and 7 from Ohio and Missouri, respectively. In Ohio, the majority of judges felt that their court system were "slightly under" funded, while a minority of judges in that state indicated that funding was either "appropriate" or "significantly under" funded. In Missouri, in almost equal raw numbers, judges indicated that their courts were either "appropriately" funded or "slightly under" funded. A minority of judges from Missouri did indicate their court was "significantly under" funded. There were not enough survey returned from New Jersey judges to reach any conclusions about their attitudes and opinions. The author does not have an explanation for the low response rate for said state. However, it appears that judges in Connecticut view their trial court funding situations as being worse than judges in Ohio or Missouri. Comparing the later two states, judges from Ohio expressed at a slightly higher rate that their courts were either "slightly under" funded or "significantly under" funded than judges in Missouri did.

The survey asked judges who had responded that they had a role in developing their courts budget if they had a conversation with another judge or court administrator regarding "the possibility of bringing an action against your funding authority to compel them to provide adequate court funding." The question was designed to identify judges who had seriously consider the question of trying to compel court funding from judges

that may have simple had an idle thought about the issue. Unfortunately, there were no judges in Connecticut that indicated that they had a role in developing their court's budget. The New Jersey sample of only two responses was so small that it is deemed to have no value. Both the limited response from New Jersey and the lack of budgetary participation from the responding judges from Connecticut were significant surprises to the author. Three judges from Connecticut stated that they had a conversation with another judge or court administrator regarding "the possibility of bringing an action against your funding authority to compel them to provide adequate court funding." However, the survey does persuasively demonstrate that judges from the two states surveyed that have largely county funded trial court systems, had a greater interest in the question of using the courts inherent powers to compel their funding authority to adequately fund their court. This can be demonstrated both by the higher rate of conversations on the issue than in Connecticut, the only state funded trial court system to respond to the survey in appropriate numbers to analyze. Additionally, the judges from the two states with primarily county funded systems participated in the survey at a much higher rate than judges from state funded trial courts. This strongly suggests a higher interest in the topic.

The survey asked judges that responded that they had a conversation with another judge or court administrator regarding the possibility of filing a funding action were asked to select one or more of five choices. The choices were, "Inadequate staff to perform court functions", "Inadequate staff to perform out of court functions", "Lack of resources to fulfill adjudicative needs of judges, for example, lack of access to updated caselaw/statutes", "Inadequate or unsafe court facilities" or "Other, please explain." It is

noted that the question asked for only judges who had the type of conversation previously describe to respond to this question. Figures 8, 9 and 10 portray the results for Ohio, Connecticut and Missouri, respectively. A chart was not prepared for New Jersey due to the limited number of responses. There are only three responses for Connecticut so the results from that state should be considered cautiously. However, in viewing Figures 8, 9 and 10 together it is clear that judges in all three states have very consistent attitudes about the root causes which may trigger them to file an action to compel their funding authority to appropriately fund them. The two primary causes would be "inadequate staff to perform in court functions" and "inadequate or unsafe court facilities."

Another goal of this project was to determine if a pre-existing dispute resolution system has an impact on judges willingness to consider filing an action to compel their funding authority to provide appropriate court funding. It was presumed that having a pre-existing mechanism in place, such as Missouri's Judicial Finance Commission, might have the unintended effect of actually encouraging court funding cases. It must be noted at the outset that there was insufficient data from the judges from the two state funded trial court states, Connecticut and New Jersey, to reach any conclusions regarding this issue with states that have state funded trial courts. However, this data from this project suggests that having a pre-existing system in place for the resolution of court funding disputes does not encourage judges to consider filing these types of actions. The total number of responses received from the two states with primarily county funded trial courts was nearly the same. Additionally, both states had the identical number of responding judges who said their courts were significantly under

funded, see Figures 5 and 7. Missouri the variance in the responses to the level of court funding which is depicted in Figures 5 and 7 is that a higher percenatge of judges in Ohio felt that their courts were slightly under funded. However, presuming that have a conversation regarding "the possiblity of filing" an action to compel court funding is indicative of a willingness to actually file such an action, then Figure 3 demonstrates that judges in Missouri, a state that has a pre-existing mechanism to resolve court fuding disputes, is actually less likely to consider this type of action. Nearly three times as many Ohio judges had a conversation regarding the possibility of filing a funding action than there Missouri conterparts. This is somewhat suprising because views as to the current level of funding and views of the triggering causes for filing actions do not differ that significantly between the states, see Figures 5, 7, 8 and 10. It is therefore concluded that in states with county funded trial court systems, having a pre-existing system in place to resolve court funding issues likely will not increase the numbers of actions being filed.

Recommendations

It is therefore recommended that in county funded states that do not have a pre-existing mechanism for resolving court funding disputes, consider creating such a mechanism. The model used in Missouri for their "Judicial Finance Commission" appears to be a reasonable model that would be easy to replicate. Their commission consists of three judges, three county commissioners and a federal judge. States may wish to include other participants in their commission design, such as a member of the bar or an appointee of the governor. However, the commission should be as evenly divided between funding authority participants and judicial participants as possible so

that there is both the appearance of fairness and actual fairness are possible. Any costs associated with the creation and operation of such a commission would likely be offset by the savings associated with having a simplified litigation process. It is also likely that filing with a commission designed to resolve court funding disputes would not create as much hostility between the funding authority and the bench as traditional litigation would.

Bibliography

Brennan, James T., *Judicial Fiscal Independence*, University of Florida Law Review, 1971, 23 U. Fla. L. Rev. 277

Buenger, Michael L., *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?,* Kentucky Law Journal, Summer 2003/2004, 92 Ky L.J. 979

Comment, State Court assertion of Power to determine and Demand Its Own Budget, University of Pennsylvania law Review, 1972, U. Pa. L. Rev.

Doguet, Andre*, McLain v. Grant Parish Police Jury: Judicial Use of the Inherent Powers Doctrine*, Louisiana Law Review, 1985, 46 La. L. Rev. 157

Dowling, Henry M., *The Inherent Power of the Judiciary*, 21 American Bar Association Journal, 1935, 21 Amer. B. Assn. Journal 635

Ferguson, William S., *Judicial Financial Autonomy and Inherent Power*, Cornel Law Review, 1973, 57 Cornel L. Rev. 975

Glaser, Howard B., Wachler v. Cuomo, *The Limits of Inherent Power*, Pace Law Review, 1994, 14 Pace L. Rev. 111

Jackson, Jeffrey, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, Maryland Law Review, 1993, 52 Maryland L. Rev. 217

Letteau, Gabrielle Tracey, *Crisis in California: Constitutional Challenges to Inadequate Trial Court Funding*, Hastings Constitutional Law Quarterly, 1995, 22 Hastings Const. L. Q. 557

Medlin, John and Rhonda B. Billings, *Judicial Independence Requires More Resources and Greater Management Flexibility,* The North Carolina State Bar Journal, Summer, 2003

Stumpf, Felix F., *Inherent Powers of the Court*, The National Judicial College, 2008

Swearingen, Walter E., Wachler v. Cuomo, *Does New York's Judiciary Have an Inherent Right to Self-Preservation?*, Pace Law Review, 1994, 14 Pace L. Rev. 153

The Cost of Justice: Budgetary Threats to America's Courts, The Constitution Project, 2006

The Court's Inherent Powers to Compel Legislative Funding of Judicial Functions, Michigan Law Review, 1983 81 Mich. L. Rev. 168

Webb, G. George and Keith E. Whittington, *Judicial Independence, The Power of the Purse, and Inherent Judicial Powers*, Judicature, 2004, 88 Judicature 13

Zobinson, Ted and Christa Brown, *The Judiciary's Inherent Powers to Compel Funding: A Tale of Heating stoves and Air Conditioners*, St. Mary's Law Journal, 1989, 20 St. Mary's L. J. 863

Appendix A

National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185

Attn: Greg Hurley, Esq.

Dear Judge:

I am currently working on a study of judicial attitudes towards the use of inherent powers to compel funding authorities to provide the courts with a sufficient funding stream so that they may fulfill their adjudicative and administrative functions. This project is being done in conjunction with the Court Executive Development Program, taught by the Institute for Court Management at the National Center for State Courts. Students who successfully complete this final phase of this program will graduate at the U.S. Supreme Court in May of 2010 as fellows of the Institute for Court Management. I am a student in the program.

I randomly selected one hundred judges from each of four states to take the enclosed survey. You were selected randomly in this process. The survey is intentionally brief so that it will not utilize any more of your time than necessary. There is also an addressed and stamped envelope enclosed with this letter for your convenience in returning the survey. The responses to this survey will only be reported in an aggregate form and the actual responses of any judge will never be released. Please respond by January 11, 2010 so that your responses can be included in my analysis of this important issue.

I have included an optional line on the survey for your email address. If you would like to receive a copy of my completed work which should be finished by March, 2010, please include it. I thank you in advance for your time and I hope will choose to complete and return the survey.

Sincerely,

Gregory S. Hurley, Esq.

Appendix B

Survey of Judicial Attitudes towards the Use of Inherent Powers to Compel Court Funding

1. How many judges are in your circuit/district? _____

2. Do you have a role in the developing your courts' budget? Yes/No

3. Do you submit your courts' budget to your funding authority? Yes/No

4. In the past 36 months, have you discussed the possibility of bringing an action against your funding authority to compel them to provide adequate funding for your court with another judge or court administrator?

5. Can you foresee a budget crisis happening that would cause your court to consider bring an action against the funding authority based on inherent powers to compel more funding? Yes/No

6. If yes to #4, what would the triggering events be that would cause you to feel justified in filing or supporting the filing of an inherent powers action against your funding authority? Circle all those that apply.

Inadequate staff to perform in court functions

Inadequate staff to perform out of court functions

Lack of resources to fulfill adjudicative needs of the judges, for example, lack of access to updated caselaw/statutes

Inadequate or unsafe court facilities

Other, please explain _____

7. In your court system, what would be the most likely single cause that might cause you to file or support the filing of an inherent powers action to compel court funding?

Please specify, _____

8. To your knowledge, has there been any serious consideration of bring an inherent powers action against your funding authority in the last 36 months by the judiciary in your circuit/district? Yes/No

9. How would you describe the current funding in your circuit/district. Circle one that applies.

Significantly over funded

Slightly over funded

Appropriately funded

Slightly under funded

Significantly under funded

10. In response to the current fiscal crisis, which of the following cost savings measures has your circuit/district had to employ. Circle all that apply.

Significant reduction of training, conference and seminar attendance

Hiring freeze for non judicial positions

Hiring freeze for judicial positions

Furloughs for non judicial employees

Furloughs for judges

Hours/days of court closures

If you would like to receive an electronic copy of the research paper which will include the results of this survey in aggregate form, please legibly write your email address below. It is anticipated that it will be sent in March of 2010.

_____

Email Address (Optional)

Response from Connecticut