

# NEW YORK UNIVERSITY LAW REVIEW

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VOLUME 80

NOVEMBER 2005

NUMBER 5

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## *BRENNAN LECTURE*

### CHALLENGES FACING AN INDEPENDENT JUDICIARY

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*Challenges to an independent judiciary are not unique to our time, but recent events have highlighted the difficulties facing a branch that can neither enforce its own decisions nor fund its own operations. In this installment of the annual William J. Brennan, Jr. Lecture on State Courts and Social Justice, I recount my state's pragmatic approach to securing the institutional independence of its judiciary. To shore up the independence of the Western world's largest court system, California began by making sweeping structural changes. In this Lecture, I discuss three of these structural reforms in detail: shifting of funding responsibilities from the counties to the state, transfer of ownership of local courthouse facilities to the state, and consolidation of different trial court levels into a single, unified whole. These changes have drastically increased the institutional independence of California's judiciary and helped to solidify its status as coequal to its sister branches. I further argue that these basic structural changes also bear the promise of greater decisionmaking independence for judges in the state of California.*

Good evening. I want to thank the Institute of Judicial Administration and the Brennan Center for Justice for inviting me to give this address. The list of previous lecturers is most distinguished, and I hope that my remarks will in some manner add to the important dis-

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\* Copyright © 2005 by Ronald M. George. Chief Justice of California, A.B., 1961, Princeton University, Woodrow Wilson School of Public and International Affairs; J.D., 1964, Stanford Law School. This lecture was delivered on January 26, 2005 at New York University School of Law for the 11th Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice. I deeply appreciate not only the invaluable assistance of my Principal Attorney Beth J. Jay, assisted by extern Jean Covington, in preparing this lecture, but also Ms. Jay's contributions in helping me and other individuals bring about the structural reforms discussed here.

cussion of how we can keep our system of justice vital, responsive, and independent.

Challenges to courts, to the rule of law, to an independent judiciary, and overall to the administration of justice, come from many sources and take many forms. This is not a phenomenon unique to our time. From the inception of our Republic, courts have been the target of criticism and complaint by political and social commentators and by movements from every corner of the ideological spectrum. Fortunately for our nation, however, its founding fathers took great effort to define and protect a strong and independent judicial branch as fundamental to the system of government they were designing.

The doctrine of separation of powers and the importance of an independent judiciary were concepts that had long appeared in political and philosophical discourse in England and the European continent. One can trace the notion of a tripartite structure of government to as early as Aristotle's *Politics*, in which he outlined three distinct "elements" of government: the general assembly, public officials, and the judiciary.<sup>1</sup>

By the middle of the eighteenth century, the notion of three separate, coequal branches of government had evolved. Blackstone, discussing the need for separation of governmental powers, wrote in his *Commentaries*:

Were [the judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles . . . . Were it joined with the executive, this union might soon be an over ballance [sic] for the legislative.<sup>2</sup>

The doctrines of separation of powers and judicial independence came to fruition in the development of our nation's Federal Constitution, and are reflected in the dialogues of the Founders. In *Federalist No. 78*, Alexander Hamilton formulated the familiar characterization of the judiciary as the weakest of the three branches of government—having neither "force nor will," and reliant upon the other branches for the enforcement of its decisions. He went on to observe that "the general liberty of the people can never be endangered from that quarter."<sup>3</sup> Instead, echoing Blackstone, he perceived such danger to lie in the union of the judiciary with either of the other branches. In support of that thesis he quoted Montesquieu's dictum that "'there is

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<sup>1</sup> ARISTOTLE, *THE POLITICS* 165–77 (Ernest Baker trans., Oxford Univ. Press 1995) (350 B.C.).

<sup>2</sup> WILLIAM BLACKSTONE, 1 *COMMENTARIES* \*259–60.

<sup>3</sup> *THE FEDERALIST* NO. 78 at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1989).

no liberty, if the power of judging be not separated from the legislative and executive powers.’”<sup>4</sup> To this end, Hamilton championed permanent tenure for judicial officers during their good behavior, and an assurance that the compensation of judges would not be reduced during their tenure.

The doctrine of separation of powers frequently is invoked today—and its limitations disputed—no less than it has been historically. Similarly, the task of delineating the scope and significance of judicial independence continues to engage us. In these remarks I intend to focus upon the manner in which the creation of a more coherent administrative and managerial identity and presence for the judicial branch can assist in advancing these principles and aid court systems in providing more substance to their status as a coequal branch of government.

The California Constitution, in language similar to that of its federal counterpart, states: “The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record.”<sup>5</sup> The state constitution’s judicial article goes on to define the various parts of the judicial branch and their powers. But only in the provision describing the Judicial Council and its duties is there any reference to statewide oversight and the broad administration of justice.<sup>6</sup>

I believe it may be of interest to describe how California has built upon the traditional role of the courts in order to create a broader *institutional* identity and structure so as to allow the judicial branch to function more in the managerial tradition of its sister branches.

Discussions of judicial independence typically focus on the importance of independent decisionmaking. The need for freedom from inappropriate influence—whether political, personal, or fiscal—informs analyses of the potential effects of judicial elections and related fundraising, political pressures, and public expectations, on the decisionmaking process. At the same time, the judiciary does not function in splendid isolation. At every juncture, it is engaged in discourse and negotiation, whether express or implied, with the other branches, particularly the legislature.

These themes have been prominent in previous Brennan Lectures. For example, New York’s Chief Judge Judith S. Kaye inaugurated this series with an examination of the dynamic relationship between state courts and state legislatures in law-making and interpre-

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<sup>4</sup> *Id.* (quoting CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 165 (Edinburgh, A. Donaldson 1772)).

<sup>5</sup> CAL. CONST. art. VI, § 1.

<sup>6</sup> *See id.* § 6.

tation.<sup>7</sup> Four years ago, Christine Durham, now Chief Justice of the Utah Supreme Court, expanded on this exploration of the relationship between these two branches by focusing on the effects of “power and politics.”<sup>8</sup>

Describing the courts’ interaction with the legislative branch, Chief Justice Durham selected two activities for initial discussion: rulemaking and judicial branch funding. In discussing funding, she decried the “persistent perceptions by the executive and the legislature that we are just one more administrative agency, whose funding requests occupy an equivalent position in the budget process.”<sup>9</sup>

Chief Justice Durham also highlighted the problem of “budgeting decisions that target judicial decisionmaking,”<sup>10</sup> using as an example the California legislature’s reaction to a decision by the California Supreme Court that upheld a voter initiative imposing term limits and reducing the legislature’s budget by thirty-eight percent.<sup>11</sup> The legislature responded by threatening to cut the judiciary’s budget by the same percentage—not coincidentally—and also giving consideration to a constitutional amendment that would have removed the court’s inherent authority to require governmental entities to fund state programs and comply with court judgments.<sup>12</sup> Fortunately, the end result was a budget reduction of only three percent, and the constitutional amendment did not make it to the ballot. The crisis was averted, but the threat made a lasting impression.<sup>13</sup>

The continuing dialogue concerning the appropriateness of checks on the exercise of the judicial function demonstrates the fluidity of the boundaries separating the three branches of government. Threats to judicial budgeting based upon displeasure with the outcome of a particular case or type of case often arise in tandem with movements to limit the judicial function in areas such as sentencing

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<sup>7</sup> Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

<sup>8</sup> Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1602 (2001).

<sup>9</sup> *Id.* at 1612.

<sup>10</sup> *Id.*

<sup>11</sup> *Legislature of Cal. v. Eu*, 816 P.2d 1309 (Cal. 1991).

<sup>12</sup> *See* Durham, *supra* note 8, at 1612–13.

<sup>13</sup> *See, e.g.*, Frances Ulmer, Distinguished Visiting Professor, Univ. of Alaska and former Lieutenant Governor of Alaska, Remarks at the American Judicature Society Mid-Year Meeting Program (Feb. 2004), in 87 JUDICATURE (2004), at 231 (“In the budget arena . . . there’s unquestionably an issue associated with retribution—trying to influence decision making. Those issues vary dramatically from state to state and event to event.”).

discretion, and to restrict the courts' jurisdiction to entertain certain types of lawsuits.<sup>14</sup>

Threats to judicial authority, whether through attempts to limit judicial powers or to restrict the exercise of discretion by individual judges, seem to some to have arisen with increased intensity and frequency of late. At the federal judicial level, responses by Chief Justice Rehnquist in his annual reports on the state of the judiciary have highlighted the challenges faced by the federal courts, whether from inadequate funding, proposals to limit federal reliance upon foreign law, or targeted scrutiny of individual judges because of decisions in specific cases.<sup>15</sup>

In 1997, the American Bar Association's Commission on Separation of Powers and Judicial Independence issued its report on "An Independent Judiciary," characterizing as twofold the intent of the Founders in establishing an independent and coequal judicial branch:

First, making the judiciary independent of inappropriate outside influence within and without government would better enable the judiciary to render impartial decisions in individual cases—hence the need for decisional judicial independence. Second, making the judiciary a third branch of government independent of the legislature and executive would enable the judiciary to check over-concen-

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<sup>14</sup> Congressional and other reactions to cases such as *United States v. Booker*, 125 S.Ct. 738 (2005) (holding that district courts are required to take United States Sentencing Guidelines into account but are not bound to apply them because guidelines are effectively advisory rather than mandatory) and *Roper v. Simmons*, 125 S.Ct. 1183 (2005) (striking down imposition of death penalty on juvenile offenders under eighteen years of age, where even minority of jurisdictions that allowed this punishment used it infrequently) demonstrate some of the continuing tensions in this area at the federal level. See, e.g., Carl Hulse & Adam Liptak, *New Fight Over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29; see also William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347. Examples of threats to alter the judicial role or process in some manner abound in current and past criticism of judicial decisions. See F. James Sensenbrenner, Jr., Chair of the House Comm. on the Judiciary, Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar. 16, 2004), in 87 JUDICATURE (2004), at 202.

<sup>15</sup> WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–8 (Jan. 1, 2005), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf> (acknowledging historical tradition of criticism of judges and judicial decisions, while observing that "criticism of judges, including charges of activism, have in the eyes of some taken a new turn in recent years," including collection of information on individual judges, "suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream," and "several bills introduced in the last Congress that would limit the jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action"); see also Mike France & Lorraine Woellert, *The Battle Over the Courts: How Politics, Ideology, and Special Interests Are Compromising the U.S. Justice System*, BUS. WK., Sept. 27, 2004, at 36.

trations of power in the political branches—hence the need for institutional judicial independence.<sup>16</sup>

Discussing institutional independence, the report acknowledged the important role of Congress in regulating the judiciary, concluding: “Theoretically, then, a line separates constitutional legislative oversight of the courts from unconstitutional usurpation of core judicial functions.”<sup>17</sup> The report reviewed various areas of intersection between legislative control and judicial functioning that have been continuing sources of friction. Among them are judicial salaries, appropriations for the support of the courts, control over internal administration, the discipline of judges, and control over court practices and procedures.<sup>18</sup>

Addressing specific state-level concerns, the Commission contrasted the lifetime tenure of federal judges with the selection process and tenure of state judges. It cited the general role of judicial elections and the related question of campaign contributions—together with the ensuing expectations concerning judicial accountability—as complicating factors in defining the scope of judicial independence.

I have no easy formula to describe the extent or limits of judicial independence. Ensuring a fair and objective decisionmaker is foundational,<sup>19</sup> but it is a goal that must be viewed in the context of many

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<sup>16</sup> Am. Bar Ass’n, *An Independent Judiciary: A Report on Separation of Powers and Judicial Independence* 5 (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html>.

<sup>17</sup> *Id.* at 26.

<sup>18</sup> *See id.* at 25–36.

<sup>19</sup> The importance of this understanding was demonstrated as early as 1805, when the impeachment of United States Supreme Court Associate Justice Samuel Chase provided an early opportunity for the judiciary’s sister branches to consider the role of an independent judiciary. The proceedings, initiated after a change in the governing party, were motivated largely by overtly political considerations. Although Justice Chase was impeached, he was not removed from office; many senators and other individuals concluded that removing judges based solely upon a change in political leadership would be detrimental to our nation’s fledgling democracy. Judge Robert Bork described the judicial role as follows: “Federal judges are not appointed to decide cases according to the latest opinion polls. They are appointed to decide cases impartially according to law.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 313 (1990). Justice Oliver Wendell Holmes has been quoted famously, albeit in slightly different formulations, as drawing a distinction between rendering justice and acting as a judge:

Justice Holmes and Judge Learned Hand had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, “Do justice, sir, do justice.” Holmes stopped the carriage and reproved Hand: “That is not my job. It is my job to apply the law.”

*Id.* at 6 (internal citations omitted); *see also* HARRY C. SHRIVER, *WHAT GUSTO: STORIES AND ANECDOTES ABOUT JUSTICE OLIVER WENDELL HOLMES* 10 (1970); Robert A. Ferguson, *Holmes and the Judicial Figure*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 183 (Robert W. Gordon ed., 1992) (quoting SHRIVER, *supra* at 10).

additional factors. As others have observed, any discussion of judicial independence in decisionmaking must be tempered by inquiry into the effect and appropriate extent of legislative oversight, the impact of political partisanship, the role of state judicial elections that may be partisan—whether competitive or retention elections—and the inherent difficulties of instilling public appreciation for the judiciary's countermajoritarian role in an increasingly polarized political landscape.<sup>20</sup> In short, aspects of *institutional* independence must be evaluated in discerning the outlines of *individual* judicial independence.<sup>21</sup>

During the past decade, California's judicial branch has taken a decidedly pragmatic approach to shoring up the institutional independence of the judiciary. By focusing in particular on basic *structural* changes—and I shall discuss three in detail—we have sought to establish a more concrete institutional identity for the judicial branch. By establishing a stronger identity as a fully developed branch of government, our court system has begun to play a more persuasive and active role in the debate concerning the appropriate degree of separation of power among the three branches, the independence of the courts, and the allocation of resources necessary to enable the judicial branch to fulfill its constitutional role.

We have made substantial progress in achieving this increased sense of institutional identity and accountability, and have done so with the active assistance and cooperation of our sister branches. As a

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Courts are charged with making decisions based upon law and precedent, because the parties cannot agree on the correct legal outcome of a particular dispute. Criticism of decisions is an expected part of the process: By its very nature, the judicial enterprise most often will leave at least one side dissatisfied with the outcome. Respect for the process, however, should not and cannot be premised solely upon agreement with results.

<sup>20</sup> Judges today are familiar with claims that their decisions thwart the will of the people. In California, we have become accustomed to seeing judicial opinions that determine the constitutionality of particular initiatives and referenda adopted by the electorate analyzed using political measurements rather than on their legal merits. Often ignored is the circumstance that it is the supreme expression of the people's will, the Federal Constitution, or its state counterpart, that may necessitate the court's invalidation of a statute adopted by a legislative body or directly by the electorate.

Scholars continue the debate begun by Alexander M. Bickel's classic work, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962), concerning the effect of judicial review on our democratic process, when courts should avoid deciding the merits of a case, and how they should weigh competing values in rendering their decisions. At the same time, however, the number of issues of major policy importance that end up before the courts, and that involve disputes that courts are bound by their intrinsic role in our government to decide, seems to have increased. The resulting dissonance illustrates the sometimes uneasy intersection of the ideally apolitical role of the courts and the political expectations of some court-watchers.

<sup>21</sup> See, e.g., Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 69 (1996).

result, we have seen greater willingness on the part of the legislative and executive branches to consider—as a primary obligation of government—the needs and role of the judicial branch.

California's court system is the largest in the Western world, surpassing that of the federal system. It encompasses more than 1600 judges and 400 court commissioners, all trained in the law. The fifty-eight counties of our state range from Alpine County, with a permanent population of approximately 1200 individuals, to Los Angeles County, with almost 10 million residents. Some counties are compact, with easily accessible county centers. Others range across deserts or are bisected by mountain ranges. Until recently, coordination among the courts was sporadic at best.

The first of our three major structural changes related to the funding of court operations. As in many states, California's trial courts historically were locally funded. Most resources were provided by the respective county Board of Supervisors. The ability of the courts in any particular county to fully meet the needs of the community depended in large part upon the financial health of their community, and, in many instances, upon the relationship (good or bad) between the court leadership and the county Board of Supervisors.

When I became Chief Justice of California in 1996, I undertook a year-long series of visits to the courts in each county in the state. It became apparent that the fiscal health of most of our trial courts was in a very precarious position. A few years earlier, the Legislature had enacted a measure to increase state support for the courts. In the face of a severe budget crisis, however, the promise of expanded state assistance fell by the wayside at the same time that many counties were finding their own resources insufficient to meet their overall governmental needs. With the responsibility for support of the courts falling on both the state and the counties, neither level of government seemed inclined to step forward and assume ultimate accountability for ensuring sufficient support to the courts.

As a result, access to justice across the state and the quality of justice being dispensed varied enormously. In some counties, courts faced imminent closure; in others, severe limitations on services available to the public had occurred or were threatened. The gravity of the situation was brought into sharp relief the day it was necessary to dispatch a messenger with an emergency check from the state Administrative Office of the Courts so that a court in a small county could meet its payroll the next day.

We turned to the Legislature, which responded by enacting emergency appropriations that allowed our system to close the fiscal year



without complete court closures in any county.<sup>22</sup> Despite this assistance, in many venues clerk's office hours were shortened, courtrooms were closed for at least part of the week, and assorted services to the public were curtailed or terminated. This perilous situation made it obvious that the existing budget system was inadequate to carry out the administration of justice, to provide equal access to the adjudication of disputes, to protect public safety, and ultimately to meet the needs and reasonable expectations of the residents of the State of California in having a well-functioning court system.

How could the judicial branch attempt to obtain the resources it needed and increase the courts' responsiveness to the public's needs? The first step was to consider *why* the courts were faced with financial instability. One clear factor was that the existing system of judicial branch governance essentially consisted of often overlapping, inconsistent, and narrowly focused fiefdoms—a system not unlike that described in Professor Robert Post's article relating the conditions that gave rise to the administrative innovations in the federal judicial system initiated by Chief Justice William Howard Taft.<sup>23</sup>

In California, no mechanism existed for ensuring continuity and equal access to justice statewide. The judicial power of the state was vested in the courts by the state constitution, but the administration of the courts was a hodgepodge of locally directed efforts.<sup>24</sup>

No clear information was available concerning the overall costs of the judicial branch statewide. Various counties employed different accounting methods to measure the funding and assistance provided to individual courts. Thus, in one court, the cost of the newly

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<sup>22</sup> 1997 Cal. Stat. 3.

<sup>23</sup> See Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft*, 1 J. SUP. CT. HIST. 50, 54 (1998) ("[F]ederal judges throughout the country were entirely autonomous, little independent sovereigns. Every judge had his own little principality. He was the boss within his district, and his district was his only concern.") (quoting FELIX FRANKFURTER, *Chief Justices I Have Known*, in FELIX FRANKFURTER ON THE SUPREME COURT 487–88 (1970)).

<sup>24</sup> The California Judicial Council, created in 1926 by constitutional amendment, evolved into an institution dedicated principally to adopting rules of practice and procedure and related forms, and to accumulating statistics as directed by the Legislature. It played an essentially reactive role, responding to actions initiated by the Legislature.

At the beginning of the last decade of the twentieth century, the Judicial Council began to consider the benefits of functioning as a more active statewide policy-maker in order to meet the changing demands and expectations facing the court system. In 1992, it launched a major self-exploration to consider ways in which to improve access to justice and the judicial branch's ability to set its own agenda for the future, resulting in the adoption of the Council's first Strategic and Reorganization Plan in November, 1992. See Press Release, Admin. Office of the Courts, Judicial Council Adopts Strategic Plan, Structural Changes to Increase Participation and Accountability (Nov. 13, 1992) (on file with the *New York University Law Review*).

emerging area of information systems management might be addressed on a countywide basis. In another court, there would be no organized approach to employing this new tool, and the decision whether to employ information systems depended upon the inclinations of individual judges or court administrators. In fact, at least one court facility housed multiple incompatible systems located in the clerk's office and various judges' chambers. There was scant attention—or none at all—paid to the possibility of coordination with other courts or levels of court, much less with agencies, such as county probation departments or the state Department of Justice or Department of Motor Vehicles, with which the efficient sharing of information was a logical goal. As a result, the use of incompatible computer technology in California was creating an electronic Tower of Babel.

Some of the public's expectations about the courts and their role in society also had changed. California's population had become increasingly diverse; in any one year, interpreters might be required to translate more than one hundred languages in our state courts. The different cultural backgrounds of those arriving at the courthouse door and the increasing number of self-represented litigants placed unprecedented demands upon the courts. High-profile cases, as well as television and film programs loosely based on legal proceedings, had influenced and all too often distorted the public's view of the legal system.

It seemed clear that a more stable, equal form of funding was essential if the courts were to meet these challenges, act responsibly, and provide reasonable accountability for their actions—and thus fulfill their constitutional role in government. The concept of statewide or unitary funding to which we turned was far from novel. Its benefits—and potential drawbacks—had been the subject of scholarly and practical consideration for many years.

More than three decades ago, an article, authored by Professor Geoffrey Hazard and two colleagues, began by noting the lack of funding then befalling the courts as well as other public institutions,<sup>25</sup> a situation not unfamiliar to us today. Analyzing the pros and cons of unitary budgeting for the courts, a process then implemented in seven states, the authors cited four advantages of a unitary system: "(1) Unitary budgeting promotes planning in judicial administration; (2) It permits a more equitable distribution of judicial services within a state; (3) It facilitates uniformity in job classification of judicial

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<sup>25</sup> Geoffrey C. Hazard, Jr. et al., *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286 (1972).

employees; (4) It provides a mechanism for administration of the system.”<sup>26</sup>

As our court system considered what structural changes might best serve California, our hope was that transforming funding for the trial courts into a statewide responsibility not only would help to realize those benefits, but also might enable our judicial system to improve meaningful access to justice without regard to county lines.

Professor Hazard’s 1972 article, discussing the political factors implicated in unitary budgeting, suggested that “[o]nce a unified budget has been established, the influence of political pressure on administrative policymaking in the courts should diminish.”<sup>27</sup> Nevertheless, from the first, we in California recognized that a simple shift to state funding would not cure all ills.

Recent experience in the federal courts, which of course are funded entirely by Congress, as well as the experience of some state judicial systems whose financial support derives fully from the state rather than from local entities, supports the conclusion that a unitary funding structure does not necessarily vanquish managerial and administrative pressures, much less substantive political pressures. Nevertheless, as I shall explain, if viewed as part of an overall effort to solidify a separate and independent “branch” identity for the court system, such funding may provide a more effective platform from which to deal with such influences.

In 1997, at our urging, the California Legislature enacted a measure shifting the responsibility for funding the trial courts from the counties to the state, conferring on the Judicial Council the function of creating (subject to legislative approval) and allocating a budget for the trial courts statewide.<sup>28</sup> Today that budget approximates \$2.5 billion.<sup>29</sup> Over the ensuing years, the Judicial Council has worked with the trial courts to create a standardized approach to assess needs, develop budgets, and set priorities, as well as to establish systems that provide fiscal accountability to our sister branches of government.

The diversity of local factors affecting court operations made it imperative that branch-building not devolve into overcentralized management or micro-management of the constituent courts. What makes sense in a large urban court may be completely inappropriate in a rural setting. Clearly, one size does not fit all. To this end, we have encouraged trial courts to develop programs that can be adapted to

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<sup>26</sup> *Id.* at 1296.

<sup>27</sup> *Id.* at 1300.

<sup>28</sup> Lockyer-Isenberg Trial Court Funding Act of 1997, 1997 Cal. Stat. 850.

<sup>29</sup> 2005 Cal. Stat. Ch. 38, available at <http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=03313218617+1+0+0&WAISSaction=retrieve>.

meet local needs, while still advancing broad policy objectives. For example, a pilot project to develop methods of better handling complex litigation has resulted in a deskbook that can be used in all courts,<sup>30</sup> but at the same time, courtrooms dedicated to handling these matters have been created only in counties in which the volume of complex cases creates a need for such specialization.

We now consider improving access to the courts for unrepresented litigants to be a major priority. In some counties, in more than two-thirds of family law matters, litigants on both sides lack counsel. The best methods for assisting these and other individuals unable to obtain legal representation—and for ensuring that courts do not become clogged due to the difficulties inherent in processing such matters—have been developed at the local level. Several courts have installed self-help, user-friendly kiosks to provide appropriate forms and basic guidance to litigants. Many courts, in conjunction with local bar associations, social service providers, probation offices, and others, have created programs that offer limited legal assistance, as well as help in filling out simplified forms, and guidance and basic information on court procedures.

One court employs a van designed to visit outlying areas to bring court services to the public. Another has cooperated in creating the first self-help center aimed specifically at the local Spanish-speaking population. One jurisdiction in Southern California works with a local Spanish-language radio station to provide listeners with useful tips and information about available court resources.

In several counties, courts, focused on the particular needs of veterans and the homeless, have brought together veterans agencies and assorted social service providers, and offer one-stop access to clear up traffic violations, to find assistance to cope with alcohol or drug addiction, and to receive information on housing and government aid. These special programs have brought a full range of services to members of the community whose multiple and overlapping problems may seem overwhelming.

Several jurisdictions have established dedicated courts focusing on individuals whose legal problems relate to drug use, domestic violence, and mental health problems. Again, working with district attorneys and public defenders, probation departments, and social services providers, these focused programs look beyond the immediate crime that brought the individual into the court system, to the causes under-

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<sup>30</sup> COMPLEX CIVIL LITIG. TASK FORCE, JUDICIAL COUNCIL OF CAL., DESKBOOK ON THE MANAGEMENT OF COMPLEX LITIGATION (2004) (on file with the *New York University Law Review*).

lying the criminal conduct. Some jurisdictions have instituted unified family courts, in which family law, child protection, juvenile court, and criminal matters affecting a single family can be coordinated and addressed in one setting.

At the same time, statewide direction and assistance to individual courts has been increased in a variety of ways. The Judicial Council continues to expand the rules for statewide practices and procedures in the courts, and to provide guidance in areas such as jury reform, education, and fiscal management. In formulating policy, the Council relies upon the work and recommendations of its numerous advisory committees and task forces, as well as public comment. The Administrative Office of the Courts (AOC), the staff arm of our Judicial Council, implements the Council's policies.<sup>31</sup> It offers budgeting, personnel, case management, legal, and information services to the courts.

The AOC's Center for Judicial Education and Research also has developed a mandatory education program for new judges, and its wide-ranging curriculum provides classes to assist judges in applying the various areas of case law they need to master. The AOC's nationally recognized Center for Families, Children, and the Courts focuses on the specialized needs of juveniles and families by providing training materials, research and educational tools, and programs, including an annual conference attended by several hundred judges, probation officers, lawyers, social services providers, and others who specialize in this field.

The AOC also created and maintains an award-winning court website<sup>32</sup> that contains information on the court system overall, together with links to individual courts and other law-related sites, reference information, all opinions issued by our Supreme Court and Courts of Appeal, material on the Judicial Council and its advisory committees and ongoing projects, and a superb self-help center, among other resources. This highly acclaimed self-help website offers material on where to find legal assistance, how to obtain a domestic violence restraining order or locate the nearest shelter for abused spouses, and information on family law matters, small claims actions, conservatorships, and other proceedings in which many litigants appear without counsel. The website has been completely translated into Spanish, and parts already are available in Chinese, Vietnamese, and Korean.

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<sup>31</sup> CAL. CONST. art. VI, § 6; CAL. GOV'T CODE § 68500 (West 2005).

<sup>32</sup> See California Courts, <http://www.courtinfo.ca.gov> (last visited June 6, 2005).

That is a limited account of what we have developed at the state level to assist courts and the public. But these accomplishments, both local and statewide, would not have been possible without shifting funding responsibility from the counties to the state, with the resulting stability in our resources. With a more constant and adequate funding mechanism, our Judicial Council can better gauge the needs of all courts, provide tools to increase responsiveness to the public, and offer more informed guidance and policy direction across the state. At the same time, local courts can better plan for using their resources to accommodate local needs. Unitary funding thus has led not only to concrete improvements in our budget process, but also has been a catalyst for change and improvement in the judicial system as a whole.

The second of the three major structural changes in our judicial system that has proved to be both a functional improvement and a tool for expanded services has been the unification of our trial-level tribunals. Previously, the trial courts in each county were divided into two levels, municipal and superior, which had different subject-matter jurisdiction in both civil and criminal matters. At our urging, the Legislature placed a proposed constitutional amendment on the ballot, which California's voters adopted in 1998, the year after the shift to state funding, permitting the courts in each county to unify upon a vote of a majority of the judges at each of the two levels of trial court.<sup>33</sup> By early 2001, the courts in all of our counties had unified into a single level of court, consolidating the state's 220 separate trial courts into 58—one in each county.

The logic underlying this move was that by combining the trial courts, the resulting single-level jurisdictions could make more effec-

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<sup>33</sup> Former article VI, section 5(e) of the California Constitution was created by Proposition 220 on the June 2, 1998, California primary election ballot. This section, permitting unification of the courts in each county, was itself later repealed by Proposition 48 on the November 2002 ballot, after the trial courts in each of California's fifty-eight counties had unified.

The unification of the trial courts marked the culmination of a change that had begun in the late 1920s, soon after the creation in 1926 of the California Judicial Council. For the current authorization of the Judicial Council, see CAL. CONST. art. VI, § 6. One of the first acts of the Chief Justice at the time, William Waste, was to evaluate the trial court system in the state. LARRY L. SIPES, *COMMITTED TO JUSTICE: THE RISE OF JUDICIAL ADMINISTRATION IN CALIFORNIA* 30 (2002). As late as 1949, another of my predecessors, Chief Justice Phil Gibson, observed that there were 768 separate courts in the state and eight distinct varieties of trial courts below the superior court level. He noted: "[T]here are very few lawyers who can correctly name all the types of courts in this state, much less give the source and extent of their jurisdiction." Phil S. Gibson, *Reorganization of Our Inferior Courts*, 24 J. ST. B. CAL. 382, 384 (1949). The next year, the voters adopted a measure that combined the trial courts into three levels: justice court, municipal, and superior. Proposition 3: Inferior Court Reorganization (statewide general election, Nov. 7, 1950); see also Court Act of 1949, 1949 Cal. Stat. ch. 1286.

tive and efficient use of all resources, judicial and administrative. Duplication in clerks' office functions, fluctuations in court workloads, overlapping or extraneous facilities—all could be adjusted or accommodated in order to provide a wider range of needed services to the public. Along with state funding, this change in court structure has proved its worth and has enabled the trial courts to respond better and more flexibly to changing local needs.

The final major structural changes are now underway as the result of an enactment we sponsored in 2002. Court facilities historically were the responsibility of the counties. The economic fluctuations currently besetting California, resulting in substantial budget shortfalls, have left the counties with severely strained resources. In the face of closing health clinics, libraries, and childcare facilities, reducing police and fire services, and generally curtailing public services, it is very understandable that expending resources on maintaining and constructing court facilities utilized for a function that is no longer funded by the counties is low on the list of local priorities.

The need for better facilities, however, is crucial. A recent statewide survey of California's 451 courthouses revealed that an alarming number fail to meet basic health and safety standards and are simply inadequate for their purpose.<sup>34</sup> Unfortunately, our "temples of justice" include many buildings that would be unable to withstand even a moderate earthquake, courtrooms located in trailers, and structures in which toxic mold, falling asbestos tiles, and peeling lead paint make the courthouse a dangerous place to work or to litigate one's case. In some courthouses, there are no facilities for jurors, in-custody defendants must be led through the clerk's office or through public spaces to get to courtrooms, security is minimal or nonexistent, courtrooms have been fashioned out of former storage closets, and there are no places for lawyers and clients to converse in private.

We are in the first stages of transferring ownership of these several hundred court facilities from the counties to the state. Under this recently enacted legislation, all courthouses will be overseen and managed by the *judicial* branch—not by a state executive branch agency.<sup>35</sup> The first courthouse transfer took place late last year, and we are expecting several dozen more over the next few months. This mammoth transfer of approximately 10 million square feet of real estate valued at about \$4 billion—one of the largest real estate transactions

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<sup>34</sup> STATE OF CAL. TASK FORCE ON COURT FACILITIES, TRIAL COURT FACILITIES: RESPONSIBILITY, FUNDING, TRANSITION 8–9 (2001), available at <http://www2.courtinfo.ca.gov/facilities/reports.htm>.

<sup>35</sup> Trial Court Facilities Act of 2002, 2002 Cal. Stat. ch. 1082 (codified in scattered sections of CAL. GOV'T CODE (2005)).

anywhere—is being funded through additional filing fees that are deposited into a courthouse construction and maintenance fund together with other court-generated revenue, and through a multi-billion-dollar bond measure that we hope to have placed on the ballot. We view this transfer of courthouse facilities to the state under judicial branch control as a crucial element in our branch's quest to engage in active, comprehensive management of the administration of justice.

These three major structural changes—the shift from county to state funding of the trial courts, the unification of the trial courts into a single level of court, and the transition to state ownership of all courthouse facilities under judicial branch management—along with the many other initiatives undertaken at both the local and statewide level, have resulted in a new, strengthened identity for the judicial branch. Again, the concept of centralizing management within the judicial branch is not new, but I submit we have made substantial progress toward the goal of transforming this concept into a reality.

Chief Justice William Howard Taft is credited with “organizing” the federal judiciary into “‘a unit, with authority to send expeditions to spots needing aid.’”<sup>36</sup> Professor Robert Post’s article analyzing Taft’s creation of this new organizational model for the federal courts described those efforts as being aimed at “transform[ing] the federal judiciary from an ‘entirely headless and decentralized’ institution, into one capable of ‘executive supervision.’”<sup>37</sup>

Post explains that the Act of September 14, 1922, which placed greater authority in the hands of the Chief Justice of the United States and created the Conference of Senior Circuit Judges to oversee the administration of justice in the courts,<sup>38</sup> drew heavily upon Chief Justice Taft’s experience as President. First, “[j]ust as the executive branch has always been seen as an integrated whole, directed by the President, the Act for the first time conceptualized federal judges as also integrated into a single, coherent branch of the federal government designed to attain functional objectives.”<sup>39</sup> Second, the Act built on the belief that every organization must have an executive in charge.<sup>40</sup> Critical to this organizational model is the principle that

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<sup>36</sup> Post, *supra* note 23, at 54 (quoting *The First Conference*, 9 A.B.A. J. 7 (1923)).

<sup>37</sup> *Id.* at 55 (citations omitted).

<sup>38</sup> Act of Sept. 14, 1922, Pub. L. No. 67-298, 42 Stat. 837 (1922) (codified as amended in scattered sections of 28 U.S.C.). California’s creation of its Judicial Council in the 1920s was part of a nationwide movement to establish an organizational framework for the judicial branch, a movement that was inspired by the federal legislation.

<sup>39</sup> Post, *supra* note 23, at 54.

<sup>40</sup> *Id.* at 55.



"[t]o accept forthrightly managerial responsibility . . . is not merely to seize the potential of executive supervision, but also to create lines of accountability."<sup>41</sup> Third, Taft believed that proper management required "the exercise of the deeply human virtues of leadership, inspiration, and a commitment to what Taft repeatedly called 'team-work, uniformity in action and an interest by all the judges in the work of each district.'"<sup>42</sup> Fourth, "the corollary of the functional unification of the federal judiciary was that the judicial branch could now articulate its ongoing and routinized requirements to the legislature, just as did the executive branch."<sup>43</sup> Our vision for the California courts contains many of these same elements.

Our efforts have focused on creating a governance structure that engages individuals and institutions from both inside and outside the court system. Within the branch, it draws upon the talents of judges, lawyers, administrators, and staff, who are invited to affect policy-making through participation in the work of the Judicial Council and its advisory committees and task forces,<sup>44</sup> and through comment on proposals circulated by the Council. In the individual courts, local innovation is encouraged, while statewide uniformity is advanced where it best meets the branch's and the public's interests. In addition, public involvement is regularly solicited through participation in Council committees, requests for comment, assorted community outreach projects at every level of court (including our Supreme Court), and inclusion in the court-planning process.

Our vision of an organizational structure for the courts thus encompasses a greater range of participants than was anticipated by Chief Justice Taft. Our intent is to lead, based upon a broad range of information and involvement. In soliciting the views of so many, in a sense we are adapting the practices of our sister branches by seeking to respond to the appropriate concerns of our "constituents." For the judicial branch, however, those concerns of course do not include allowing public preferences or pressures to influence the resolution of cases, but the range of public interest in the administration of justice offers ample opportunity for the courts to respond to the public's needs and desires in improving access to justice.

I would be telling only part of the story if I did not acknowledge that the fundamental changes we have instituted in our court structure

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<sup>41</sup> *Id.* at 56.

<sup>42</sup> *Id.* (citations omitted).

<sup>43</sup> *Id.*

<sup>44</sup> See <http://www.courtinfo.ca.gov/courtadmin/jc/advisorycommittees.htm> (last visited Sept. 19, 2005) (providing list of California Judicial Council committees and task forces, descriptions of charges, and lists of members).

have not always been greeted with universal enthusiasm by all members of our judiciary. Professor Post suggests that although the idea of a more organized judicial branch "may seem obvious to us today," in contrast "in 1922 it provoked great resistance."<sup>45</sup> There are some judges in California, albeit a decreasing number, whose reaction to the move toward increased cohesiveness and better management has been similar to that of Judge Henry Clayton, who is cited in Professor Post's article as proclaiming that the Federal Act granting managerial authority to the Chief Justice of the United States and creating the Council of Senior Circuit Judges produced "a dictatorial power over the courts unrecognized in our jurisprudence."<sup>46</sup> This reluctance is somewhat understandable and consistent with the general conservative inclinations of many judges, who are trained to look back to precedent and accustomed to act in the isolation of their individual chambers as protective stewards of their independence.

The recent fundamental structural changes in California's judicial system have gone to the heart of the longstanding culture of the courts. Some resistance is to be expected. But by inviting widespread participation in the process of formulating policy, and encouraging local initiatives, we have worked, with some success, to alleviate the concerns of those judges.

Our focus has not been limited to creating a new internal organizational structure. I already have mentioned some of the ways in which we have institutionalized our outreach to the public. Interactions with our sister branches also have become more regular and are aimed not only at presenting court needs, but at highlighting the crucial role of the judicial system in our democratic form of government.

The importance of this effort is heightened by the circumstance that the number of lawyers serving in the California Legislature has drastically declined. Combined with the effect of legislative term limits, this development has reduced the Legislature's institutional long-term memory and expertise in matters affecting the judicial branch. To promote better understanding of our branch's position and its requirements, we offer several educational opportunities for legislators. For example, I participate in regular orientation programs to introduce the judicial branch to new legislators.

Each year, like many of my fellow Chief Justices, I deliver a State of the Judiciary Address to a joint session of the Legislature, outlining our branch's accomplishments, plans for the future, and needs. It is followed by a reception in the Capitol Rotunda hosted by the Judicial

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<sup>45</sup> Post, *supra* note 23, at 54-55.

<sup>46</sup> *Id.* at 55 (citations omitted).

Council and the AOC for legislative members and staff, executive branch officers, and others concerned with the administration of justice.

Accompanied by the leadership of our Administrative Office of the Courts, I also meet regularly with the Governor and his staff, including the Department of Finance, which advises the Governor on budget issues, and with legislators and their staffs. We discuss a range of judicial branch issues, which are not limited to our budget. Through meetings with representatives of organizations such as bar associations, local government, law enforcement, and business and employee groups, we also build coalitions on matters in which we have a community of interest.

Over the past seven years, since the start of state funding, we have worked closely with our sister branches of government to enhance our ability to advocate effectively for the needs of our branch and at the same time to provide accountability to them for our actions in expending public funds and meeting public needs. By focusing on increasing access to the courts, improving services, enhancing public safety, and cooperating with others to address societal problems more comprehensively and effectively, we have defined the scope of branch governance and concomitant responsibilities to include far more than the task of managing caseloads.

We have sought to create a branch that is perceived as not only fair and effective in adjudicating the individual cases that come before the courts for resolution, but as one that also affirmatively strives to improve and expand the boundaries of the overall administration of justice for the benefit of the public we serve and society as a whole.

A few months ago, perhaps because of these efforts, we were able to reach another important milestone with the enactment of budget legislation that, apart from a quantitative improvement in the allocation of funds for the California judicial branch's \$2.5 billion budget, enacts some permanent systemic changes in our budget process. A statute now provides for a base of the prior year's trial court operational budget with an upward adjustment based on a factor linked to the urban cost-of-living index and population increases, a factor employed annually to adjust automatically the Legislature's own budget.<sup>47</sup> Although we still must advocate for new programs in our proposed budget, and our base budget has gaps that leave us with some shortfalls in our ability to meet current needs, this new method of budgeting brings us a long way from the days of having to start from scratch each year to justify the cost of our trial court operations.

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<sup>47</sup> CAL. GOV'T CODE § 77202(a)(1) (West 2005).

We hope to see this budgeting methodology for the courts added to our state constitution and expanded to other components of the judicial branch budget.

Additionally, consistent with our status as a coequal branch of government, we now are permitted to submit our trial court budget proposal directly to the Legislature at the same time we send it to the Governor, who, although still able to comment on it during the legislative process, will not restrict what we request of the Legislature.

We have made great strides toward recognition of the court system as not just another state agency, like the Department of Fish and Game or the Board of Cosmetology, but as a well-defined branch of government able prudently to manage its budget and appropriately to provide fiscal and administrative accountability to others. We seek change in not only the reality, but also the perception, of the judicial branch and its place in the governmental scheme.

There are, of course, no guarantees for future cooperation among the branches of government. A particularly unpopular court decision, or overall concerns about how a specific area of the law is being applied by the courts, without question could result in an effort to reduce our budget, curtail the courts' jurisdiction, or otherwise reduce our ability to perform our constitutional functions.

Our hope, however, is that the approach we have undertaken will affect far more than the internal culture of the courts and our year-to-year treatment by our sister branches. We have sought to take our place as a fully equal branch of government, committed to managing resources, enhancing the administration of justice, and standing accountable to the legislative and executive branches—as well as to the public—for the actions of our branch.

By establishing a clearer and stronger *institutional* identity, we anticipate being in a better overall position to ensure independence in *decisionmaking*—thus preserving *as* a branch and *for* our branch the ability of courts to perform their core role in our democracy.

In his article, Professor Post argues that:

The most lasting effect of Taft's unique perspective was its root assumption that the federal judiciary was not a collection of independent judges, but instead a unified branch of government with functional obligations. No Chief Justice after Taft has been able to escape being evaluated on [the] fulfillment of these obligations.<sup>48</sup>

Chief Justice Taft's assumption deserves to be regarded as a cornerstone of our expectations about the judicial branch today. But the

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<sup>48</sup> Post, *supra* note 23, at 67.

true challenge that lies ahead will be how well the courts, at both the state and federal level, take the steps necessary to realize the full potential of their role as part of a fully functional branch of government.

We work with words and persuasion, not with the power to appropriate or legislate. We shall be measured in the end by how well we perform our constitutional function of providing fair and accessible justice and preserving the rule of law.

The judiciary's ability to continue achieving these goals will be greatly enhanced as it acquires the ability to act, and be treated by others, as a coequal and independent branch of government, not just in name but as a demonstrable reality. The responsibilities and obligations that come with functioning as a true branch of government are substantial, but the ensuing benefits to the administration of justice and to the public we serve make it an endeavor well worth the effort.