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JUDICIAL FISCAL INDEPENDENCE

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The practical independence of the judiciary may depend in part upon budgetary procedures and the amount of the judicial budget. The power of the purse generally rests with the legislative branch of government; however, its exercise is often controlled by custom. Thus, within limits, legislative fiscal control will not necessarily have an adverse effect upon the independence of the judiciary.[1] Judicial independence is more likely to turn upon other things, such as the process of selecting judges and the means for financing the political campaigns of prospective judicial officers. Nevertheless, the judiciary is finally dependent upon the legislature and, in some instances the executive branch as well, for salary increases and for the funding of new methods of operation and services for the courts. Thus, control over the judicial purse might substantially affect the quality of justice available in a jurisdiction, even if it does not directly affect the judicial decisionmaking process in specific cases.

MEANING OF JUDICIAL FISCAL INDEPENDENCE

The phrase "judicial fiscal independence" may be used in at least two quite different senses. To some, this phrase denotes the unrestrained right and inherent power of the judiciary to determine for itself how much government money will be expended for each judicial purpose. To others, it means that administrative control over the preparation of budget requests and funds appropriated for the judiciary should rest with the judiciary itself.

In a number of states the responsibility for disbursing and auditing judicial accounts rests with the executive branch.[2] On this point the following position on judicial fiscal independence was adopted in 1965 in the

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1. Note that one may not only be concerned with the fiscal and budgetary independence of the judiciary from the executive and legislative branch of the government, but also with the fiscal and budgetary independence of individual courts and judges within the judicial hierarchy. A judge who submits his own budget directly to the appropriate legislative or executive official is in a different position from a judge who submits his proposed budget to a chief judge of his own court for approval and forwarding to a chief justice for his approval. If an individual judge must submit his budget request to a court administrator, a further dilution of judicial independence occurs for those judges to whom the court administrator is not responsible. While budgets prepared by superiors probably do not differ greatly from budgets initially prepared at lower levels and forwarded up the administrative chain of command, passivity in the administrative process of preparing the budget may create a psychological climate of dependence rather than of independence.

2. Funds appropriated for the judiciary are placed in the comptroller's account in California, Florida, Hawaii, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, New York, Rhode Island, Texas, West Virginia, and Wyoming. INSTITUTE OF JUDICIAL ADMINISTRATION, STATE AND LOCAL FINANCING OF THE COURTS 74 (Tent. Report 1969).

statements of principles of both the National Conference of Court Administrators and the Conference of Chief Justices:[3]

> With the use of sound and accepted principles of fiscal management, the courts should be able to *regulate the details* of their expenditures *subject to general controls* imposed by law but free of administrative direction by officials of the executive branch.

The ease with which this view of administrative fiscal independence can transmute into the broader view of absolute fiscal independence—that the judiciary should have the complete power to determine its expenditures — is illustrated in the same statements of principles: "Thus, the independent authority of courts to hire and fire their employees, to fix and adjust their salaries . . . should not be subject to the approval or control of any non-judicial agency."[4]

Administrative, as distinguished from absolute, fiscal independence seems desirable and in accord with sound principles of management whenever the size of the judiciary warrants a judicial administrative staff. This will not always be the case, particularly at the local level of government. Even where disbursement and auditing of judicial accounts is performed by a judicial administrative staff, adoption of uniform accounting procedures utilized in all branches of government is desirable. Thus, financial departments of the executive branch should, as a practical matter, exercise a limited, unifying authority over the fiscal affairs of the judiciary.

The Impetus for Judicial Fiscal Independence

Considerable interest in judicial fiscal independence exists today among members of the judiciary, court administrators, clerks, and others concerned with judicial administration. The causes are numerous and diverse, but they emanate from an acutely felt need for greater appropriations to the courts.

More funds are needed by the judiciary for several reasons. Many of our court facilities and court staffs were intended to process the judicial business generated by a much smaller population. Moreover, technological advances and social changes have led to the litigation of many matters that previously would have gone unnoticed by the courts.[5] Changes of considerable magnitude have occurred in the judicial processing of criminal cases. United States Supreme Court rulings concerning regulation of police practices,[6] appointment of defense counsel for indigent defendants,[7] and other

3. *The Need for Independence in Judicial Administration,* 50 JUDICATURE 129 (1966) (emphasis added).

4. *Id.*

5. In his first annual "State of the Judiciary" address to the A.B.A. in June 1970, Chief Justice Burger enumerated as one of the factors that has produced the present problems in our federal courts the fact that "entirely new kinds of cases have been added because of economic and social changes, new laws passed by Congress and decisions of the courts." Burger, *The State of the Judiciary,* 56 A.B.A.J 929, 930 (1970).

6. *E.g.,* Katz v. United States, 389 U.S. 347 (1967); Mapp v. Ohio, 367 U.S. 643 (1961).

7. *E.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963).

matters have increased the time and expense required for judicial processing of criminal cases.[8] The net result has been to create a need for more judicial time than most courts can provide. The settlement of civil cases and the acceptance of plea bargains in criminal cases have become matters of practical necessity to prevent the courts from becoming hopelessly backlogged.

Prompt and proper processing of cases requires the construction of new physical facilities, the introduction of a greater degree of mechanization, and an increase in the number of judges and court employees. In addition, new types of ancillary court personnel who are qualified to prepare presentence reports and reports of certain types of domestic matters have been found desirable in improving the quality of justice dispensed in these matters. Furthermore, increases in court personnel have created the need for an administrative staff of the judiciary to ensure that the courts function efficiently.

Because of the relatively high proportion of available tax dollars that flow to the federal government, state and local legislative bodies have encountered difficulties in raising tax revenues to satisfy the need for many new or improved social services. Consequently, courts generally have not received adequate funding for new physical facilities, equipment, and salaries required to obtain greater number of competent personnel.

Meanwhile the courts have become subject to mounting public criticism, particularly concerning the administration of criminal justice.[9] Because of their central position in the administration of criminal justice, courts are blamed for the purported failure of the criminal justice system, although much of the blame should rest equally on the police, prosecutors, correctional institutions, and executive and legislative bodies. Traditional concepts of proper judicial behavior, however, have resulted in judicial passivity in the face of widespread public criticism and the absence of any attempt to shift the blame to other agencies of government. Nonetheless, judges are political beings who are disturbed by the present intensity of public criticism directed against the courts.

Generally, members of the judiciary view increased public funding as prerequisite to improving their operations and thereby alleviating public criticism.[10] Also, more judges and court administrators are considering mandating the funds that they believe are required if legislators fail to provide adequate funds for judicial operations.

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8. In his "State of the Judiciary" address Chief Justice Burger also stated that "the actual trial of a criminal case now takes twice as long as it did ten years ago . . . ." Burger, *supra* note 5, at 930.

9. *See, e.g., The Law*, TIME, Jan. 18, 1971, at 48-55.

10. Relatively little judicial consideration is being given to developing significantly different methods of processing court business. For the most part, increased facilities, equipment, and personnel are being requested by the courts in order that courts may continue to process cases in substantially the same manner that was employed at the time of the American Revolution. This is about as realistic as it would be for the United States today to depend for its national security on the Army created by the Continental Congress with its tactics, command, procedures, rules, and equipment.

Although some judges among the author's acquaintenances have espoused total judicial fiscal independence from the executive and legislative branches of government in determining the amount of judicial budget, almost all the funds expended by the judiciary in the United States will, as a practical matter, likely continue to be appropriated in accordance with normal budgetary procedures. On the other hand, courts may increasingly be successful in mandating appropriations of specific amounts for particular purposes, especially at local governmental levels when legislative or executive actions seem unreasonable. Ultimately, however, the courts' power in this regard is delimited by public attitudes, and courts will lack the power to mandate appropriations that are unreasonable.

Separation of Powers and Judicial Independence

In order to place judicial independence in perspective, the judiciary must be viewed as one side of the triangle of the doctrine of separation of powers. Concern for judicial independence normally arises in several contexts—the judicial contempt power; the power of the judiciary over practice before the courts, including rules of practice; admission to the bar and disbarment; the power of the judiciary over employees of the courts; and the power of the judiciary to obtain funds considered requisite for its operations.

Court involvement in the "law of judicial independence" differs markedly from other areas of substantive law since here the judiciary itself is often a party to disputes in which the questions of inherent powers and independence of the judiciary are raised.

A number of courts have considered the inherent power of courts to appoint court employees and determine their salaries and to make expenditures that have not been authorized by the legislature.[11] While such opinions are "judicial opinions," a decision of an appellate court that is engaged, for example, in a dispute with a Governor concerning whether he or the court has the power to appoint a successor clerk of the court is quite different from a decision of the same court in a tort action between private parties or even in a criminal case. Thus, it was no surprise that in *In re Appointment of the Clerk of the Court of Appeals*[12] the highest court in Kentucky decided that it, and not the Governor, had the power to appoint its successor clerk. Whether such a judicial decision is more significant than an executive memorandum on the same topic, an opinion of the attorney general, or a resolution of the legislature depends more upon the practical aspects of power than upon the "correct solution" of the problem.

If the prestige of the judiciary or the personal political influence of its members is great, its decision will probably be accorded respect by the other governmental branches. Clearly, a writ of mandamus is, in the final analysis, only a scrap of paper originating with the judiciary. If no one in the executive branch will honor it and there is public support for the position taken by the executive, the judicial decision will not be practically implemented.

11. *See* cases cited note 7 *supra*, notes 12-35 *infra*.

12. 297 S.W.2d 764 (Ky. 1957).

It follows that the concept of judicial independence, although a useful descriptive term, is to a certain extent illusory for, ultimately, sovereignty is not divisible. Although the exercise of governmental functions may be allocated among separate branches of government, the process of governing finally depends upon cooperation among various branches. None can effectively govern by itself. Indeed, the doctrine of checks and balances, as well as separation of powers, anticipates cooperation and joint agreement in government action.

SUBSTANTIVE LAW OF JUDICIAL FISCAL INDEPENDENCE

Wisconsin has a "sum-sufficient" judicial budget for its supreme court that is beyond the control of the legislature.[13] All Indiana courts have the power to mandate payment of claims (except increases in judicial salaries) in excess of appropriated funds.[14] The extent of the legislative power over the judicial budget remains an open question in Colorado, while in Maryland and West Virginia the legislatures may not reduce or delete items from the judicial budget, although they may make increases.[15] In all other states the budget of the judicial branch of the government, like that of the executive branch, is subject to modification by the legislature.[16] Of course, legislative respect for the judiciary does, in many instances, lead to relatively trouble-free approval of the judicial budget.

Whatever may be the theory of the financial independence of the judiciary in Wisconsin, Colorado, Indiana, and West Virginia, it should not be assumed that the judiciary could independently appoint large numbers of new court employees without precipitating a governmental crisis. An underlying assumption of the coordinate power of the three branches of government is that all three will cooperate with each other. Although sovereignty may be functionally allocated, it may not be conceptually divided. Notwithstanding that governmental *interdependence* is the fact, *independence* is the slogan used in discussions of governmental powers. Furthermore, the assertion by a branch of the government of its independence is often an attempt, motivated by policy or political considerations, to impose its own judgment upon another branch.

Cases concerning judicial independence may be divided into those that originate in the inherent powers of the judiciary[17] and those that have their origin in interpretation of constitutional provisions.[18] Occasionally, a case may arise out of arguably conflicting constitutional provisions such as,

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13. *See* INSTITUTE OF JUDICIAL ADMINISTRATION note 2 *supra*.

14. *Id.*

15. *Id.*

16. In every state except Maryland the legislature holds or may hold hearings on the proposed budget for the judiciary. This information was revealed by questionnaires completed by state government officials and furnished to the Institute of Judicial Administration for use in preparing the Institute's report STATE AND LOCAL FINANCING OF THE COURTS, note 2 *supra*.

17. *E.g.*, Smith v. Miller, 153 Colo. 135, 384 P.2d 738 (1963).

18. *E.g.*, *In re* Appointment of Clerk of Court of Appeals, 297 S.W.2d 764 (Ky. 1957).

whether the Governor or the Court of Appeals of Kentucky had the right to appoint a successor clerk to that court.[19] More frequently, when the issue of judicial fiscal independence is raised, however, the dispute originated in a failure of the legislature to provide funds for a particular purpose.[20] Often the applicability of a broad necessary expenditure statute is involved.[21] Often, the sweeping statements concerning the inherent powers of the judiciary that are made by courts issuing writs of mandamus to executive officials directing payment of funds were unnecessary.[22] Usually, the same decisions could have been reached through statutory interpretation, particularly where the origin of the dispute was in apparently conflicting statutes. In a number of instances the case could have been resolved simply by the declaration that a specific statute concerning the judiciary was applicable to the exclusion of a general statute.[23] Nonetheless, declarations of judicial independence should not be brushed aside as mere obiter dicta, since lower courts may ultimately be bound by it.[24] In addition, frequently repeated unnecessary declarations of judicial independence likely will be utilized in instances where disputes cannot be resolved by statutory construction alone.[25]

In *State* ex rel. *Kitzmeyer v. Davis*[26] a dispute arose between the Supreme Court of Nevada and the Board of Capitol Commissioners concerning the purchase of some chairs and a carpet for the supreme courtroom. After the board refused the supreme court's request, the court ordered the sheriff to purchase the articles, but the treasurer refused to pay the bill. One statute provided that the board "shall control the expenditure of all appropriations for furnishing" the capitol building unless otherwise provided.[27] Another statute authorized the supreme court to provide "a suitable room in which to hold its sittings."[28] The court held that the expenditures were authorized

19. *Id.*

20. *E.g.*, Noble County Council v. State *ex rel.* Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955); State *ex rel.* Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909); State *ex rel.* Kitzmeyer v. Davis, 26 Nev. 373, 6 P. 689 (1902).

21. *E.g.*, State *ex rel.* Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909).

22. *E.g.*, Noble County Council v. State *ex. rel.* Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955).

23. *E.g., id.*

24. In State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966), the New Jersey supreme court ruled on the right of assigned counsel to receive fees for their services and reimbursement for their out-of-pocket expenses. The court recalled that in an earlier case, State v. Horton, 34 N.J. 518, 170 A.2d 1 (1961), it had stated that even in nonmurder cases, assigned counsel are entitled to their out-of-pocket expenses. In reversing the lower court for not awarding assigned counsel his out-of-pocket expenses the court stated: "The trial court here regarded that expression as 'dictum.' *Horton* did involve a murder charge, but we deliberately dealt with 'non-murder' cases as well and hence whether our expression technically was 'obiter' or not, trial courts should abide by it." 46 N.J. 339, 416, 217 A.2d 441, 450 (1966).

25. *See, e.g.*, Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963).

26. 26 Nev. 373, 68 P. 689 (1902).

27. NEV. COMP. LAWS §2044 (1900).

28. State *ex rel.* Kitzmeyer v. Davis, 26 Nev. 373, 378, 68 P. 689, 690 (1902). The statute in question provided that the court should provide for a room "suitable and sufficient for the transaction of business." NEV. COMP. LAWS §2518 (1900).

by statute, but indicated it had inherent power to order them even if not so authorized.[29]

Courts have also determined they have the inherent power to hire employees and to set their salaries. In *Noble County Council v. State* ex rel. *Fifer*[30] an Indiana judge appointed a probation officer to serve indefinitely at an annual salary of 2,500 dollars.[31] After appropriating funds for the first year's salary, the council refused to do so for the following year.[32] The county court issued a writ of mandamus in favor of the probation officer, and the county appealed. As noted in a concurring opinion,[33] the court could probably have held that the statute authorizing the appointment of probation officers controlled and that the appropriation by the county was required. The majority of the court, however, declared that the legislature could not limit the inherent powers of the courts.[34] The basis of this inherent power,

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29. The court said: "To assume that the legislature did confer any such absolute power [over funds for the judiciary] upon the board is to assume that the legislature possesses unlimited power of legislation in that matter — that it could by hostile legislation destroy the judicial department of the government of this state. In the absence of the statuory authority given to the court by Section 2518, *supra*, there exists, as we believe, the inherent power in the court, growing out of and necessary to the exercise of its constitutional jurisdiction, to make the order." State *ex rel.* Kitzmeyer v. Davis, 26 Nev. 373, 379, 68 P. 689, 690-91 (1902).

30. 234 Ind. 172, 125 N.E.2d 709 (1955).

31. IND. ANN. STAT. §9-2212 (Burns 1948) provided: "The judges of the several circuit courts . . . may appoint one or more probation officers, to serve such courts, and under the direction of such judges, as the needs of such courts shall require. . . . The judge or judges of such courts appointing a probation officer, are hereby authorized to fix the compensation to be paid such officer, at not to exceed $2,500 per annum."

32. The refusal to pay the salary was based upon IND. ANN. STAT. §26-515 (Burns 1948, Repl. 1970), which provided: "The power of making appropriations of money to be paid out of the county treasury shall be vested exclusively in such council, and, except as in this act otherwise expressly provided, no money shall be drawn from such treasury but in pursuance of appropriations so made." A third statute, IND. ANN. STAT. §26-527 (Burns 1948, Repl. 1970). provided: "No court, or division thereof of any county, shall have power to bind such county by any contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction of the parties and subject matter of the action, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such court, and for the purpose for which such obligation is attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort attempted beyond such existing appropriations shall be absolutely void."

33. "It seems to me that the question presented in this appeal might have been fully decided simply by determining the authority of the circuit court under the provisions . . . [which grant] to the circuit court the authority to appoint a probation officer and fix his salary at an amount not in excess of $2,500 per year. In order to make the act effective these expressed powers must be construed to carry with them the implied power to compel the county council to appropriate funds sufficient to pay such salary and expenses of the probation officer appointed pursuant to the act." Noble County Council v. State *ex rel.* Fifer, 234 Ind. 172, 192-93, 125 N.E.2d 709, 719 (1955).

34. "We therefore conclude that notwithstanding the provisions of the County Reform Act (§§26-501, etc., Burns' 1948 Repl.) *supra*, such Act was ineffectual to deny to the court its inherent and constitutional authority to appoint and require payment of such personnel as the functions of the court may require," *Id.* at 187, 125 N.E.2d at 717.

which extended to the right to appoint a probation officer and fix his salary,[35] was said to be the establishment of a judiciary by the constitution.

In *Smith v. Miller*[36] a similar dispute had arisen between the district court for El Paso County, Colorado, and the county commissioners regarding the salary of certain court employees. Mandamus was brought against the county commissioners after they failed to approve all the salary recommendations of the judges. The relevant statute[37] provided that the judges should fix the salaries of the employees "subject to the approval of the county commissioners" and "as shall be approved by the board of county commissioners." Under these facts, the issue of inherent power of the courts could not have been avoided as it might have been in *Noble County,* and the Colorado supreme court held that district judges were empowered to fix the salaries of their employees.[38] The ground for this decision was that the Colorado Constitution provided for the division of governmental powers into three parts and commanded that persons charged with the exercise of the powers of one department should not exercise any power properly belonging to another department.[39] A dissenting justice criticized the fluidity of the concept of inherent judicial power enunciated by the court,[40] maintaining that the

35. "[T]he authority of the court to appoint a probation officer, fix his salary and require payment thereof, does not rest upon mere legislative fiat. The court has inherent and constitutional authority to employ necessary personnel with which to perform its inherent and constitutional functions and to fix the salary of such personnel, with reasonable standards, and to require appropriation and payment therefor. The necessity of such authority in the courts is grounded upon the most fundamental and far reaching considerations." *Id.* at 180, 125 N.E.2d at 713.

36. 153 Colo. 35, 384 P.2d 738 (1963).

37. COLO. REV. STAT. §§49-16-1, 56-3-8 (1963).

38. "[I]n the absence of a clear showing that the acts of the judges in fixing such salaries were arbitrary and capricious and that the salaries so fixed are unreasonable and unjustified . . . it is the ministerial duty of the county commissioners to approve them and to provide the means for payment of such salaries . . . [w]here a question is raised as to the reasonableness of the salaries fixed by the judges or whether their acts in respect thereto are arbitrary and capricious, the burden is on the Board to establish such facts by competent evidence." Smith v. Miller, 153 Colo. 35, 41, 384 P.2d 738, 741-42 (1963).

39. The supreme court quoted with approval the lower court's reasoning: "In their responsibilities and duties, the courts must have complete independence. It is not only axiomatic it is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source. It it abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice. These principles, concepts, and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national policy." *Id.* at 40-41, 384 P. at 741.

40. "Here the court is speaking of 'inherent powers.' I would call the powers outlined as incidental rather than inherent. Many times we have said that arms of government have such incidental powers as are reasonably necessary to perform its functions. Here the judges have the necessary help, the employees are performing their duties, and none has submitted a voucher that has not been paid, and the court has not been curtailed in the performance of its functions." *Id.* at 50, 384 P. at 746.

court, by its decision, had invaded the province of the legislature.[41]

It is not a great step from holding that the judiciary may set the amounts to be expended for individuals' salaries without concurrence of the legislature to the assertion that the judiciary may determine its budget independently and free of any control from other branches of the government. In *Carlson v. State* ex rel. *Stodola*,[42] mandamus resulted after the budget request of the city judge of Hammond, Indiana, was slashed by 12,000 dollars. The lower court's decision favoring the judiciary was upheld.[43]

State ex rel. *Schneider v. Cunningham*,[44] involving a writ of mandamus against the state auditor, arose out of an act by the Montana Board of Examiners (Governor, secretary of state, and attorney general) fixing the salary of the stenographer of the supreme court at 150 dollars per month[45] when the 200 dollars per month had been appropriated for this purpose by the legislature. The writ was granted on the basis of statutory interpretation,[46] but the court clearly indicated its belief that it had the inherent power to issue such an order in any event.[47] The opinion stated that if no other

41. "In this case the judiciary has invaded the exclusive domain of the legislative branch of the government . . . .

"Implicit in the decision in this case and the mandate is the direction to the board that it include in its appropriation resolution amounts fixed by the judges and disapproved by the board. Compliance with the mandate of the court requires the board to approve that which it disapproves; to audit and approve for payment vouchers which it in fact disapproves, to levy taxes in an amount that it does not sanction, and to disburse public funds in an amount in excess of that which it approves or sanctions." *Id.* at 53, 384 P. at 747-48.

42. 247 Ind. 631, 220 N.E.2d 532 (1966).

43. "Our sense of justice tells us that a court is not free if it is under financial pressure, whether it be from a city council or other legislative body, in the consideration of the rights of some individual who is affected by some alleged autocratic or unauthorized official action of such a body. One who controls the purse strings can control how tightly those purse strings are drawn and the very existence of a dependent." *Id.* at 633-34, 220 N.E.2d at 533-34.

44. 39 Mont. 165, 101 P. 962 (1909).

45. The relevant statute provided: "The board of examiners may at any time when necessary, employ clerical help for any state officer or board, and no clerks must be employed by such officers or board without the authority of the board of examiners, and no such clerks must be employed by the board of examiners except when all the duties of the office cannot be performed by the officer himself." MONT. REV. CODES §262 (1907).

46. In holding the relevant statute inapplicable to the judiciary, the court stated: "Whatever application [it] may have to the help employed in the executive department, it cannot have, and was not intended to have, any application to the necessary employees attached to this court. This court, viewed as a department of the state government, is neither an officer nor a board, and therefore does not fall within the terms of this provision." State *ex rel.* Schneider v. Cunningham, 39 Mont. 165, 172, 101 P. 962, 965 (1909).

47. "[T]he court has the inherent power to select and appoint its own necessary assistants and make the compensation due for their services a charge against the state as a liquidated claim. Any other conclusion would be to put the court in the attitude of a petitioner to the board of examiners from time to time, and thus reduce it from its position as a co-ordinate branch of the government to the level of the ordinary citizen who deserves or claims payment for services rendered." *Id.* at 171, 101 P. at 964.

authorization had existed, the court could itself have provided a stenographer and the authorization could not take away this power.

The judiciary has also asserted its independence in declaring its inherent powers to regulate and control membership in the bar.[48] The potentially open-ended nature of the judiciary's control over the bar is exemplified in *State v. Rush*.[49] In the absence of specific statutory authorization for such expenditures, assigned attorneys in nonmurder prosecutions proceeded for reimbursement of out-of-pocket expenses and for an allowance of reasonable counsel fees. The court found that counsel were entitled to both reasonable fees and reimbursement for expenses. A New Jersey statute[50] provided that the county treasurer should pay "all necessary expenses incurred by the prosecutor for each county in the detention, arrest, indictment, and conviction of offenders against the laws." The court stated: "[T]he 'necessary expenses' of the prosecution are the burden of the county. Within that category must fall the expenses of providing counsel for an indigent accused without which a prosecution would halt and inevitably fail under *Gideon v. Wainwright*."[51]

Independence and Accountability

In the resolution of problems involving judicial independence, the relevancy of the method of selecting members of the judiciary has apparently been considered only by the Indiana supreme court in *Carlson v. State* ex rel. *Stodola*.[52] Seemingly, the measure of inherent power enjoyed by judicial appointees in a democracy should be less than that enjoyed by elected mem-

48. *See, e.g., In re* Greathouse, 189 Minn. 51, 248 N.W. 735 (1933). In its opinion the court explicated its view of the nature and extent of the judicial power over the bar: "The power to admit applicants to practice law is judicial and not legislative, and is of course vested in the courts only. Originally the courts alone determined the qualifications of candidates for admission; but, to avoid friction between the departments of government, the courts of this and other states have generously acquiesced in all reasonable provisions relating to qualifications enacted by the legislatures.

"The privilege given to an attorney, authorizing him to practice his profession, is always subject to revocation for cause. It is well settled that a court which is authorized to admit attorneys has inherent jurisdiction to suspend or disbar them. This inherent power of the court cannot be defeated by the legislative or executive department. The removal or disbarment of an attorney is a judicial act." *Id.* at 55, 248 N.W. at 737.

49. 46 N.J. 399, 217 A.2d 441 (1966).

50. N.J. STAT. §2A:158-7 (1952).

51. The court stated, however, that in meeting "the costs of the constitutional mandate to provide counsel for the indigent . . . there are practical problems which persuade us to delay the effective date upon which the members of the bar will be relieved of the burden they now bear alone. . . . The legislature should have an opportunity to decide whether this obligation of the State should be met by the present system of assignment in individual cases, or by a public defender, or some combination of both. . . . Then, too, the Legislature may wish to consider whether the substantial sums involved should be met in whole or in part at State level rather than by the local taxpayer alone." State v. Rush, 46 N.J. 399, 414-15, 217 A.2d 441, 449 (1966). The Public Defender Act, N.J. STAT. ch. 2A-158A (Supp. 1970) took effect July 1, 1967, and established a state public defender system for New Jersey.

52. 247 Ind. 631, 220 N.E.2d 532 (1966).

bers. In *Carlson,* while affirming the lower court's ability to mandate funds for their operation, the court stated:[53]

> [T]here comes a time when a judge or any other public official must make an accounting to the voters for his actions, if arbitrary, extravagant or not in the public interest, and that is true of a city judge or any judge in the State of Indiana, or if not the judge, then the one who exercises appointing powers. What has just been said about courts may also be said with reference to legislative bodies. There is no absolute protection against the extravagance of such bodies in fixing their own salaries or expenditure of money for their own quarters and operations except that it comes at the polls.

The reasons advanced by the court for relying upon the ballot box rather than the checks of co-responsible branches of the government to prevent judicial extravagance are forceful. They may even be persuasive in a state such as Indiana where all judges (except municipal court judges) are elected on a partisan ballot. However, in states where judges are appointed for life or are otherwise practically insulated from political processes, such as a doctrine of financial independence for the judiciary might invite judicial extravagance. Conceivably, an explosion in the size and services of the judicial branch could result, thereby rendering a proper balancing of priorities among competing government services impossible.

Judicial Fiscal Independence of the Executive

What has been said in regard to the independence of the judiciary from the legislative branch applies with equal force to the independence of the judiciary from the veto power of the executive branch. Whether the judicial budget is subject to the veto power is, under separation powers doctrine, a distinctly separate question from whether the judicial budget must be forwarded to the executive branch before reaching the legislature, or whether the executive branch may hold hearings on the judicial budget, change it, or recommend changes. Abstract doctrines such as separation of powers and checks and balances do not aid much in determining these important procedural questions. They might reasonably be resolved either way, and either resolution could be justified under the principle of checks and balances. What seems more important than the manner of their settlement, however, is that their customary constitutional resolution not be unilaterally altered by any one branch of the government.

The theory that financial independence from other branches of government is necessary for the judiciary to preserve its inherent independence might equally apply to the executive branch. However, if the executive budget were independent of any legislative control, few would deny that a very substantial change had occurred in the "constitution" of our government.

53. *Id.* at 638-39, 220 N.E.2d at 536.

Conclusion

It is submitted that the judicial independence from the legislature espoused in *Carlson v. State, Smith v. Miller,* and similar cases contradicts "constitutional" practice in the United States. While these decisions advocate the doctrine of separation of powers, they ignore the coordinant principle of checks and balances. In a sense, these cases represent a small minority view, for in actual practice the judiciary has almost universally accepted the power of the legislature to review and alter its judicial budget. Any change in such a traditional constitutional relationship should only be effectuated in the manner provided for amending the Constitution. Ultimately, the people must be informed about and concerned with the fiscal problems of the judicial system and the influences that have caused them.