

Judicial Funding in Times of Budget Crises

Justice John Dooley

I am sure that members of the bar, and the public interested in the functioning of the Vermont courts, were surprised to see press reports of a budget cutting scenario under which half the state courts (family and district) in the state would be permanently closed, and, in addition, all the courts would be closed for twelve days during the rest of the year and all judicial employees furloughed. How can it be that the courts could be dismantled, with no action from the legislature, as a result of relatively short-term revenue shortfalls of 8 percent? Was this an intentionally dramatic threat to stave off any budget cuts?

My intent in this brief article is to give the bar and the interested reader some notion of the intricacies of the current budget process, which is hardly understandable or transparent from the brief news accounts. I do not promise that this will be easy reading (perhaps even less so than a Vermont Supreme Court opinion), but my hope is that an informed bar can influence for the better a very uncertain future for the Vermont courts. The main point of this brief article is that changes in the structure of the judiciary, of a kind and degree not seen in this state in the past, are definitely on the table as the result of the current budget difficulties, and the bar should fully understand the reasons for them and their scope and nature.

Returning to the opening paragraph, the answer to the second question posed in the opening paragraph is “No—the scenario reported was the response to the proposed rescission cut that would continue to maximize judicial services to the public within the resources available.” The detail behind that answer lies in the answer to the first question, and that answer in turn requires some context. Please bear with me on this. Under

Vermont law, the State Emergency Board—made up of the governor and chairs of the four major money committees in the legislature—constructs and modifies as necessary an official state revenue estimate. The legislature built the FY 2009 budget based on the January 2008 revenue estimate, but it became clear by spring that the revenue flow was eroding and the estimate was too high. In July, the official revenue estimate was reduced by about 2.1 percent, and this act triggered emergency budget reduction action by the secretary of administration and by the legislature's Joint Fiscal Committee, a committee of four House and four Senate members. By a law passed in 1995, in case of a reduction of 1 percent or more in the revenue estimate, the secretary can create a plan to reduce expenditures and present it to the Joint Fiscal Committee, which has the final decision unless it fails to act. In that event, the secretary's plan is implemented. The secretary prepared a plan in July, and after negotiation the Joint Fiscal Committee approved it; this rescission caused the judiciary to reduce its budget by 2.6 percent—about \$825,000.

Another revenue downgrade occurred in December, and the secretary of administration went forward again with a rescission—this time looking for an 8 percent reduction from many parts of government including the judiciary. For the judiciary, an 8 percent rescission meant another cut of about \$2.5 million. Because the cuts would come in mid-year, with only six months or so to make up the cut, the actual percentage reduction was about 16 percent. A careful examination of what it would take to meet the proposal produced the court closure and furlough scenario I described earlier at the beginning of this article.

Under an agreement between the legislature and the executive branch, the judiciary was spared most of this cut, but only for now. It did take an additional reduction

of \$245,000—an amount equal to 5 percent of the salaries above \$60,000 for the remainder of the fiscal year—and this reduction will be achieved by furloughing staff earning \$60,000 and above and closing all courts for one day per month during February through June. I say “for now” because the legislature plans a budget adjustment act that further cuts budgets, and the judiciary is very much at risk of further cuts in that process. Indeed, we consider them to be likely.

Why do these cuts threaten the whole structure and operation of the judiciary? Again, the answer is somewhat detailed, and I have tried to summarize the answer below. First, however, the reader must understand that the whole value system of the appropriations process changes in this environment. Rather than talking about what appropriations fund, the common budgetary parlance turns to formula fairness and “it’s all about the money.” I am sure that most of the readers of this article view the right to trial by jury in civil and criminal cases as one of the most important constitutional rights. In budget crises times, however, juries mean \$300,000 of expenditures to budget cutters who need the money to balance the budget. Further, if the judiciary does not take its percentage cut, some other agency or program has to take a bigger cut to make up for the loss—that strikes budget cutters as unfair.

So why do these budget reductions require such major changes in the judiciary? There are four main reasons. First, the judiciary was not fiscally healthy coming into this crisis. Less dramatic budget cutting has been going on for years, and has slowly impaired the ability of the judiciary to perform its function. The clearest indication of this trend is the growing list of unfilled vacancies, particularly in the trial court clerk’s offices, which

has now reached 24—7 percent of all judiciary positions. Included is a judge position, which the legislature authorized but we have never filled for budgetary reasons.

The Supreme Court recognized this slow erosion in judicial operations last January and requested that the legislature restore funding for these positions over time. The appropriations committees were very responsive to this request and restored funding for six of the positions this year. That funding was almost immediately lost in the first rescission, and the restoration never occurred. Now even further cuts have occurred. The judiciary implemented a half-day closing of courts both to save money and to reduce pressure on understaffed clerk's offices.

Second, the major cutting is being done by rescission in mid-year and not by the funding and impact analysis that occurs as the appropriations act moves through the two parts of the legislature. The sole goal is short-term savings, even if it means larger costs in the longer term. Thus, there is no time to plan and no opportunity to modify statutory mandates that lead to inefficiencies in operations. Indeed, the pressure is to start cutting as fast as possible because the opportunity to achieve the necessary savings is reduced with each passing day. As I said above, an 8 percent annual cut achieved over only the six months of the remainder of the budget year is actually a 16 percent cut. If it is achieved by lay-offs, much of the savings will be eaten up by pay-offs of accrued vacation and unemployment compensation costs, forcing more people to be laid off to achieve the short-term savings.

The meat cleaver approach of a rescission is why the Supreme Court, when faced with a rescission in 1990, imposed a moratorium on civil juries. It was the only way to get through the fiscal year without long-term damage to the system. The New Hampshire

Supreme Court has recently made the same decision. This is not a preferred way of cutting a budget, but rescissions force these kinds of actions. Again, in this environment, it is all about the money.

Third, judicial services are an entitlement. Whatever the funding level, we must be open for business and adjudicate the disputes that come before the trial courts and resolve the appeals to the Supreme Court. We cannot say that we will no longer adjudicate property disputes, misdemeanors, or divorces. When we evaluated the impact of proposed second rescission, we quickly realized that we could implement it only if we withdrew geographically and kept judicial operations functioning from fewer locations. Otherwise, we would have to lay off virtually every clerk's office staff person in the state, essentially shutting down all judicial operations.

The last reason is the greatest. The Vermont judiciary includes sixty-three courts and ninety judicial officers (including justices, trial judges, probate judges, assistant judges, magistrates, and hearing officers). Most of our expenditures are mandated by statute—for example, the salaries of judges and clerks—and cannot be cut by the judiciary without legislative action. Almost 15 percent of the judiciary budget is expended for rent it pays to the Department of General Services to occupy state courthouses. If the structure and mandates are untouchable, very little budget flexibility is left, and most of that flexibility disappeared in the long-term underfunding and the first rescission. As a result, it is virtually impossible to run an effective court system with a smaller amount of money, at least with current technology.

In saying this, I acknowledge that there are items we have protected from cuts because the long-term effects of those cuts will disproportionately impair judicial

services. For example, we can cut our expenditures for alternative dispute resolution, particularly mediation, and guardian ad litem support, but cutting the former will mean a significant increase in caseloads and cutting the latter will significantly impair the quality of parental rights and responsibility decisions, perhaps our most important determinations. More to the point, the amount of expenditures on these items is small in relation to the magnitude of the budget cuts, and elimination of these items would provide little budgetary help.

Where is this all going? Assuming the judiciary can get through this year without closing courts, the greatest impact of the budget crisis will be felt in the next budget year (FY 2010), starting in July of 2009. For that fiscal year, the governor will apparently recommend a judicial budget that is reduced by about 12 percent below current levels—a cut of \$4.5 to \$5 million. There are only three possible results of this proposal.

The first is the most obvious, but seems the least likely from today's perspective—that is, that the legislature will fully fund the current judiciary structure, despite the revenue shortfall, because a strong, functioning judiciary is essential to a democratic society. As every part of state government, and every constituency of government services and resources, adopts a common mantra—"Cut somewhere else!"—the ability of any part of the government, including separate branches like the legislative and judicial, to avoid budget reductions is unlikely.

The second is the other extreme—the judicial structure is maintained, but it is forced to run on drastically reduced funding. The cuts in services that will result from this action will be deep, but not particularly rational. Geographical retrenchment of the family and district court would be a near certainty because the judiciary would be forced to get

out from under paying rent for state buildings and to reduce personnel costs. These courts would operate out of only a few locations in the state. Even these cuts will not be sufficient to meet the budget numbers, and extensive lay-offs and furloughing will be needed. Perversely, because these courts involve statutory mandates or county administration, the effect on the probate and superior courts would be the least substantial.

The third is that the judiciary is restructured to meet a reduced budget. If cuts are to be made, this is the most desirable option. Consistent with this option, the legislature last year established a Commission on Judicial Operations chaired by Chief Justice Reiber and containing representatives from all the branches of government and citizen members. That Commission is looking at restructuring options and will make an initial report by January 15th, with a full report to come by January 2010. Note that restructuring can also be assisted by substantial technology enhancements, including general e-filing, that will be introduced over the next five years.

It is important to emphasize that planned restructuring cannot be done overnight and certainly not within a budget year. A carefully worked out plan to increase efficiency, maintain access to the judiciary, protect the rights of citizens, and maintain or improve judicial services will take considerable time and will not produce budget savings until some time well into the future. For this option to work, the legislature will have to protect the judiciary budget in the short term to achieve savings in the longer term.

If the decision were left to me, I would opt for some variation of the third option with the hope that any short-term shortfalls are minimized because a strong, healthy judiciary is essential. Every cloud has its silver lining, and I think, particularly with the

aid of new technologies, it is possible to create a more efficient and less-expensive judiciary that provides access to justice and protects the rights of Vermont's citizens. Indeed, the lesson from the longer term underfunding we have experienced is that the judiciary needs to become more efficient, even if there never was a short-term budget crisis. We are, as Pogo once said, at a time of "insurmountable opportunities."

Probably the greatest impact on the choice actually made will come from you—those who have a point of view on how courts should operate and are informed about the realistic choices and their effects. If we are to avoid the second option, an irrational dismantling of the courts to maximize short-term budget savings, those who work in and use the courts must speak out. I urge you to join the debate; the future of judicial institutions depends upon it.

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