The State of State Courts: Efforts to Improve Interbranch Relations in the Wake of Perceptions of Crisis[1]

Roger E. Hartley and Melissa L. English

Declining budgets, the need for court reforms and efforts to rein in court power necessitate examining how courts work with or lobby other branches of government. This article examines existing research on how courts do intergovernmental relations work and focuses on the need for the development of best practices.

It is well documented that declining state budgets have created significant funding challenges for state courts during the past decade. Unprecedented state budget deficits have led to year-over-year budget deficits from 2009–11 for a majority of state court systems.[2] While some data suggest state court budgets have stabilized,[3] court leaders, lawyers, scholars and organizations such as the National Center for State Courts and the American Bar Association have noted how these sustained budget cuts have hollowed out state courts, seriously compromised state court operations and jeopardized judicial independence.[4]

One important byproduct of the budget crisis in state courts is a renewed focus on the judiciary's neglect of the complex intergovernmental relationships at the heart of the budgeting process. Even for courts, these relationships are political in nature. In 21 states, the judiciary submits budget requests directly to the legislature. In 12 states, the judiciary's budget is submitted to the executive. In 19 states, it is submitted to both. Most states permit the executive branch or legislature to amend the budget request; the request is filed as a separate bill in only 10 states.[5] Regardless of the specific budget process, courts in every state must lobby one or both branches to pass the budget and must be in a position to advocate, lobby and defend themselves by establishing and leveraging intergovernmental relationships.

Courts, however, arguably face intergovernmental relations and lobbying constraints other agencies and groups do not.[6] The power of the judiciary is related to the perception that courts remain unbiased and above politics.[7] The role of judges as fair and impartial arbiters of disputes might make them conservative in their interactions with more overtly political branches of government. Some scholars argue that open and political efforts to work with the other branches might raise perceptions of bias and lead to efforts to rein in the power of the courts.[8] Research confirms these fears and suggests that legislative efforts to invalidate the Violence Against Women Act may have been amplified by judicial lobbying.[9]

On other hand, research suggests a constrained, conservative or passive approach to politics by courts leads to poor performance and poor outcomes. In budget politics, for example, court leaders behaved less acquisitively than other agencies in budget requests and were unable to grow their budgets at the same level.[10] Also, unlike other agencies, courts rarely came to the legislature with allies to support their requests.[11] When asked to rate a set of common lobbying strategies employed by court officials, legislative and gubernatorial budget officials generally rated the importance of the courts' budget strategies lower than court officials had rated them.[12] This suggests legislative and executive officials responsible for judicial budget requests expect courts to adopt the more aggressive —and political—approaches used by state agencies like transportation, education and corrections.

Intergovernmental relationships are important to more than the budget process, and have been specifically linked to courts' ability to impact any kind of court reform that requires political effort or change by other branches. The rise and institutionalization of specialty courts, such as drug and other therapeutic courts, is a striking example of the potentially dispositive effect of intergovernmental relationships on court reform.[13] In states such as Arizona, Missouri and New York, court leaders actively lobbied the state legislature and executive branch, obtaining significant resources including statewide funding, administrative offices and personnel devoted to specialty courts. In states where court-lobbying efforts were stifled, like South Carolina, statewide resources have not been allocated.[14]

Intergovernmental relationships are also important to crafting sound public policy. Judges and other justice system officials have a unique judicial voice that stems from their regular participation in the implementation of legal policy and street level knowledge of the law in action.[15] This experience and knowledge is beneficial in evaluating proposed policy and recognizing the positive and negative consequences of proposed legislation.

The judicial voice in the policymaking process can help inform the elected leaders who set the agenda and write laws, and the executive branch officials who implement policy. For example, some states permit courts to submit a judicial impact statement to the state legislature if a bill or resolution has the potential to affect court revenues or expenditures.[16] Only a very few states, however, allow judicial impact statements.[17] The improvement of intergovernmental relations and efforts to improve communication and lobbying can facilitate and amplify the judicial voice in the policy process and, perhaps, improve lawmaking.[18]

While attacks on court budgets by legislatures and executives is not unprecedented,[19] the importance of intergovernmental relationships have come into sharp relief more recently as state legislators in Kansas have gone as far as tying court appropriations to particular case outcomes in apparent retaliation for court decisions in high-profile cases.[20] Other state legislators and governors have targeted court structure or jurisdiction.[21] In South Dakota, a voter initiative called J.A.I.L 4 Judges would have ended judicial immunity by constitutional amendment.[22]

These more bare-knuckled attacks on courts underscore the lesson of the past decade's budget crisis. Whether it is a response to crisis, an effort to improve relationships to prevent crisis or attempts to amplify the judicial voice in the policy process, courts must be able to openly and effectively build relationships with other branches, communicate their needs and interests to elected officials, and find ways to make these judicial needs and interests salient. These are, by definition, political efforts.

Efforts to Improve Intergovernmental Relations

In the past five years, a renewed focus has been placed on improving the judiciary's intergovernmental relationships and crafting strategies that will help courts negotiate the rough-and-tumble of the political process. Court officials at the highest levels, public legal organizations such as the National Center for State Courts and the American Bar Association, political scientists and legal scholars have shared this focus. The result has been the identification of important opportunities for the judiciary to improve intergovernmental relationships, and the development of innovative programs to develop the opportunities and capacity for courts to advocate within the political process.

One opportunity that has been identified is for court leaders to build collegial relationships with the other branches so the members of those branches understand the role of courts, their importance to the legal system and their needs. In 2009, the American Bar Association's Presidential Commission on Fair and Impartial State Courts and the National Center for State Courts sponsored a national summit in Charlotte, N.C., entitled "Justice is the Business of Government: The Critical Role of Fair and Impartial State Courts."[23] The summit included 300 attendees and delegations for each branch of government from 37 states. It focused on the need to improve relations among the branches and concluded that court leadership needed to become more assertive about the needs of courts. Among the conclusions of the summit was for each delegation to create local plans for regularized communication with the other branches of government with specific attention to legislation with an impact on courts.[24]

The 2013 annual meeting of the Conference of Chief Justices and Conference of State Court Administrators in Burlington, Vermont, had a similar focus: "Collaborative Justice: Interbranch Relations in the New Century." This meeting was notable for including representatives from the National Governor's Association and the National Conference of State Legislatures. The Justices and court administrators spent significant time discussing how to improve lobbying efforts with other branches. Among the findings were that judicial leaders needed to create and maintain personal relationships with legislative and executive leaders.[25] The attendees established a framework for an institutionalized meeting structure where regular interbranch communication can occur and committed to build national partnerships with the National Governors Association and National Conference of State Legislatures to work on policy agendas and research of interest to all three branches.[26]

Courts also recognize the necessity of internal and external reforms to increase the courts' capacity to lobby while also closing avenues for reprisal.

In the context of budget politics, external reforms include constitutional amendments to allow direct submission of the budget to state legislators, legislative efforts to free courts of restrictive budget line items and institutional changes inside courts that would build better strategic lobbying efforts.[27] Internally, courts can improve capacity for political engagement by devoting more resources to intergovernmental relations staff and building internal lobbying processes that persist across budget cycles.[28] Unfortunately, no research examining the amount of money and staff courts devote to their intergovernmental relations work has been conducted.

Other scholars have noted the importance of improving tactics and effective messaging. For example, Jeremy Buchman, Associate Professor of Political Science at Long Island University, has documented how the U.S. Supreme Court successfully lobbied for the Judiciary Act of 1925. The Act sought to reduce the U.S. Supreme Court's caseload by expanding the Court's discretionary jurisdiction and forcing more parties to seek review by writ of certiorari. The U.S. Supreme Court used improvement of court efficiency as a means to persuade lawmakers.[29] Research also documents strategy and successful efforts where federal court officials worked with the other branches to build judicial institutions over time and the lobbying work of the Administrative Office of the United States Courts.[30] For example, court officials at the federal level successfully lobbied for the Judiciary Act of 1891 that created the United States Circuit Court of Appeals and in 1939 Congress created the Administrative Office of the United States Courts. In states, a host of reforms have been created in partnership with state legislatures and governors like court unification of administration efforts, changes to judicial selection methods, and support of specialized courts.[31]

Judicial leadership and tenure also have been identified as being important to improving interbranch relationships. Effective leadership is important to build better relations with the other branches and to form partnerships. Rather arbitrary selection methods, limits on the tenure of court leaders—in Alabama, for example, presiding circuit judges are limited to three-year terms—or mandatory rotation of judicial positions and benches may fracture important networks once they are formed. For example, chief judges of the circuit and district courts are the most senior judge in the federal court system. They may serve a seven-year term or until the age of 70.[32] An alternative to short rotations of judicial leaders is longer terms with attention to judges with court leadership skills, providing mentoring and grooming them for succession into leadership, and giving them the opportunity to serve longer or multiple terms.

Courts also might create partnerships with outside organizations to help advance causes of importance to courts. Courts in Tennessee, for example, have created partnerships with executive branch agencies that are participants in the court system, including the prosecution and public defense bars.[33] Partnerships like these allow courts to have allies that might raise the salience of court issues and needs that would otherwise be ignored when the branch goes into the political process alone. In Washington state, the courts helped organize the Justice in Jeopardy Commission, which included representatives from business, the bar, the legislature and others to lobby on behalf of court funding increases.[34]

Conclusion

Indiana Chief Justice Randall T. Shepard wrote the following about the need for effective court leadership on societal problems and interbranch relations:

> "… A member of the judicial family is called upon to play roles that are not strictly a part of the classic adjudicative function, but reflect instead the exercise of leadership in other ways, like lending a part of the credibility the judicial branch acquires over time to a very important undertaking that society needs."[35]

The crisis in court funding and efforts to alter the powers of courts call attention to importance of the courts' intergovernmental relationships and how, without effective and competitive advocacy, court needs get lost in the rough and tumble of the political process. While courts and allied organizations have a renewed focus on the importance of intergovernmental relations, the effectiveness of emerging strategies and best practices still need evaluation. In addition, more scholarly research is needed to continue to identify effective strategies for courts to improve their capacity and ability to lobby other branches, their tactics and how these strategies compare to those of the executive agencies with whom courts compete.

Notes

[1] The authors wish to thank William Raftery of the National Center for State Courts for his help with this article.

[2] Daniel Hall. "Reshaping The Face Of Justice: The Economic Tsunami Continues." National Center for State Courts. 2011.

[3] "COSCA 2013 Budget Survey Analysis." National Center for State Courts. January, 2013. This survey suggests that state court budget stabilization has been widespread. Out of 45 states reporting data, 30 reported an increase in state appropriations in the 2013 fiscal year, although those increases were typically 1–4 percent and were expected to be applied to court operations. Similarly, 38 out of 45 states reporting expected the "judicial budget situation" in their state to stay the same or improve over the next three years.

[4] Daniel Hall. "Reshaping The Face Of Justice: The Economic Tsunami Continues." National Center for State Courts. 2011.

[5] S. Strickland, R. Schauffler, R. LaFountain and K. Holt, eds. *State Court Organization*. (National Center for State Courts: 2014), Table 3A. Available at *http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM09*.

[6] Roger E. Hartley, "Moving Past Crisis … Promoting Parity: How Effective Intergovernmental Relations can Help Build a More Co-Equal Branch." *New England Law Review* 47(2013): 101–129.

[7] Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor, Michigan: University of Michigan Press, 2006): 243–251.

[8] Several scholarly works argue that while there is some ability of court officials to engage with the other branches, it may not be prudent. The concern is that court officials will appear associated with a political side on policy arguments and that taking these stances will invite attacks on their independence as a branch. See Charles Geyh, "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress," *New York University Law Review* 71 (1996): 1165; William C. Vickrey, Joseph L. Dunn, and J. Clark Kelso, "Access to Justice: A Broader Perspective" *Loyola of Los Angeles Law Review* 42 (2009): 1182–1184; Judith Resnik, "The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act," *Southern California Law Review*, 74 (2000–2001): 269, 287–90.

[9] See Geyh and see Resnik at id.

[10] James Douglas and Roger Hartley, "State Court Strategies and Politics During the Appropriations Process" *Public Budgeting and Finance* 21, p. 35, 2001.

[11] Id.

[12] Id.

[13] Other compelling examples are court reforms regarding changes to judicial selection processes and efforts to unify the administrative systems of state courts. See Robert Tobin, *Creating the Judicial Branch: The Unfinished Reform* (Williamsburg, VA: National Center for State Courts, 2004) for a great discussion of state court reform over time.

[14] James W. Douglas and Roger E. Hartley, "Policy Diffusion as a Chain Reaction: The Evolution of the Diffusion Process of the Drug Court Movement; A Qualitative Analysis." Unpublished Working Paper. On file with the authors.

[15] See Roger E. Hartley, "It's Called Lunch: Judicial Ethics and the Political and Legal Space for the Judiciary to 'Lobby'" *Arizona Law Review* 56 (Forthcoming 2014).

[16] See, for example, the "judicial impact statement" law in Ohio at *http://codes.ohio.gov/orc/105.911*.

[17] William Raftery, email correspondence citing internal, unpublished National Center for State Courts research that noted that few states allow these statements on March 24, 2014.

[18] Interestingly, while judicial codes of conduct in states prohibit some political activity by judges and court officials, exceptions that allow judges to speak on issues related to law or judicial administration are very common. These exceptions are recognition that judicial officials have a role to play and important knowledge to bring in the policy process. See Roger E. Hartley, *Arizona Law Review*, supra n. 14.

[19] James Douglas and Roger Hartley, "The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?" *Public Administration Review*, 63 (July/August 2003): 441–454.

[20] Bill Rafferty, "Kansas Senate approves more funding for courts provided they don't find laws unconstitutional; provision language used in court vs. legislature K–12 funding fight bills," March 7, 2014 on *Gavel to Gavel Blog*, *http://gaveltogavel.us/2014/03/07/kansas-senate-approves-more-funding-for-courts-provided-they-dont-find-laws-unconstitutional-provision-language-used-in-k-12-funding-fight-bills/*.

[21] One recent effort occurred in Michigan in 2013 where Gov. Rick Snyder signed legislation that would move lawsuits against the state out of the Ingham County Circuit Court and move them to four Court of Appeals judges from at least two of the state's four equally apportioned districts. The four judges would be selected by the Michigan Supreme Court. Jonathan Oosting, "Snyder downplays politics of moving lawsuits against the state: 'This is the right thing to do.'" November 7, 2013 on *MLive*, *http://www.mlive.com/politics/index.ssf/2013/11/snyder_downplays_politics_of_b.html*.

[22] Bert Brandenberg, "Rushmore to Judgment: South Dakota ups the ante in the national war against judges," March 14, 2006 , on *Slate*, *http://www.slate.com/articles/news_and_politics/jurisprudence/2006/03/rushmore_to_judgment.html*.

[23] See C. Dale McClain, "Pennsylvania Leaders Agree: Justice is a Key Government Goal, We Must Work Together to Bolster Understanding." At *http://www.pabar.org/public/news%20releases/pr060209.asp*. See also American Bar Association, "300 State Officials Leave State Court Summit with Plans for Action to Improve Relations, Protect Court Funding." At *http://www.americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/SummitRelease.authcheckdam.pdf*.

[24] See McClain, id.

[25] Hartley, Roger E., "Final Report: Developing National Leadership Collaboration: How Might CCJ, COSCA, NGA and the NCSL Work Together to Forge Better Public Policy?" (September 6, 2013). Williamsburg, VA: Conference of Chief Justices and Conference of State Court Administrators (2013).

[26] Id.

[27] Roger E. Hartley, *New England Law Review*, supra n. 6.

[28] Roger E. Hartley, *Arizona Law Review*, supra n. 14.

[29] Jeremy Buchman, "Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925," *The Justice System Journal*, 24 (1)(2003): 1–22. See also these works on judicial lobbying efforts at the federal level. Justin Crowe, "The Forging of the Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *Journal of Politics*, 69 (2007): 73, 77–80; John W. Winkle III, "Interbranch Politics: The Administrative Office of U.S. Courts as Liaison," *Justice System Journal*, 24 (2003): 43, 50.

[30] Winkle at id.

[31] See Tobin, *Creating the Judicial Branch*, supra n. 13.

[32] Administrative Office of the United State Courts, "How is a Chief Judge Selected?" at *http://www.uscourts.gov/Common/FAQs.aspx*.

[33] See Hartley, *Arizona Law Review*, supra n. 25.

[34] See Hartley, *New England Law Review*, supra n. 24.

[35] Randall T. Sheppard, "The Changing Nature of Judicial Leadership." *Indiana Law Review* 42 (2009): 771.

About the Authors

Roger E. Hartley is professor and director of the master's of public affairs program in the Department of Political Science and Public Affairs at Western Carolina University. Hartley's recent research focuses on how state courts interact with, or lobby, the other branches of government. He also has published works with colleagues on judicial budget politics, federal judicial selection and specialized courts.

Melissa L. English is assistant professor of business law at Western Carolina University. English was a civil litigator for eight years and received her Juris Doctor from the University of Arizona. She teaches courses on individual rights, business law and business ethics.