

Policy Dialogue

No. 49 • April 2002

A Judicial Declaration of Independence

The Massachusetts judiciary has yet to assume its rightful place as a fully independent branch of government, writes retired District Court First Justice James W. Dolan in a new Pioneer Institute White Paper. Although its workload has declined in recent years, staffing has increased through patronage positions created by the legislature but never requested by the judiciary. In addition, the system suffers from an inequitable distribution of resources due to legislative micromanagement through line item budgeting that exists in no other state with a state-funded, centrally-controlled court system. Judge Dolan discussed his findings at a recent Pioneer Forum, with commentary by attorneys Edward P. Ryan, Jr., immediate past president of the Massachusetts Bar Association, and David Steelman of the National Center for State Courts, a management consultant to courts around the country. The remarks of each are excerpted below.

The Massachusetts Judiciary: Is it Truly an Independent Branch?

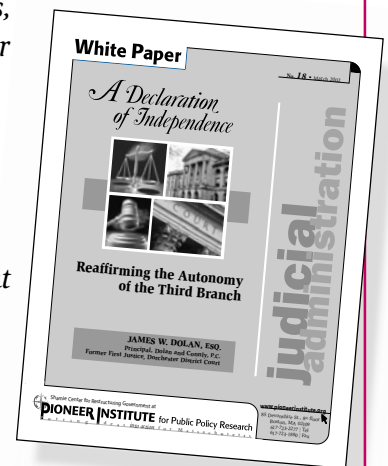
Judge James Dolan: We're at a crossroads in the development of the Massachusetts court system. It can continue functioning as a political extension of the legislative branch, or it can at last assume its rightful role as an independent branch of government and a full partner in governance.

Compared to the executive and legislature, the judicial branch is in its adolescence. For all practical purposes, it has only been a functioning branch of government for 23 years. Lacking the experience and confidence of its more senior partners, it has been reluctant to assert its independence in an effort to avoid confrontation and retaliation. It has struggled with the fact that judicial administrative authority continues to be marginalized in a system for which, by law, judges are responsible.

Power continues to be shifted away from judges to clerks, registers, and the commissioner of probation. Having the authority but not the power, court administrators are demoralized. The chain of command is unable to impose coherence and discipline upon a still-fragmented system. Costs rise, productivity suffers, and resources are distributed unevenly.

The cause of this administrative impotence is the continued use of the line item budget, the vehicle by which the legislature micromanages court personnel and the most significant impediment to administrative autonomy.

For most of our history, the courts had been a loose confederation of county-funded units with virtually no centralized administrative structure and no centralized budgeting process.



Read the complete study, "A Declaration of Independence: Reaffirming the Autonomy of the Third Branch," online at www.pioneerinstitute.org/research/whitepapers/wp18cover.cfm.

www.pioneerinstitute.org

85 Devonshire St., 8th floor
Boston, MA 02109
617-723-2277 | Tel
617-723-1880 | Fax

It was, literally, each court for itself, as local court officials, county officials, and the legislature passed on each court's budget. There was no central planning, setting of priorities, oversight, or administrative review. Resources depended on how well connected you were. The system, if you could call it that, had worked that way for about 200 years.

The cause of the judiciary's administrative impotence is the continued use of the line item budget, the vehicle by which the legislature micromanages court personnel and the most significant impediment to administrative autonomy.

—*Judge James Dolan*

With the Court Reform Act of 1978, the judicial branch, for all intents and purposes, came into being. The legislation created a state-funded court system with an administrative structure and a chain of command to oversee its continuing operations. The chief administrative justice was directed to prepare an over-all trial court budget. However, the House of Representatives broke the budget down, as it had historically done, into individual court line items. While the structure of a separate and equal branch had been established, its administrative authority was to be severely limited.

Authority without power was of little effect. The chain of command lacked the power to impose coherence and discipline in a system where important personnel decisions were being made elsewhere. Since local court officials and their legislative sponsors controlled personnel, the fragmentation of authority, so much a part of the old system, continued.

Patronage and Inequitable Resources Plague the Court System

It was certainly understandable why legislators were reluctant to give up that power. After all, they had always exercised it. And it provided direct access to good paying jobs in the court system, something they did not have in the executive branch. Patronage, like water, follows the course of least resistance, which explains why last year, in outside sections of the budget, the Legislature shifted even more hiring authority away from judges to the more compliant clerks and the more cooperative commissioner of probation.



Former District Court First Justice James Dolan

The result is a haphazard distribution of personnel within the system, based more on political considerations than absolute or relative need. Not every court has politically active leadership. And not every legislator is in a position to deliver jobs. So the fruits of the process are unevenly distributed, with connected courts getting more, while unconnected or uncooperative courts get little or nothing. This practice serves the interest of the players, but doesn't contribute to the even-handed distribution of justice.

The Boston Municipal Court and the Springfield Court are two prime examples of the inequities that occur within this system. The BMC is essentially a district court with limited geographic criminal jurisdiction. Seven district courts serve the neighborhoods of the city of Boston. While only a single court, it is a separate court department with its own chief justice, a large administrative staff, 12 judges, 37 probation officers, 27 assistant clerks—55 more employees and a budget over twice that of the Springfield District Court, the busiest district court. The Springfield District Court, which serves the entire city of Springfield and four surrounding communities, has six judges, 26 probation officers, and 10 assistant clerks. Long recognized as the most overstaffed court in the state, the BMC's abundant resources speak more to its favored status than to its need.

In addition, the courts in the four western counties are funded far below the courts in Suffolk County, attributable, I believe, more to the fact that legislative leadership of late tends to be drawn from Suffolk rather than any reliable assessment of staffing needs.

During most of the past decade, the business of the court has declined quite dramatically—down more than five percent between 1996 and 2000. During such a period, you would expect the court budget and personnel to stabilize. After all, you don't grow the business when it's in decline. But just the contrary happened.

Between 1994 and 2001, the court budget jumped from \$261.6 million to \$475.7 million, an increase of 82 percent. The governor's budget proposal for the judiciary in fiscal year 2002 was \$599 million. Personnel increased by nearly 27 percent between 1994 and 2001; 111 unrequested assistant clerks or registers, 65 probation officers, 196 associate probation officers, and 44 court officers were added between 1998 and 2001. The total cost of the new hires was \$50.1 million over the four years. These costs will continue to be borne by the system as we head now into difficult financial times.

Who was adding all these jobs during a period of decline in business? Not the administrative office of the trial court. While the judiciary asked for some positions, many were added by the legislature without being requested by the administrative office of the trial court.

The unchecked pressure to create new jobs during good times frustrated planning and any realistic assessment of the needs of the court. The court system budgetary requests are regularly ignored in favor of special interests. Its efforts at long range planning are stymied. Its power to transfer personnel and money limited. This all adds up to administrative impotence.

It's obvious that the legislature has a vitally important role in funding the court system. Nobody is questioning its power to appropriate and its responsibility to hold the system

accountable for the expenditure of public funds. It can and should take an active oversight role in assuring that funds are managed prudently. However, the legislature should not be *micromanaging* the operations of the judicial branch, particularly as they relate to the allocation of personnel. Because when that happens, patronage becomes the driving force.

Patronage is inevitable. Sponsorship of supporters, constituents, family, and friends for jobs in the public sector will exist so long as we have government and human beings. Few, if any, judges or clerks are appointed without some level of sponsorship. Often the sponsored candidate is the best. There are many excellent people in the system who had sponsors. But there

must be safeguards. The job has to be necessary; the sponsored candidate has to be qualified; and unsponsored candidates must have a fair opportunity to be considered.

There are many excellent people in the system who had sponsors. But there must be safeguards. The job has to be necessary; the sponsored candidate has to be qualified; and unsponsored candidates must have a fair opportunity to be considered.

—Judge James Dolan

Recommendations for Change

The use of the line item budget should be eliminated. It is simply too great a temptation for mischief within the system, not only by legislators, but by court officials who can bypass their superiors and undermine the chain of command by dealing direct. The legislature has no business managing human resources in a separate branch of government. It doesn't do it in the executive branch. The University of Massachusetts, with an operating budget about the same as the court system, is one line item—and it's not even a separate branch of government. Unless this is done, the court system's development will be retarded and its reputation for fairness undermined.

Court administrators must also be given clear authority to shift personnel and funds both within and between court departments as circumstances warrant. With power comes responsibility, and the judicial branch must be able to demonstrate its competence by developing a fair and reliable staffing formula, which doesn't exist now. The report suggests two: one, a weighted caseload approach calculates workload based on the number and types of cases. This formula translates caseload into workload and, thus, into staffing requirements. The second, called policy based budgeting, takes into account systemwide policy objectives, performance evaluations, and cost analysis to determine staffing and funding needs. Legislative claims of no confidence must be met with reasonable standards of organizational management to demonstrate that judicial funding requests are based on a plan, not a whim.

A conscious effort must be made to identify judicial leaders with administrative and political experience to guard the line between the branches and deflect incursions that could erode the inherent power of the court. Court leaders should also consider establishing an office of external affairs, similar to that operating in Connecticut. Among other things, that office keeps the legislature informed about court-related issues, alerts legislators to significant programs or events planned in local courts, and invites their participation. This outreach permits legislators to share in the development and the launching of useful and politically beneficial programs, thereby acknowledging their stake in what may be the most important public institution in their district. That office also processes patronage requests. As indicated earlier, sponsorship is an inevitable part of popular government, but when regulated fairly, it need not be a liability.

Finally, and most importantly, those qualities so prized in the courtroom—fairness, process, openness, and decisions made on the merits—must also influence and inform the judicial branch in the exercise of its administrative responsibilities. They are the core values of the system. In asserting its independence, the judicial branch should set an example of administrative integrity and competence that will dispel any concerns by the other branches, and demonstrate that it is prepared to fulfill its rightful role as a full partner in governance.



*Edward Ryan,
immediate past
president of the
Massachusetts Bar
Association*

Crisis in the Massachusetts Judicial System

Edward Ryan: We face an unprecedented crisis in fulfilling the promise of justice to the citizens of Massachusetts, a guarantee that for some 200 years, people have died to secure. We have a crisis in confidence in our justice system and a crisis in the delivery of justice all throughout the Commonwealth. It's that crisis in the delivery that, in part, underlies the crisis in confidence in the Judiciary.

There is a price tag to the administration and delivery of justice. In the fiscal crisis we currently face, that price tag takes on human form. To meet the cuts required by the shortfall of the funding of the courts, 269 positions were left unfilled, 349 people took an early retirement, and 185 people were laid off—a total of 803 jobs. Soon, there won't be enough money to pay people to interpret in all of our courts and justice will be denied to persons who don't speak English. Court reporters will not be able to be paid, eliminating transcripts in criminal and civil cases. We won't be able to appoint court investigators because we can't pay them. How many cases will languish as a result?

This is a function of the lack of adequate funding and an inability on the part of the court to adjust, on its own, in times of fiscal crisis, to meet the needs in a given court. Certain courts are busier than others. But the system doesn't have the ability to adjust for this and send resources to the courts that need them, and take away from courts that are fortunate enough to be able to deal with the business they have and have somewhat of a surplus of resources.

This creates internal struggle in the court—politicizing, factionalizing, marginalizing, and finger pointing. But we shouldn't play the blame game; it's not the fault of the members of the judiciary. We should really see how we can fix the problem. Judge Dolan's report is an arrow aimed at fixing the problem. He identifies the source of some of the trouble, and proposes some very simple solutions that, in the practical world of real politics, will be very difficult to implement.

Judge Dolan proposes some very simple solutions that in the practical world of real politics, will be very difficult to implement.
—Edward Ryan

We have an incredible justice system in the Commonwealth of Massachusetts. The 350 judges who work in the system are, by and large, hard working, dedicated individuals—about whom we only read if there's one aberrant sentence in a criminal case or a particular result in a civil case. We don't read about the thousands of cases that go on day in and day out in all of these courts. We don't read about the clerk's office staff people who work before and after their regularly appointed time because they have some pride in what they do.

The judiciary is an independent branch of government. It needs to be independent in order to secure liberty and justice, which is the promise of our Constitution. It is not fully independent today. We need to support this system. We need to be able to move our resources around.

The National Context: Massachusetts Stands Alone



David Steelman, an expert on court organization and caseload management

David Steelman: I want to give a sense of what has generally been happening over the last 50 years or so with state funding of trial courts. Before 1950, most state-level funding for courts was for the courts of last resort, like the Supreme Judicial Court in Massachusetts, and other appellate courts. Trial courts were part of the local political culture and were largely locally funded.

In 1948, the Supreme Court of New Jersey created a State Court Administrator's Office. That started a movement across the country toward administrative unification of courts. It was characterized by uniform statewide procedures, more professional judges and court employees, and approved court management. Advocates of state-level financing of trial courts have usually argued as well in terms of unified budgeting—that is, a system in which all judicial costs are funded by the state through a single appropriation. They argued it would allow more efficient, balanced allocation of resources, remove judges from fiscal politics at the local level, and provide a broader funding base for court improvement. When you have state-level financing of courts, you don't necessarily have to have this centralized unified budgeting. But most of the court systems throughout the country that have gone in the direction of state-level funding of courts have, in fact, adopted centralized and unified funding systems.

Where is Massachusetts in this? In 1978, the Cox commission on judicial reform recommended major administrative and structural changes, as well as a transition to state-level funding for the trial courts. But it created a budget process with separate line items for every minor subdivision of the trial court system, giving legislators considerable influence over the resource allocation at each level of the court system and limiting the extent to which the judiciary could allocate resources to meet demands placed on the judicial system.

Let's jump back again to the national picture. By the late 1980s, financial problems created for localities by the rising costs of trial courts were moving more states toward state-level financing so that now, in states with substantial state-level funding of courts, the submission of the budget is through either the state supreme court, the state level administrative office of the court, or whatever is the highest administrative authority for the court system. Only New Mexico and Massachusetts have an extensive line item budget for the judicial branch of government. In every other state, the budget is appropriated in a single lump sum or in an appropriation with a relatively small number of line items, so that the leaders of the court system have the capacity, the authority, and the responsibility to allocate resources where the workload is.

No other state-funded court systems in the country have the level of legislative micromanagement through line item budgets that we have here in Massachusetts.

—David Steelman

In 2001, New Mexico state legislators requested that a single unified budget be submitted for all general jurisdiction trial courts, rather than having to set priorities among many different line items for local courts. With this change, no other state-funded court systems in the country will have the level of legislative micromanagement through line item budgets that we have here in Massachusetts.

In every other state with substantial state-level funding of courts, the judicial branch of government is viewed as a single entity of which the trial courts are a part. State appropriations are to the judicial branch as an entity, and resources are allocated within the budget by the leaders of the court system in a manner consistent with the judicial branch's responsibility to provide justice to all the citizens of the state. That's the national context—Massachusetts stands alone.