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Courts: Inherent Power and Administrative Court Reform

Lynn Laufenberg

Geoffrey Van Remmen

INHERENT POWER AND ADMINISTRATIVE COURT REFORM

I. INTRODUCTION

Little novelty exists in current pleas for general court reform. In the many pages of text, law review articles, and committee reports devoted to the subject, it has become fashionable to quote from Dean Roscoe Pound's now famous address to the American Bar Association in 1906 wherein he decried the disorganized state of our nation's courts and outlined his ideas on the unified court system.[1] The road to reform has been long and rocky with little apparent progress. Where changes have been made, they have often lagged far behind the ever-increasing demands for more efficient and effective courts.

In Wisconsin, as early as the first years of this century, the demand for structural court reform culminated in the so-called "Winslow Report" of 1915 which advocated adoption of a unified system with "the judicial power of the state . . . vested in one great court."[2] The plea went unheeded and since that time a number of study committees created by the state bar and the legislature have reviewed the problem. The court reorganization of 1962 was the result of these efforts. While it represented a decided step forward, it stopped somewhat short of the complete revision which has been advocated and which may well be required.

The primary focus of proposals for reform has been on structural reorganization. As such, they have been directed to the legislature. The adoption of a unified court system or even a rearrangement of the present court structure would no doubt require legislative action or even a constitutional amendment.[3] However, it has been recognized that a good part of the blame for the problems which now face the judiciary can be attributed to *internal* disorganization and lack of centralized, efficient court administration. Chief Justice Earl Warren in his address to the American Law Institute in 1967 stated:

> In a century which has been characterized by growth and modernization in science, technology and economics, the legal fraternity is still living in the past. We have allowed the mainstream

1. 29 ABA Reports 395 (Part I, 1906).

2. Report of Joint Committee of the Legislature of Wisconsin on Investigation of the Organization and System of the Courts in Wisconsin 3 (Madison 1915).

3. See art. VII, § 5, Wisconsin Constitution.

> of progress to pass us by. . . . Our failure to act becomes alarming when a competent . . . judge must admit in testimony before a Senate committee that unless something new and effective is done promptly in the area of judicial research, coordination and management, the rule of law in this nation cannot endure. When justice is denied to any of our citizens because of faulty administration our failure to act becomes inexcusable.[4]

In its report on the state of the judiciary, the Citizens Study Committee on Judicial Organization noted that there has been little change in the administration of Wisconsin's courts since the mid 1800's. In reality, the report continued, there is no administration at all. Trial judges are their own boss, free to operate their courts as they see best, on their own schedule and with their own methods. The Committee further noted that the supreme court, vested by the constitution with supervisory powers over the lower courts, has not used this power to exercise administrative authority over the day-to-day operation of the trial courts.[5]

The Committee report concluded that administrative practices have not changed because they are concealed from public view, not very glamorous, and difficult to understand.[6] There is a recognized need for administrative leadership and a system of organizational management which can only be accomplished by a concerted effort to change old practices. The Committee report summarized its findings:

> There is no effective administrative structure in Wisconsin's court system and no one has responsibility for overall direction of its operations. The result is a highly segmented, non-uniform system in which each judge exercises substantial control over the administration of his individual court without regard to the rest of the system. The product is a court system which is neither economical nor efficient.[7]

It is a thesis of this article that a resolution of this aspect of the judiciary's problems may not require legislative action. It may well be that, should the legislature at some point determine to change the *structural* organization of the judicial system, such a change could adequately incorporate measures to resolve the *internal* and administrative problems. This was the proposal of the

4. See Citizens Study Committee on Judicial Organization 85 (Madison 1973).
5. *Id.* at 86.
6. *Id.*
7. *Id.* at 87-88.

Citizens Study Committee. However, there is no immediate prospect of legislative action and if this portion of the problem can be resolved as well by judicial directive as by legislative action, there appears to be no reason to delay the necessary action.

In succeeding sections, this article will explore the basis for possible court action to implement administrative reforms and consider selected problems presented by the proposals of the Supreme Court's Chief Judge Study Committee.[8] Those proposals involve the creation of administrative court districts headed by a chief judge whose duties will substantially parallel the recommendations of the National Conference of Metropolitan Courts.[9]

II. Basis for Court Action

A. Source and Definition of Inherent Power

Under what authority might the supreme court order and implement administrative court reforms should it determine that they are desirable? It seems apparent that the traditional adjudicatory powers will not support such quasi-legislative action. Further, as noted in the Citizen's Study Committee Report,[10] the superintending power of the court has not been construed to grant authority to administer the day-to-day operations of the trial courts. While the power affords a wide range of action with respect to internal housekeeping, its exercise has been more closely related to the court's appellate jurisdiction and the adjudication of legal issues.[11]

The aspect of judicial authority which appears to offer the greatest promise in this area is the concept of inherent power. A court's "inherent power," as evidenced by the term, arises from the very fact of the court's existence and, therefore, is not dependent upon a special legislative or constitutional grant.[12] The source of this power is found in the constitutional separation of powers principle which sets up an independent judiciary. To insure its independence, the courts have argued, the judiciary must possess the power, not only to protect itself from attacks by the co-ordinate branches, but also to take the initiative in preserving its existence when the need arises.[13]

8. Minutes of April 5, 1974, Meeting of Chief Judge Study Committee.

9. See Standards Relating to the Office of Trial Court Chief Judge (National Conference of Metropolitan Courts, 1973).

10. Note 4, *supra.*

11. See, generally, Shavie v. State, 49 Wis. 2d 379, 182 N.W.2d 505 (1970).

12. See State ex rel Gentry v. Becker, 351 Mo. 769, 174 S.W.2d 181 (1943).

13. See State ex rel Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909); State

This "inherent power of the judiciary" is generally said to allow a constitutional court to do whatever is reasonably necessary to preserve and guarantee the efficient and orderly administration of justice.[14] Definitionally, then, the court's inherent power is couched in broad expansive terms. A more realistic idea of the scope of the power can be gained by looking at the cases in which it has been employed. The summary of cases which follows will afford a realistic picture of how courts have applied the concept of inherent power. Special attention will be paid to the Wisconsin authority.

B. Judicial Application of Inherent Power Principles

1. As Relating to Court Personnel

The appointment, dismissal and compensation of court-related personnel has, both in the past and at present, been a frequent source for the application of inherent power principles. *In re Janitor of the Supreme Court*,[15] an early Wisconsin case, is a leading decision in this area. In that case the state superintendant of public property attempted to remove the court-appointed janitor of the supreme court from his position and replace him with his own appointee. In its review of the situation, the Wisconsin Supreme Court noted that it had been customary for the court to appoint its own janitor who also served as librarian and general assistant to the justices. It was important, the court said, that the person serving in such capacity be one who could understand the manner of the court's functions and generally get along with the justices. The court concluded that the power of appointment of such a key court employee should reside in the court itself and, therefore, also the power of removal should reside in the court. The order of the superintendant, the court said, was a direct invasion of the rights and privileges of the court and of the justices. The basis for the decision was the court's inherent power:

> It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as

ex rel Kitzmeyer v. Davis, 26 Nev. 373, 68 P. 689 (1902); Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963); State ex rel Weinstein v. St. Louis Co., 451 S.W.2d 99 (Mo. 1970); Knox Co. Council v. State ex rel McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940).

14. State ex rel Weinstein v. St. Louis Co., 451 S.W.2d 99 (Mo. 1970).

15. 35 Wis. 410 (1874).

> very doubtful whether the court can be deprived of it. As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments.[16]

The court concluded that the superintendant had exceeded his statutory authority in removing the court-appointed janitor and ruled that he be retained until dismissed by the court or until he voluntarily resigned the position. As to further interference from the superintendent, the court stated:

> In case his name shall be omitted by the superintendent from the pay-roll, so that his compensation cannot be made to him monthly as heretofore, it will devolve upon the next legislature to make the requisite appropriation and likewise to provide against the recurrence of similar contingencies in the future. It is not within the range of presumption, or a supposition to be for a moment indulged, that any legislative body will neglect or refuse to make such appropriation or to enact suitable measures for the future; but if it should refuse to appropriate, the appointee will have his remedy by action against the state in the manner prescribed by law.[17]

A subsequent Wisconsin case, *Stevenson v. Milwaukee County*,[18] echoed *In re Janitor* with respect to a court-appointed bailiff whom the defendant county refused to pay. The bailiff was awarded judgment against the county by the circuit court and the county board appealed, contending that the circuit court had no authority to make the appointment and, alternatively, if there was such authority, there was no necessity since the sheriff, pursuant to statute, had appointed two deputies to attend the court in question. The supreme court dismissed both contentions:

> We shall not enter into any extended discussion of the power of circuit judges to appoint attendants, because it seems to be well-settled that the power exists in proper cases. Under the Constitution of this state the judicial powers of the state in matters of law and equity are vested in a Supreme Court, circuit courts, and

16. *Id.* at 419.
17. *Id.* at 421-422.
18. 140 Wis. 14, 121 N.W. 654 (1909).

> other courts provided for in that instrument. The circuit courts of this state therefore are created by the constitution and do not depend solely upon statute for their powers. Independent of statute such constitutional courts have inherent power to make such rules and orders as may be necessary to properly perform their functions. . . . The power to appoint necessary attendants upon the court is inherent in the court in order to enable it to properly perform the duties delegated to it by the Constitution.[19]

As to the necessity of the appointment, the court stated:

> The power to determine the necessity must rest somewhere, and no place, we think, more appropriately than with the judge making the appointment, for it is for him to determine when a necessity exists in the administration of the business of his court; and it necessarily follows from the nature of the case that a broad and liberal discretion is vested in the judge respecting this power. Whether the power of the judge in determining the necessity is subject to review in any case, and, if so, in what manner and under what circumstances, we need not and do not decide, because in the case before us the record shows no abuse of power by the judge in making the appointment. . . . We think it clear that where it seems to the judge necessary that an attendant upon the court in addition to the sheriff and his deputies, should be appointed it is his right to make the appointment for such time as the necessity exists. . . . When that necessity exists must be determined by the judge of the court in which the appointment is made.[20]

The cause was remanded for a new trial on the question of the amount to be paid, the court deciding that the remuneration should be the same as that provided for in the statutes for deputies appointed to the position by the sheriff. Justice Marshall, dissenting, contended that *In re Janitor* should be no authority since in that case, there was no statutory provision for the appointment of the attendant in question. Justice Marshall would have limited the court's inherent power:

> It may well be that courts are not obliged to bow to the legislative will in such matters, but they ought to in all cases where their constitutional authority is not prejudicially interfered with. The written law does not leave any occasion for use of the court's inherent power except in purely emergency cases, and it is manifest that no such case existed in the instance before us.[21]

19. *Id.* at 17, 121 N.W. at 655-656.
20. *Id.* at 19, 121 N.W. at 656.
21. *Id.* at 22-23, 121 N.W. at 657.

An early Montana case,[22] on substantially identical facts, adopted Justice Marshall's position in denying recovery. The court there noted that the very concept of inherent power carried with it the implication that it would not be used where established methods could accomplish the desired results. Only when those methods failed, the court noted, should a court be authorized to proceed under its inherent power to fill the void. That the separation of powers guaranteed independence to the separate branches of government, the court concluded, did not mean that there should not be cooperation.

In an earlier case,[23] the Montana court affirmed a trial court order compelling the state to raise stenographic salaries. Noting that if the state could regulate the salaries it could, to some degree, subject the courts to its control, the Montana Supreme Court avoiding this result held that the power to set the salaries must coincide with the power to appoint the employees which rested with the court. Referring to the provision of the Montana constitution which established separate branches of government, the court stated:

> It is within the knowledge of every intelligent man that its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgment of all power in the hands of one body. It is incumbant upon each department to assert and exercise all its power wherever public necessity requires it to do so; otherwise, it is recreant to the trust reposed in it by the people.[24]

The court then discussed the legitimacy of the raise in salary:

> . . . [I]t is manifest that the power to select the proper employees could not with propriety be vested elsewhere than in the court itself; and it is equally manifest that the power to say whether it may or may not be necessary to have assistance, and what the qualifications of the assistants shall be, may not be vested elsewhere. If the power of appointment exists at all, it is a necessary power of the court, and, since the qualifications of the individual desired is determined in a measure by the amount of compensation paid for his services, the power to fix the compensation is also a necessary power. In short, the court has the inherent power

22. State ex rel Hillis v. Sullivan, 48 Mont. 320, 137 P. 392 (1913).

23. State ex rel Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909).

24. *Id.* at ____, 101 P. at 963.

> 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.[25]

The Montana cases can probably be reconciled on the basis that, in one case, as opposed to the other, an established procedure for the appointment and compensation of the employees had been set forth by the legislature. This limitation on the judiciary's inherent power has been recognized in other jurisdictions.[26] The limitation appears to be more the result of a strict application of the "reasonable necessity" test than a separate restriction on the scope of inherent power. Unless the established procedure proves ineffective, there is no "necessity" for court action.[27]

An interesting variation of the usual inherent power case was presented by a New Jersey case[28] where a statute authorizing judges to select and set compensation for probation officers was challenged as unconstitutional because it required judges to interrupt their adjudicatory duties. The court's discussion of the inherent power concept is worthy of note.

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25. *Id.* at ___, 101 P. at 964.

26. In a more recent Missouri case, for example, the issues were presented as to who should select and set the compensation for the administrative and detention personnel connected with the juvenile court. The Missouri Supreme Court in State ex rel Weinstein v. St. Louis Co., 451 S.W.2d 99 (Mo. 1970), recognized that the questions involved the "fundamental nature and function of the judicial department of government and of the power which possesses to carry out such functions," and held that the judiciary's inherent power should be exercised only on occasions where necessary personnel and facilities are not provided for by conventional methods. "When, however, conventional sources do not provide necessary funds, the court does have inherent authority to do those things essential to the performance of its inherent and constitutional functions." Also see, In re Appointment of Clerk of Court of Appeals, 297 S.W.2d 764 (1957); Brydonjack v. State Bar of California, 208 Cal. 447, 281 P. 1018 (1929); and Leahy v. Farrell, 362 Pa. 52, 66 A.2d 577 (1949).

27. In Leahy v. Farrell, 362 Pa. 52, 66 A.2d 577 (1949), a local court ordered raises for certain court employees. Discussing the traditional separation of powers, the Pennsylvania Supreme Court noted that the fiscal powers were of a particularly legislative nature and rejected the contention that a statute authorizing the state to set the salaries in question was unconstitutional. As to the court's inherent authority, it was determined that the court must first comply with reasonable fiscal regulations set by the legislature and it was only when such regulations were so arbitrary or capricious as to impair the efficient and orderly administration of justice that the court could employ its inherent power as a remedial measure. However, in State ex rel Houey v. Noble, 118 Ind. 350, 21 N.E. 244 (1889), a statute setting the term of office and rate of compensation for certain court assistants was held to be an unconstitutional infringement of the judicial power. The appointment of persons to assist the judiciary in the administration of justice, the court said, was the court's job.

28. In re Salaries for Probation Officers of Bergen Co., 58 N.J. 422, 278 A.2d 417 (1971).

> It may be conceded that the appointment of probation officers and the fixing of their salaries are not, at least in the purest sense, judicial acts. But the doctrine of the separation of powers was never intended to create, and certainly never did create, utterly exclusive spheres of competence. The compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight.[29]

As to the basis for the court's authority to make the appointments, the court stated:

> In a number of other states, statutes give judges the right to appoint probation officers, subject to the approval of the county. Such statutes have been uniformly interpreted to limit the power of the county effectively to disapprove to those cases where there has been a showing that the action of the judges was arbitrary, capricious or unreasonable. . . . Other states, quite apart from statute have held that courts possess the inherent power to appoint probation officers as well as other personnel necessary to a proper administration of justice and to see that they are paid. Whether justification for the action is to be found in a statute, or in the inherent power of the courts properly to maintain themselves, we have no doubt that such power exists and that it will be set aside only upon a showing that its exercise was arbitrary, capricious or unreasonable. (Cites omitted.)[30]

The duty to act reasonably with respect to the appointment and compensation of court employees is further demonstrated by a recent Indiana case[31] where judges sought to compel defendant county to pay court employees at a rate set by the judge rather than under the schedule established by the county. In upholding the judicial action, the Indiana Supreme Court stated:

> Judges should constantly be aware that their constitutional responsibility to maintain the judicial system carries with it the corresponding responsibility to limit their requests to those things reasonably necessary in the operation of their courts and to refrain from any extravagant, arbitrary or unwarranted expenditures.[32]

In the course of its decision the court rejected the county's conten-

29. *Id.* at ____, 278 A.2d at 418.

30. *Id.* at ____, 278 A.2d at 419. Also see Noble Co. Council v. State, 125 N.E.2d 709, 234 Ind. 172 (1955).

31. McAfee v. State ex rel Stadola, 284 N.E.2d 778 (Ind. 1972).

32. *Id.* at 782.

tion that, because the courts were continuing to function without the employee pay raises, the judge's requests were, per se, unreasonable.

Failure to follow established procedures will not always render court action under its inherent power unreasonable. In *Smith v. Miller*,[33] an action in mandamus to compel a county board to approve court-set salaries for court employees, the Colorado Supreme Court upheld the judicial action on the grounds of inherent power, stating:

> . . . [I]n the absence of a clear showing that the acts of the judge in fixing such salaries were arbitrary and capricious and that the salaries so fixed are unreasonable and unjustified, . . . it is the ministerial duty of county commissioners to approve them and to provide the means for payment of such salaries.[34]

In addition, the burden of showing unreasonableness was upon the board. The court noted that the proper procedure, which involved a prior request to the county board, had not been followed, but affirmed the case on the grounds that, had the board disapproved the request, the court would have had the inherent power to compel payment in the absence of a showing of unreasonableness.

On the basis of the language in *Stevenson*,[35] Wisconsin courts do not appear to be strictly limited in their use of inherent power by so-called "established methods." Even in the face of a legislative or administrative regulation which is alleged to provide for the deficiency in question, a Wisconsin court may determine it "reasonably necessary" to take independent action under its inherent power. Other Wisconsin cases recognize the importance of cooperation between the branches of government. However, in at least one case, the court has noted that while an essentially judicial power may be delegated to the legislature for procedural efficiency purposes, it remains a *judicial* power and therefore still exercisable by the judicial branch.[36]

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33. 153 Colo. 35, 384 P.2d 738 (1963).

34. *Id.* at ____, 384 P.2d at 741.

35. 140 Wis. 14, 121 N.W. 654 (1909).

36. See In re Constitutionality of Section 251.18, Wis. Stats., 204 Wis. 501, 236 N.W. 717 (1931), where the court noted that by customs or constitutional mandate or the inherent necessity of the situation, branches of the government have exercised other powers than those which belong peculiarly to them. The fact that the legislature has acquired a power of the judiciary, the court held, does not mean that it is not still essentially a judicial power and therefore still exercisable by the judicial branch. The limit of the court's inherent power, the supreme court concluded in that case, was a *judicial* question.

In *Brydonjack v. State Bar of California*,[37] the issue was whether the judiciary or the legislature should have the authority to admit persons to the practice of law. The California Supreme Court discussed the spirit of cooperation which should exist between the branches of government:

> Our courts are set up by the constitution without any special limitations; hence the courts have and should maintain vigourously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. . . . But this does not mean that the departments of our government are not in many respects mutually dependent. Of necessity the judicial department as well as the executive must in most matters yield to the power of statutory enactments.[38]

The court concluded by noting that although the admission to practice is a power inherent in the judiciary, the legislature may place reasonable restrictions on the practice of law.

In a recent far-reaching decision the Michigan Supreme Court in *Judges for the Third Judicial Circuit v. County of Wayne*,[39] held it within the inherent power of the judiciary to hire necessary administrative personnel to assist the judges even after the county specifically refused to appropriate funds for their salaries. The court recognized that although such power in the judiciary was administrative in nature and similar to that vested in the executive department, it was a judicial power in the sense that its exercise was essential to the proper functioning of the court.

On rehearing, the supreme court held that where the reasonableness of the amount requested by the circuit judges was uncontested, the judges had the authority to hire law clerks and a judicial assistant and to require the county to appropriate funds required for their compensation.[40] Further, the county was to pay the recommended compensation for probation officers despite the county's contention that it had insufficient money to meet the demands on its treasury and that it had the exclusive power to determine where the available funds should go. The Michigan Supreme Court, recognizing the problem posed by the case, established a procedure for resolving future conflicts. It required subor-

37. 208 Cal. 447, 281 P. 1018 (1929).
38. *Id.* at ____, 281 P. at 1020.
39. 383 Mich. 10, 172 N.W.2d 436 (1969).
40. 386 Mich. 1, 190 N.W.2d 228 (1971).

dinate courts to submit all future proposals for orders involving the expenditure of public funds to the constitutional office of court administrator for approval.

In a subsequent case, the Michigan Supreme Court held that a collective bargaining agreement executed by the county board of commissioners, as employer, was not binding on the judicial district and its employees.[41] In the course of its opinion, the court reaffirmed the inherent and statutory power of the courts to set the compensation of its employees in the face of the county's argument that the salaries must be fixed to fit within appropriate limits.[42]

2. As Relating to Court Facilities, Necessities and Expenses.

The judiciary has also applied its inherent power with respect to the provision of courtroom facilities and other necessities. The prevailing consideration in this line of cases is that justice cannot be efficiently administered without adequate courtroom facilities and other necessities. An early Wisconsin case, *In re Courtroom and Office of the Fifth Branch Circuit Court*,[43] involved an order by the judge for the court in question which sought to enjoin county supervisiors in their efforts to move the court to what were considered by the judge to be inadequate facilities. The county, on appeal, challenged the jurisdiction of the court in making such an order. The supreme court reviewed the events which had precipitated the conflict, concluding that the circuit court judge was correct in his factual conclusion that the proposed quarters were inadequate. Noting that this was a case of first impression, the supreme court held that the county's contention that the duty of providing a courtroom (vested by law in the board) was the board's *alone* was erroneous. Citing the statutory provision which required the board to provide courtrooms and office space for circuit judges, the court stated:

> It was thus made the statutory duty of the county board to provide suitable and convenient quarters for the accommodation of the court. There was a duty to do so under the constitution, independent of and regardless of any statute, and it is not correct

41. Judges of the 74th Judicial District v. Co. of Bay, 385 Mich. 710, 190 N.W.2d 219 (1971). The dispute centered around efforts by defendant union, recognized by the county as the exclusive bargaining agent for the county employees, to force court employees to join. A charge of unfair labor practices was filed by the union against the judges for refusing to bargain and the judges countered with an injunction aimed at prohibiting the union from interfering with court employees.

42. *Id.* at ___, 190 N.W.2d at 226.

43. 148 Wis. 109, 134 N.W. 490 (1912).

> to say that there is a discretion vested in the county board in reference to the selection of courtrooms which is entirely beyond the control of the courts. If such were the case, it would be within the power of county boards to at least greatly curtail the usefulness of circuit courts by declining to furnish them quarters in which judicial business could be transacted. The authorities, insofar as any can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency.[44]

The court concluded:

> A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it. Circuit courts have the incidental power necessary to preserve the full and free exercise of their judicial functions, and to that end may, in appropriate cases, make ex parte orders without formally instituting an action to secure the desired relief.[45]

The order of the circuit judge was held to be tantamount to an order to show cause coupled with a temporary restraining order operative until an open hearing could be held on the issue. The use of the injunction, the court said, was an error in form only and did not negate the authority of the court to exercise its discretion as to the propriety of moving to the new quarters.[46]

Court furnishings and accessories have also been the subject of many judicial-legislative disputes. In *State v. County Court of Kenosha County*,[47] a county judge sought to compel the county to pay for an air conditioner which he had installed in his courtroom in an attempt to foster the administration of justice without interference from the heat and humidity. A round of confrontations between the judge and the county purchasing agent resulted in the agent being found in contempt of court for failing to testify at a hearing on the issue held by the judge. Addressing itself to the

44. *Id.* at 121, 134 N.W. at 495.

45. *Id.*

46. See also In re Board of Commissioners of Caldwell Co., 4 N.C. App. 626, 167 S.E.2d 488 (1969), where an order was issued to county board commissioners to provide sufficient space for the clerk of the county court. The board ignored the order and was found in contempt. On appeal, the North Carolina Court of Appeals dismissed the contempt proceedings, finding that the initial order to the board regarding the office space was vague, but it did not deny the court's authority to make such an order.

47. 11 Wis. 2d 560, 105 N.W.2d 876 (1960).

authority of the court to conduct such hearings, the supreme court stated:

> The court had jurisdiction to conduct the proceeding *ex parte* to determine whether air conditioning was necessary to function efficiently as a court and perform its duties. Such proceedings are not without precedent. Early in the history of this state, it was established that courts of record had an inherent power to appoint such assistance as they deemed necessary to expedite and properly conduct judicial business.[48]

Citing *In re Janitor*,[49] *Stevenson v. Milwaukee Co.*,[50] and *In re Courtroom*,[51] the court continued:

> True, in the instant case the county court did not make its record showing the necessity for air conditioning as in *In re Courtroom, supra*, and either procedure outlined therein is preferable to the method used by the county court. However, the county court had the jurisdiction to institute on its own motion the proceedings to determine the question of necessity for air conditioning and that was what it was ineptly doing. Whether or not air conditioning of the Kenosha County Court room is necessary to its functioning as a court is a question which is not presented and not decided.[52]

The limitation of "established methods" has proven to be a stumbling block to the exercise of inherent power in this area as well.[53] However, in a recent Massachusetts case an order issued by a lower court to the county to pay for tapes and a tape recorder was upheld as being within the court's inherent power.[54] The Mas-

48. *Id.* at 575, 105 N.W.2d at 884.

49. 35 Wis. 410 (1874).

50. 140 Wis. 14, 121 N.W. 654 (1909).

51. 148 Wis. 109, 134 N.W. 490 (1912).

52. 11 Wis. 2d at 577, 105 N.W.2d at 885. Also see State ex rel Kitzmeyer v. Davis, 26 Nev. 373, 68 P. 689 (1902), where a court ordered the state controller to purchase chairs and carpets for the courtroom. Upon his refusal, the bailiff at the court's order purchased the furniture of plaintiff and plaintiff sought to recover from the state. The Court stated:

> In the absence of the statutory authority, . . . 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. The doctrine is not new, but has been recognized and acted upon by the courts of other states, and we have been unable to find any authority which holds to the contrary. 26 Nev. at ____, 68 P. at 691.

53. See, for example, Committee for Marion Co. Bar Ass'n v. County of Marion, 162 Ohio St. 345, 123 N.E.2d 521 (1954), where the installation of an elevator was not found to be essential; Commissioners of Neosho Co. v. Stoddart, 13 Kan. 207, (Kan. 1874), as to carpeting; and Cleary v. Eddy County, 2 N.D. 397, 51 N.W. 586 (1892) as to office rental space.

54. O'Coins, Inc. v. Treasurer of the Co. of Worcester, 287 N.E.2d 608 (Mass. 1972).

sachusetts Supreme Judicial Court noted that among the judiciary's inherent powers is the power to protect the court from the impairment of its physical function, stating:

> It would be illogical to interpret the constitution as creating a judicial department with awesome powers over the life, liberty, and property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipment, facilities, and supporting personnel.[55]

The court overruled the county treasurer's contention that statutory authority was required to enable a judge to bind the county contractually for expenses reasonably necessary for the operation of his court. Noting that a statute existed which could have afforded a basis for the court's decision, one commentator stated:

> The significance underlying this approach was that by finding the issue of judge-made contracts to be important enough to choose a constitutional rather than a statutory basis for its decision, the Supreme Judicial Court decisively took the issue away from the legislature.[56]

The pattern employed in the case is familiar with the court basing its decision on the constitutional mandate of an independent and impartial judiciary.[57]

The limiting test of reasonable necessity has resulted in reversals of some lower court appropriations.[58] In an interesting Missouri case a court had appointed an attorney to represent its interests in a contempt proceeding.[59] The Missouri Supreme Court, on

55. *Id.* at 612.

56. Comment, *Courts - Judge's Power to Bind Contractually County Treasury for Courtroom Necessities*, 7 SUFFOLK U.L. REV. 1136, 1137-1138 (1972).

57. Several cases have involved the issue of whether a court may set and order paid a fee on behalf of a court-appointed attorney. In Knox Co. Council v. State ex rel McCormick, 29 N.E.2d 405 (1940), the Indiana Supreme Court answered in the affirmative, stating at 407-8:

> The judiciary is an independent and equal co-ordinate branch of the government. Courts were established for the purpose of administering justice judicially, and it has been said that their powers are co-equal with their duties. In other words, they have the inherent power to do everything that is necessary to carry out the purpose of their creation.

Also see Grady v. Treasurer of Co. of Worcester, 352 Mass. 702, 227 N.E.2d 490 (1967).

58. Two cases are illustrative of instances wherein the courts have misjudged the reasonable necessity of certain court-related expenses. See Board of Commissioners of White Co. v. Gwin, 136 Ind. 562, 36 N.E. 237 (1894), regarding court remodeling, and Schmelzel v. Board of Commissioners of Ada Co., 16 Idaho 32, 100 P. 106 (1909), concerning court-ordered shaves and haircuts for jurors.

59. State ex rel Gentry v. Becker, 174 S.W.2d 181 (Mo. 1943).

the issue of whether the county should pay the court-set fee, noted that the most important and essential of inherent powers of the court was the authority to protect itself against those who disregard its dignity and disobey its orders by punishing for contempt. However, as to the necessity of setting the attorneys' compensation, the court stated:

> The court has the inherent power to punish for contempt and if it has also the inherent power to appoint or request a lawyer, as an officer of the court, to represent it or the state in the prosecution of the contempt proceeding, that is all the power the court reasonably needs for its own protection, and for the due administration of justice. The court could and did adequately protect itself by exercising its inherent power of punishing for contempt and appointing counsel and it was not necessary for the court to further exercise its inherent power by allowing the fee in question.[60]

In what is perhaps the most far-reaching decision involving the use of inherent power to support a court's order for necessary expenses, the Pennsylvania Supreme Court in *Commonwealth ex rel Carroll v. Tate*,[61] held that a court had the power to determine what expenses were reasonable and necessary to its operations and to compel the city to appropriate those funds and make them available to the court *irrespective of the amount of money available in the city budget*!

Court efficiency weighed heavily in the decision. Basing its holding on the right and power of courts to protect themselves from impairment of their constitutional function, the Pennsylvania court said:

> [T]he judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.[62]

However, the court emphasized that the burden of showing the necessity of such demands was on the judges who made them and was (as in *Wayne*) subject to appellate review.[63]

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60. *Id.* at 184-185.

61. 442 Pa. 45, 274 A.2d 193 (1971).

62. *Id.* at ___, 274 A.2d at 197.

63. For in-depth discussions of the Carroll case as it relates to matters of judicial independence in fiscal matters see: Comment, *State Court Assertion of Power to Determine*

In a subsequent Pennsylvania case, *Glancey v. Casey*,[64] newly appointed municipal judges requested mandamus to order their salaries paid retroactively to their assumpttion of office. Noting that *Carroll* was inapposite because not involving judicial salaries, the Pennsylvania Supreme Court denied the request, holding that the legislatively-set period of retroactivity was adequate under the circumstances. Although it has been cited as a retreat from the bold position in *Carroll*,[65] *Glancey* is probably more properly viewed as an example of a more restrained application of the reasonable necessity test.

3. Generalizations Regarding Inherent Power.

After such a review of the case law, what generalizations can be drawn with regard to the concept of inherent power? At the outset it should be noted that it is difficult to speak in a definitive manner about the concept outside the context of the cases in which it has been employed. Nevertheless, the cases present a general idea of the power's scope, and demonstrate certain consistencies and trends which reappear regardless of the particular use to which the concept is being employed.

First, with respect to source, the courts in the various jurisdictions seem in near-unanimous agreement that the power springs from the constitutional mandate that the branches of government be separated. From this "balance of power" concept comes the court concern with judicial independence. To maintain this independence, the judiciary has repeatedly held, it must possess the power to protect itself from outside control and to maintain its internal consistency.[66]

As to scope, the cases demonstrate that the judiciary is bound by "reasonable necessity" when dealing with a threat to the effective and efficient administration of justice.[67] As a result, courts appear to possess a wide range of discretion when dealing with what they consider to be threats to judicial independence. The vagueness of this "limitation" is probably responsible for most of

and Demand its own Budget, 120 U. PENN. L. REV. 1187 (1972); Hazard, McNamara & Sentilles, *Court Financing and Unitary Budgeting*, 81 YALE L.J. 1286 (1972); and Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972).

64. Glancey v. Casey, 447 Pa. 77, 288 A.2d 812 (1972).

65. See Comment, *State Court Assertion of Power to Determine and Demand its own Budget*, note 63 *supra*, at 1189.

66. See notes 13 and 16 *supra* and accompanying text.

67. See notes 27, 31 and 32 *supra* and accompanying text.

the inconsistencies which appear in the various cases employing the concept of inherent power.

The most notable inconsistency is with respect to the effect that legislative alternatives have on the exercise of judicial power. A number of cases hold that a court may not take it upon itself to remedy a supposed problem through inherent power where an established method exists through which the problem may be solved.[68] Other cases, apparently to the contrary, hold that where a situation demands judicial action, the fact that there is an established legislative alternative does not impede court power.[69] The resolution of this conflict of authority is undoubtedly based on courts' differing views of what constitutes a reasonable necessity. Many courts are willing to cooperate with legislative alternatives because it appears reasonably certain that just results will be obtained. Of course, the political considerations cannot be underplayed in such situations. Nevertheless, the fact remains (as has been recognized by some courts) that if the legislative alternative of the established method fails, inherent power remains as a means to solving the problem.

The use of inherent power to accomplish meaningful court reform has been criticized on other grounds.[70] First, it is often pointed out that the power, where applied successfully, has been used in matters of relative minor importance. The courts can afford to use high-sounding terms in defense of judicial independence, it is said, where the stakes are small — where it would not result in a showdown of power between the judiciary and either the legislative or executive branch. Perhaps the most effective answer to such an argument is the *Carroll* case, discussed in the section of this article relating to the sources of inherent power, where the Pennsylvania courts not only took on the legislative branch, but did so in an area where one might most expect to see such a "showdown" — the area of fiscal autonomy. Ultimately, although the weight of political consequences as a deterrent factor cannot be underplayed, it should be noted that the very configuration of inherent power establishes it as a viable means to major court reform.

A further criticism of the inherent power concept as a useful tool in court reform stems from what some have termed its nature

68. See notes 22, 26 and 53 *supra* and accompanying text.

69. See notes 33, 35 and 54 *supra* and accompanying text.

70. See Note, *Judicial Financial Autonomy and Inherent Power*, note 63 *supra*.

as a defensive instrument. It is argued that the power has only been employed where the judicial system faces a direct threat from the outside. It is contended that courts will be reluctant to employ the concept to initiate offensive court reform. It must be conceded that the cases generally involve direct conflicts which require immediate court action. However, it must again be pointed out that the nature of the power, as defined by the courts, does not prohibit its use in instances involving no apparent conflict. The cases demonstrate that the use of inherent power is justified when the courts perceive any threat to the effective and efficient administration of justice. The fact that a situation exists which is not the source of direct judicial-legislative confrontation does not preclude the judiciary from concluding that a threat to the administration of justice exists which justifies the use of inherent power. In other words, the judiciary does not have to wait until the situation comes to a head before remedial action is taken.

Another point of difference stemming from the nature of the "reasonable necessity" limitation is the question of who is to determine the necessity. Generally, this is a point which has not received a lot of attention. Some courts have held that the proper person to determine the necessity is the individual who perceives the problem — generally, the lower court judge under the typical fact situation.[71] Other courts have held either that the necessity is to be determined, ultimately, by the court of last resort in the jurisdiction or, (and this is perhaps the same thing), that a determination of necessity is subject to appellate review. Some courts are required to submit proposals for judicial action of this nature to the higher courts or to a designated officer within the judicial system who is to determine the necessity. However the issue is resolved, it is apparent that the judiciary, as repository of the inherent power, is to determine when the necessity of its use arises. On the other hand, there does exist some conflict in the situation where the necessity is challenged as to who has the burden of proof on the matter. Varying jurisdictions have placed it on the judiciary or on the body challenging its use.

In summary it can probably be said that the fact that the limits of inherent power are so vaguely drawn works both as an aid and a hindrance to its use. Depending upon the attitude of a particular court, "reasonable necessity" may require that the power be construed broadly or narrowly. And this would hold true, not only as

71. See notes 16 and 20 *supra* and accompanying text.

one moves from jurisdiction to jurisdiction, but even as one moves from situation to situation within a given jurisdiction.

III. Selected Problems Presented by Proposals of Chief Judge Study Committee

The review of case law and the commentary in the preceding section has outlined the source and scope of the judiciary's inherent power. It should again be emphasized that what is "inherent power" is very much dictated by the context of cases in which it is sought to be employed. In other words, from the general notion of a power to do all that is reasonably necessary to preserve judicial independence and guarantee the efficient administration of justice, courts faced with specific problems shape "inherent power" to fit their special requirements. It is therefore unreasonable to speculate as to the judicial reaction to a particular problem which may arise.

However, this article is concerned with the possibility of judicial self-help in effecting administrative court reform. Its premise is that the doctrine of inherent power may be a viable means to that end.

The Supreme Court's Chief Judge Study Committee, recognizing the problems caused by inefficient administrative procedures, has been considering proposals that would establish, if adopted, administrative districts headed by a chief judge with duties closely paralleling the recommendations of the National Conference on Metropolitan Courts for that position. Selected problems posed by the Committee's proposals will here be considered in light of what has been said about inherent power. At the outset it should be pointed out that there are no easy answers to these problems since there is no case law which directly supports action of this kind by a state judicial system. Nevertheless, the very nature of the overall problem, affecting as it does the efficiency of the entire system of justice in Wisconsin, particularly lends itself to resolution by means of the judiciary's inherent power.

A. Creation of Administrative Districts

An integral part of the Study Committee's plan for administrative reform is the creation of administrative districts. It has yet to be determined whether such districts would coincide geographically with the present judicial district alignment. Recognizing that the purpose of the proposals, as a whole, is to improve administrative efficiency, it must at least be recognized that the present district alignment might not be ideal for those purposes.

Article VII, section 5 of the Wisconsin Constitution states that "for judicial purpose," the state is to be divided into judicial circuits. Section 6 of that article provides that the legislature may alter or increase the number of circuits and change their boundaries. The issue, then, is whether the supreme court could order the creation of administrative districts which do not coincide with the legislatively prescribed circuits. More specifically, does the constitutional grant of authority to the legislature to alter the number and change the boundaries of judicial circuits "for judicial purposes" extend to the creation of such districts for internal administrative purposes?

This question of constitutional construction can best be resolved by evaluating the factual circumstances and policy considerations which led to the adoption of the sections in question.[72] On April 20, 1836, Congress approved the territorial government in what later became the state of Wisconsin. The newly established legislature divided the territory into three judicial districts consisting of two counties each. The circuit judge in each district also served as a member of the territory's three-man supreme court. The availability of a legal forum within the Wisconsin territory was an accomplishment in itself. Prior to 1823 the area which now constitutes Wisconsin had no courts which were capable of handling matters of any importance. Cases of any significance had to be tried in Detroit and litigants were required to travel hundreds of miles to have their day in court.

In 1838, the legislature re-distributed the territory's counties among the three judicial districts. Counties which were small in population and relatively unorganized were attached to the more developed counties for purposes of defining the judicial system geographically. The constitutional conventions of 1846 and 1848 witnessed much discussion both pro and con on the advisability of having the circuit judges serve also as members of the supreme court and on the creation of county courts. The convention ultimately re-distributed the counties among the judicial circuits and left it to future legislatures to change this arrangement as it became necessary to do so. The debates surrounding this measure make it clear that the primary concern was to make the judicial system accessible to the people of the new state. In the words of the then

72. Most of the material in this historical analysis was gleaned from the Preface, 1 Pinney 4, pages 4-57, (1872).

chief justice for the territory, the judiciary committee to the convention:

> . . . desired to establish a system which should be cheap, simple, and adequate to the present wants of the people, leaving it to future legislatures to make such further additions as the increase of business and density of population might make expedient.[73]

Viewed in this context, it is obvious that the concern of the drafters of the constitution was primarily with creating judicial circuits which would serve the needs of the people. Nowhere in the published debates was any reference found to the internal administrative management of the court system. It appears, then, that the power given by Article VII, Section 6 to the legislature to alter the composition of the circuits is one which relates solely to the external structure of the court system with the purpose that the courts be made as accessible as possible. This is borne out in part by the debates concerning the need for county courts in *addition to* circuit courts. The delegates who contended that they were not needed prevailed at the time but the provision allowing the legislature to create such courts if necessary reflects efforts by those who were concerned that needs might change as population and business increased. In short, the sections in question do not appear to bar the creation of judicial districts by the supreme court for *administrative* purposes.[74]

Assuming that there is no constitutional impediment, it remains to be considered whether the creation of such districts might be justified as an exercise of the supreme court's inherent power. As courts have applied inherent power in the past, there first must be a problem which threatens either judicial independence or the efficient administration of justice. Courts have stated that the constitutional separation of powers mandates that the judiciary maintain its independence as a separate branch of the government. Further, the constitution entrusts to the judicial branch the task of efficiently and effectively administering justice under the law.

There can be little doubt that, without effective administrative guidelines and centralized control, the judicial system cannot operate as an organized, cohesive unit. Such disorganization creates problems of administrative efficiency, unclear delineation of responsibilities, duplication of effort and, in some cases, unequal dis-

73. Journal of the Convention to form a Constitution for the State of Wisconsin, 372, (Tenney, Smith and Hall 1848).

74. *Id.* at 346.

tribution of the judicial workload. That a problem exists which comes within the traditional scope of inherent power, then, can hardly be disputed.

Recognition of a problem, however, has not always been enough to warrant the resort to inherent power to resolve it. Many courts are reluctant to take action where alternative methods of solution are available. It cannot be denied that the problem may be solved by appropriate legislative action. But such action has not been taken in the past and there is no assurance that it is immediately forthcoming. Even those courts which adopt the "alternative methods" limitation on the use of inherent power have recognized its inappropriateness when those methods fail. The argument that the problem is not of such magnitude or of such immediacy as to warrant judicial action can only be met by pointing to those cases which indicate that a court need not wait until a crisis situation exists before remedial action is taken. And the fact that the system continues to function in spite of such problems is no valid reason to live with them. Ultimately, as the Wisconsin court has held, when such a problem is recognized to exist, it is for the court to determine the necessity of its solution.

In what mannèr, then, shall the court resolve what we have construed to be a problem necessitating, or at least warranting, the use of inherent power. In this regard, the court is guided only by the test of reasonableness. Whatever means it may choose, as long as reasonably designed to resolve the problem at hand, would appear to be appropriate. A comparison of the merits of the administrative districting plan encompassing the appointment of a chief judge with other plans designed to solve the problem is not within the scope of this article. That is for the court to decide. Nevertheless, under the rationale of inherent power and its test of reasonableness, it cannot be said that the proposed plan is inherently unreasonable.

B. Chief Judge Position and his Powers

As to the necessity and reasonableness of creating the position of chief judge, no more need be said than has been said with regard to the creation of administrative districts. If the overall plan is reasonable, it is fallacy to argue that an integral part of the plan is not reasonable. However, some question may arise as to whether the powers required to be exercised by this administrative official are capable of being vested in one person. It is imperative that if the chief judge is to resolve the problems facing the court in the

area of administration, he must possess the powers necessary to that task. One aspect of that task will be the effective control of court-related personnel. There is ample case law supporting the proposition that key court-related personnel are subject to the control and discipline of the courts.[75]

An initial problem relates to who may be considered court employees or court personnel for purposes of court control and direction. The case of *Judges of 74th Judicial District v. County of Bay* discussed in the source of inherent power section of this article, may help resolve this problem.[76] Although primarily concerned with issues of labor representation, the case presents an extensive discussion of who is and who is not considered a court-related employee. The ramifications of the civil service statute have yet to be resolved, but it appears that the *system* of employment may be separable from the *form* of employment where it concerns court-related functions essential to court operation and thus, traditionally, under judicial control.

The fact that such control has traditionally been exercised by each particular judge over the employees of his own court should not negate the authority of the chief judge under a plan of centralization of such control. Under the plan envisioned by the Committee, the chief judge would exercise no more authority or control as to court employees than the individual judge has traditionally retained. Essentially, the chief judge would wield the same authority but from a different organizational standpoint. The power would be exercised by the chief judge on behalf of the other judges in his district in response to a supreme court directive.

C. *Control over Municipal Judges*

Whether the municipal judge, who is recognized by the case law as existing at the whim of the legislative body which creates him would come under the umbrella of control afforded the chief judge by the proposed plan is another question which has not been resolved by the case law. Under the constitution of the state, the supreme court has the power of supervision over *all* judges, regardless of the source of their creation. Although this power has been utilized chiefly in matters of an adjudicatory nature, an argument

75. See Robbin v. Brewer, 236 So. 2d 448 (Fla. App. 1970); Woods v. R. D. Hunt and Son, Inc., 207 Va. 281, 148 S.E.2d 779 (1966); Lambert v. State, 105 So. 2d 612 (Fla. App. 1958); and Martin v. Carroll, 235 Ala. 30, 58 So. 2d 106 (1952).

76. Note 41 *supra*.

might be made that, since the supreme court is ultimately responsible for the operation of the entire system of justice, it would be within its power, inherent or otherwise, to direct their cooperation in the reform project.

Not too much "bootstrapping" is required to reach the conclusion that, although the superintending power has been limited to relations between judges and litigants in adjudicatory matters, failure to cooperate in a project which is designed to increase the litigant's chances for a speedy and just hearing, may be a violation of the nature reserved for solution under the supervisory powers.

IV. Conclusion

There can be little doubt that administrative disorganization and mismanagement have contributed greatly to the problems of inefficiency which currently plague our nation's courts. A judicial housecleaning will at some point be required to centralize the management and set guidelines for court operation. In Wisconsin, the Supreme Court's Chief Judge Study Committee thinks it has the answer in the form of administrative districts headed by a chief judge who will coordinate the efforts of the judges under his direction. The issue addressed by this article is who is to implement this plan. No doubt the legislature, in connection with called-for structural change, could put the proposals into effect. However, the verities of politics dictate that hopes for early action in this area are unrealistic.

This article has proceeded on the premise that the judiciary, and especially the supreme court, has the responsibility to oversee and insure the efficient and effective administration of justice. With responsibility must also come power. That power must necessarily be expansive enough to facilitate the performance of constitutional mandates. The authorities cited herein present support, it is believed, for the proposition that, by the exercise of its "inherent power," the supreme court might implement whatever plans are reasonable and necessary to insure the continued efficient and effective administration of justice.

Lynn Laufenberg
Geoffrey Van Remmen