// MAINE STATE LEGISLATURE

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STATE OF THE JUDICIARY ADDRESS

January 26, 1984

by

CHIEF JUSTICE VINCENT L. McKUSICK

to the

SECOND REGULAR SESSION

One Hundred and Eleventh Legislature

"THE STATE OF THE JUDICIARY"

A REPORT TO THE JOINT CONVENTION
OF THE 111TH MAINE LEGISLATURE
BY CHIEF JUSTICE VINCENT L. McKUSICK
January 26, 1984

I much appreciate your invitation to report again to a Joint Convention of the 111th Legislature. Joining me here today are my judicial colleagues who share with me responsibility for supervising the operations of the Third Branch—my fellow members of the Supreme Judicial Court, which I like to call the Board of Directors of the Judicial Department, and Chief Justice Clifford of the Superior Court and Chief Judge Devine of the District Court. I bring you greetings, and regrets, from Justice Violette and Justice Glassman. He is today undergoing a routine surgical procedure at Cary Memorial Hospital in Caribou. Justice Glassman is the victim of a fall on the ice Tuesday evening.

The invitation that your leaders have extended to us, and our grateful acceptance of this opportunity to report to you, demonstrate the realization by us both that cooperation between our two great branches of state government is essential if the constitutional mandate of each branch is to be fully carried out. The fair and efficient administration of justice will come only through that cooperation between the Legislature and the Judiciary.

You have, or will have, before you two pieces of proposed legislation that well illustrate the healthy potential of such cooperation, each in its own special way. The first is the recommendation of the Advisory Committee on Collective Bargaining for Judicial Department Employees. That Advisory Committee, chaired by Dean James Carignan of Bates College, with balanced membership representing both sides of public employment labor relations, was appointed by the Supreme Judicial Court under your authorization of a year ago. That Advisory Committee recommends that you of the Legislature enact a statute, and that at the same time the Court issue an administrative order, establishing in identical parallel fashion the right of judicial employees to bargain collectively. The Court stands ready to do its part in this cooperative effort.

A second example of proposed cooperative action comes from the report of your Commission on Local Land Use Violations. That Commission, chaired by Senator Trafton, recommends 1) that you confer additional jurisdiction upon the District Court to enforce compliance with land use laws by equitable orders of abatement and 2) that the Supreme Judicial Court by rule prescribe a streamlined procedure for the District Court in such cases similar to that used for civil traffic infractions. Of course, I have no right to intrude upon your deliberations on the legislative wisdom of the proposed statute; but, I assure you that if you do enact it, the Supreme Judicial Court will do its part in promulgating an implementing rule. Senator Trafton's Commission has prepared a draft of such a rule. That will give the Court and its Advisory Committee on Civil Rules a head start on the rulemaking job.

The cooperation represented by the proposed joint efforts on judicial employee collective bargaining and on land use violations continues the long tradition of the Maine judiciary and the Maine Legislature working together to improve the court system and law enforcement.

In reporting to you at your first regular session, I took a look back over the preceding five years, making a wide-sweeping review of developments in

Maine's courts. This time I propose a less comprehensive report and one limited in time to the year 1983. I will try to hit the high spots.

First, the Law Court—the name historically applied to the Supreme Judicial Court when it sits to hear appeals. The new system for workers' compensation appeals, set up two years ago, is working as intended. An appeal from a single commissioner's decision now goes first to an Appellate Division consisting of two or more of the other commissioners; then, the losing party before that Appellate Division can get a full hearing in the Law Court only with the court's permission. Only about one third of the appeals from hearing commissioners' decisions are being taken beyond the Appellate Division. That Division is thus performing a valuable screening function; and also the commissioners sitting as the Appellate Division can develop a coordinated approach to questions of workers' compensation law, before those questions come to the Law Court. The whole appellate process is thereby improved.

Even with the reduced number of workers' compensation appeals reaching the Law Court, the filings in the Law Court remain at an annual level of about 500 cases. Other categories of civil and criminal appeals have continued to increase in number. We are proud to report that we remain abreast of our heavy workload.

Now let us turn to the trial courts. As of January 1st the Superior Court has a Chief Justice, authorized by you last year. Chief Justice Clifford has undertaken the added responsibilities of administrative leadership of that busy court with enthusiasm and effectiveness. As of January 1st, I also reappointed for another three-year term Chief Judge Devine of the District Court, who has again designated Judge Alan Pease as his deputy. It is a tribute to Chief Judge Devine, and his predecessor, Chief Judge Nicholas Danton, that when we reorganized the Superior Court's administrative structure we modeled the new arrangement exactly upon that of the District Court. I am now relieved of many details in the administration of the Superior Court, as I have been in the District Court, and so can concentrate on coordinating the operations of the several courts.

In 1983 we found particularly useful the flexibility the Legislature has given us over the years to assign trial judges to sit in other courts than their own. For example, under the new law of last year that permits me to assign the two Administrative Court judges to sit in the Superior Court, as well as in the District Court, they have during the last six months of 1983 devoted one judge week per month to hearing contested divorces and other nonjury matters in the Superior Court in Cumberland County. At the same time, they have continued to sit in the District Court for two judge weeks per month.

Our widely praised in-court mediation service continues to be a success story. In March, I issued an administrative order making mediation available in family law cases at all Superior and District Court locations statewide. Mediation can be used for some or all of the child custody and property issues in a divorce case. Although our administrative order requires the attorneys and the judge to explore with the parties the suitability of mediation in their divorce case, going to mediation remains a matter of choice by the parties, and any issue is resolved in mediation only by mutual agreement. An average of 50 divorce cases per month were mediated during the period May through December, 1983. Even though we foresee a further increase this year, the number remains too small to provide any significant relief to our trial courts, faced with 7,500 divorce cases a year. However, mediation is a valuable ad-

junct to our usual adjudicatory processes. Where appropriate, it produces a better brand of justice. Because of the voluntary feature of mediation, court orders entered on mediated settlements (whether in family law, small claims, or other civil matters) later meet with a higher level of compliance than do orders entered after adversary court proceedings.

We can report with satisfaction that the District and Superior Courts are successfully implementing the Single Trial Law, now in effect for two full years. In the two years 1982 and 1983, about 158,000 Class D and E and traffic criminal cases were commenced in the District Court. All of those 158,000 cases potentially could have had a jury demand, requiring transfer to the Superior Court for trial. However, our fear that the Superior Court might be swamped by defendants transferring to gain time has proved unfounded. In fact, the number of cases transferred for trial to the Superior Court in the two years that the Single Trial Law has been in effect was actually slightly fewer than the total number of transfers and appeals to the Superior Court during the last two years under the old law, when both transfers and appeals were entitled to a full trial in the Superior Court. We will continue to watch the situation closely, but the message apparently is out that transfer to the Superior Court merely for delay does not work.

I now turn to a subject that any report on the courts must address to be complete. I want to identify for you some of the most pressing of the needs faced by the Maine courts.

Last year I reported that "very soon we will need additional judges," and I assured you that we would, before the convening of this second regular session, quantify our need as precisely as the nature of the question permits. That has now been done by our Judicial Policy Committee, chaired by Justice Roberts. For the past 11 years, the Superior Court has had only fourteen judges. We now ask for **three** additional judges for that court. The Superior Court's pending caseload has steadily grown until it is now over 17,000 cases—some 80% higher than in 1973. This growing backlog exists despite the fact that each Superior Court justice is disposing of more than 1,100 cases a year—nationally rated a high level of productivity. These figures simply reflect the litigation explosion that has now reached Maine. In the past 11 years, civil litigation has become more complex—often involving multiple parties with multiple counsel, and often brought under statutes that did not even exist prior to 1973, for example, the Consumer Credit Code, the strict liability statute, and the tort claims act. Both civil and criminal motions are filed with much more frequency than was the case 11 years ago, aided by the routine use of word processors in lawyers' offices. Facing the same phenomenon, the legislature in New Hampshire has authorized the addition of ten more Superior Court judges over the next three years.

Justice Roberts' report also documents the need for **three** additional District Court judges. In 1973 the District Court had 20 judges, and the only addition since then has been the one judge authorized two years ago. In that eleven-year period, major additions have been made to the District Court's responsibilities. For instance, the Protection from Family Abuse statute was enacted in 1979, and in the year 1983 that statute generated over 2,100 cases, sensitive cases demanding much judge attention. The rules to implement the Single Trial Law require all pretrial motions to be filed, heard, and decided in the District Court before a criminal case with a jury demand is transferred to the Superior Court for trial. In addition, as I mentioned earlier, the Commission on Local Land Use Violations proposes an equity-type enforcement

procedure in the District Court, recommended in preference to creating a statewide system of land use hearing examiners; that proposed law will increase the workload of that court, perhaps substantially. The caseload of the District Court has already increased by well over one third in the past 11 years. In the same period, the cases heard by the District Court have become more complex—for example, proceedings to terminate parental rights, mortgage foreclosure, custody and marital property issues in divorce.

By any measure, Maine has a remarkably small judiciary. The requested increases in the Superior and District Courts are modest in light of the urgent need. We trust you will give our request your favorable consideration.

We are also in critical need of additional personnel in our clerks' offices. In the District Court this clerk shortage has become particularly acute since the Single Trial Law went into effect on January 1, 1982. To implement that law, all arraignments and all pretrial motion hearings in transfer cases have to be recorded. This means that clerical personnel are taken from their office and put into the courtroom to monitor the recording of proceedings there. As a consequence, the remaining office staff work under even more pressure to accomplish their increasing workload in timely fashion. Under these pressures, some of our best clerks of court have resigned or taken early retirement. In the Superior Court, the expanded caseload and growing complexity of litigation and motion practice also necessitates additional clerical personnel. We are very proud of the men and women who staff the clerks' offices at our 50 trial court locations. They work very hard and productively. But they cannot be expected to carry their steadily growing burden without adequate help.

Now I turn to another great need of our courts: facilities. I was asked recently how many state courts operate in buildings constructed with state bond issues. The answer is **none.** If I asked you how many of our 50 trial court locations are housed in facilities constructed with any kind of state funds, how many would you say? The answer is **one.** Only the Augusta District Court is located in a state-owned facility, constructed 14 years ago by a direct appropriation. It is one of our better buildings.

The State became responsible for all of our state courts on January 1, 1976. Yet, in spite of our joint efforts, the public remains poorly served by court facilities in several locations.

The District Court system leases space in 32 cities and towns. Twenty-seven of those facilities are owned by county or municipal governments; five, by private owners. Our state Superior Court and the Supreme Judicial Court continue to operate entirely in county facilities for which, under the 1975 statute, the State pays no rent. So, it is clear that our state court system remains almost completely dependent on facilities provided by other governmental units or by private landlords.

Our court facilities should promote respect for the laws that are fashioned in this splendid State House. Unfortunately, many do not.

Our top priority is to improve our court facilities in Portland. That is by far the largest and busiest location for both the Superior Court and the District Court. Both are crammed into the Cumberland County Courthouse. That is a magnificent structure, built 75 years ago and well maintained by the Cumberland County Commissioners. But it is far too small to meet today's demands.

The District Court in Portland should have four courtrooms to handle the approximately 40,000 cases filed each year from the twelve communities it serves. It needs to triple its space in order to serve the public adequately. The Superior Court needs, by conservative standards, to increase its space by more than 50 percent for proper functioning. It will cost in excess of $5 million to build an addition to the courthouse to provide these essential facilities.

Meanwhile, the consequences in the Portland District Court are serious inconvenience to the public and added delay to the judicial process. The Superior Court in Cumberland County now has a pending caseload of over 4,200 cases, an increase of over 40 percent since 1978. The average civil case there takes more than 575 days from filing to disposition because of the shortage of courtrooms and the necessary priority given to criminal cases.

Also, we must give high priority to obtaining a new judicial facility to serve the Bath-Brunswick area. There, we contemplate a building that will enable the present District Court operations in both communities to be consolidated. Such a building can also accommodate the Superior Court for Sagadahoc County and serve eastern Cumberland as well. Such a building can be constructed for about $1 million.

We in the Judicial Department look to your collective wisdom to decide how to fund these urgent building needs for the courts. Should it be by bond issue, or should it be by direct appropriation, or by a combination? We have failed in the past to find a solution to these questions, but we must not let that cause us to stick our heads in the sand. Every year, the situation gets worse, and more expensive to correct.

Before closing, I offer some general observations.

The courts always have rendered essential social service, not merely public service, but essential social service. The courts were among the first social service agencies, long before the Department of Human Services was conceived of and indeed long before most of its functions were seen as appropriate for government to perform. The trial and punishment of crime and the resolution of civil disputes have been, from the earliest days of civilization, of utmost importance to a safe and harmonious society. The courts have long since become so much an established part of a civilized society that it is all too easy for us to take them for granted. We can no longer afford to do so. The courts must have sufficient judges and support staff, and they must be given adequate facilities and technological tools to enable them to do their jobs. Failure to do so will jeopardize the very fabric of our society.

Courts will never win a popularity contest. Every day judges are called on to make tough decisions. At times those tough decisions, though made in keeping with constitutional and statutory standards, cause frustration and even hostility toward the judiciary among some of the public. Furthermore, going to court is always a painful experience, even for the party who seemingly prevails. Judge Learned Hand, who spent most of his adult life in the courts, once said that he would view his own involvement as a litigant as a personal disaster. However much it was a mistake for us to lump court building needs into an omnibus bond issue last fall and however much we in positions of public responsibility failed in making our case for court facilities before the electorate, both then and three years before, the simple fact is that the courts have no natural constituency. The courts can only appeal to the intelligence and the fair-mindedness of Maine citizens.

These remarks lead me to my final observation. Ever since my father served in both the House and the Senate starting 43 years ago this month, the Maine

Legislature has been to me a very special institution—a place where men and women of all callings, including farmers like my father, come together to make laws to advance the best interests of our beloved State of Maine. From my acquaintance with you individually and as an organized group, I know that you recognize the essential social service that Maine courts perform. I know that you are every one committed to doing what is right as you see it in carrying out your lawmaking responsibilities. I know that you will do your very best to give us in the courts the tools that we need. No one can ask more.