

MAINE STATE LEGISLATURE

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STATE OF THE JUDICIARY ADDRESS

February 6, 1985

by

CHIEF JUSTICE VINCENT L. McKUSICK

A Report to the Joint Convention

of the

One Hundred and Twelfth Legislature

“THE STATE OF THE JUDICIARY”

A REPORT TO THE JOINT CONVENTION
OF THE 112th LEGISLATURE
BY CHIEF JUSTICE VINCENT L. MCKUSICK
February 6, 1985

I count it a high honor to be invited to address this Joint Convention.

At the outset I want to expand on a thought about the Separation of Powers that I expressed to you at your Legislative Banquet in early December. By article III of our Maine Constitution, the powers of government, as Caesar said of all Gaul, are divided into three parts, Legislative, Executive, and Judicial. Article III expressly mandates that each of the three branches stay within its own domain and not intrude upon the responsibilities of the others. Judges must and will be particularly conscious of that constitutional command. The independence of the judiciary depends upon it. But Separation of Powers does not mean judges have to be isolated; nor does it mean judges have to be confrontational. On the contrary—now in my eighth year as head of the Judicial Branch, I have come to believe more and more that there is a governmental principle parallel to the Separation of Powers Doctrine—and that principle teaches us that each of the three branches must practice a policy of comity, communication, and cooperation with the other branches on matters of common concern.

To carry out that Policy of the Three C's—comity, communication, and cooperation—the Chief Justice, by a tradition started in 1977 by my predecessor, Chief Justice Dufresne, has addressed every Legislature early in its first regular session. I regularly report to you so that you legislators may be better able to carry out your heavy responsibilities with regard to the Judicial Branch. Your responsibilities include enactment of the substantive law for both civil and criminal cases; and resolution of questions of court structure and jurisdiction, court facilities, court operating budgets, and the number of judges and their compensation.

Yes, in our relationship with this great body, I believe strongly in the value of communication—two-way communication, incidentally. Also, communication not just by talking to you in a formal setting such as today, but also by having our judges and our State Court Administrator provide information at the committee hearings that are the basic fabric of the legislative process. To promote communications with the Legislature, the Judicial Branch has formed a Legislation Committee headed this year by Superior Court Chief Justice Robert W. Clifford. One of its members, State Court Administrator Dana Baggett, will be available to you on a priority basis to respond to your inquiries about the courts.

Over the years the Policy of the Three C's has given Maine a court system we can jointly be proud of. I am reinforced in that pride every time I compare notes with my counterparts in the national Conference of Chief Justices. The features of Maine's court system admired by other states include the total statewide unification of four courts; state funding that isolates the courts from direct dependence on local revenues; the creation of career civil service (independent of political affiliation) for the men and women serving our courts; and the use of professional court administrators to manage the business-type functions of the courts, freeing judges for judging.

Cooperation among the three branches has produced fine results for the administration of justice in the past twelve months. To cite a few examples:

First, the Legislature and the Supreme Judicial Court last year cooperated in implementing the recommendations of your legislative Commission on Local Land Use Violations, headed by Senator Richard Trafton. You by statute conferred additional jurisdiction upon the District Court to enforce compliance with zoning and other land use laws by equitable orders of abatement; and our Court by rule prescribed streamlined procedures for such cases in the District Court similar to the procedures used there for civil traffic infractions. By this joint effort the previous crazy-quilt of cumbersome and incomplete enforcement procedures in the Superior and District Courts has been replaced with a uniform, simplified process in the District Court.

Second, collective bargaining for Judicial Department employees has come about by the coordinated action taken by the Legislature and the Supreme Judicial Court, jointly advised by a citizen committee with balanced membership representing both sides of public labor relations. To avoid any problem of separation of powers, the Legislature enacted a statute, and at the same time the Supreme Judicial Court issued an administrative order, establishing in identical parallel fashion the right of judicial employees to bargain collectively. In December our employees, divided into three bargaining units, chose the Maine State Employees Association as their collective bargaining agent.

Third, following the recommendations of your State Compensation Commission, chaired by Donald E. Nicoll, the Legislature addressed on a long-range basis the problem of judicial compensation and pensions. By your action, you established the principle that Maine judges are worthy of being paid comparably with federal judges and should have a modern, funded pension program in which a younger judge can build up a vested interest. That was landmark legislation. With it on the books, there should be less of a financial barrier to Maine's getting the best qualified women and men to accept judicial appointment.

Fourth, last year you took the first steps to meet our documented need for adding three judges to each of our principal trial courts, the Superior Court and the District Court. You authorized one additional judge for each court. We hope you will this year take the second step in a three-year program. The Governor joins me in recommending the addition this year again of one Superior Court judge and one District Court judge. By any measure, Maine has a remarkably small judiciary. Our need to complete our three-year program is plain, if our trial courts are to cope with their heavy caseloads.

Fifth, you of the Legislature last year identified a need for the legal system to do more to protect children caught up in the financial and emotional stress of their parents' divorce proceedings. Last year Maine had about 8,000 divorce cases filed, and I estimate that over half of the divorcing couples have one or more minor children. The Maine courts have had in operation since 1977 a *voluntary* mediation program for divorces, as well as small claims and other civil cases. The statute that went into effect last July 25th requires court-sponsored mediation of all contested issues in any divorce case where the divorcing couple has minor children. In the six months since July 25th, our mediation service under its director Lincoln Clark has fully implemented the new law; and divorce mediations are now running at close to 400 per month. It is too early to assess the results fully. We can report, however, that the rate of success in mandatory mediation appears to be as high as in mediation pursued voluntarily by the parties. Also, the mandatory mediation is apparently producing fringe benefits. Lawyers now seem to be more successful in getting agreement between their divorce clients even before reaching mediation, so

that their cases go directly to the judge uncontested. Furthermore, the advertised availability of mediators at regular times all over the state has led to greater voluntary use of mediation in non-divorce cases. We now have 51 mediators compared to only 16 prior to July 25th. They are an impressive group, representing a broad range of vocational experience. They all share one common quality: the ability to get contesting parties to communicate and negotiate calmly with one another. They are contributing much to a better brand of justice in our Maine courts. The program has drawn acclaim from far beyond Maine's border.

The Legislative and the Judicial Branches can be proud of these tangible results of our mutual Policy of the Three C's. To these accomplishments, Governor Brennan has also contributed much. It is hard to imagine a Chief Executive who by personal nature and professional experience could be more understanding of court needs. It was under his leadership as a State Senator and as Chairman of the Commission bearing his name that our present unified court system was conceived and ultimately adopted in 1975. We are currently discussing with the Governor ways to realize more fully the Brennan Commission's objectives with regard to the interrelationships between the Executive and the Judicial Branches. For example, in the important area of budget development, we hope to enhance direct communication between the Judicial Branch and your Joint Appropriations Committee.

Let me now report on each of our courts. This year I want to focus, first and foremost, on our trial courts. I take this opportunity to pay tribute to the trial judges and the other men and women who work diligently, day in and day out, in serving the State of Maine in our very busy trial courts.

The **Superior Court**, our court of general jurisdiction and only court with a jury, sits at every county seat, and at Caribou as well as Houlton in Aroostook County. The Superior Court handles over 16,000 cases a year—all the most serious civil and criminal cases.

The **District Court**, sitting at 33 locations from Fort Kent to Kittery, is our "people's court" because it typically handles about 230,000 cases a year. It also comes closest to being our "family court," handling all juvenile cases, nearly all divorces and family abuse and neglect matters, and the certification of foster homes for children, and the certification of the mentally ill and the mentally retarded for treatment. Legislative additions to the District Court's responsibilities have brought it close to being a general jurisdiction court on the civil side—hearing cases up to \$30,000, making available its simplified small claims procedures in cases up to \$1,400, foreclosing real estate mortgages and mechanics liens—just to name a few of its expanded tasks on the civil side. Under the Single Trial Law, now successfully in effect for three years, all criminal cases tried in the District Court are appealable only on questions of law, the same as criminal cases tried in the Superior Court.

Finally, the third trial court, the **Administrative Court**, with its two judges, is charged with hearing and deciding petitions for the revocation of most state professional and business licenses.

Those three trial courts are functionally and administratively unified. Under my statutory authority to assign our two Administrative Court judges to the other trial courts, they sat in the District and Superior Courts three judge-weeks out of every month during 1984. Last year I also assigned District Court judges to sit in the Superior Court when needed at various times around the State. Active retired judges, including those of the Supreme Judicial Court, sat by my assignment in the trial courts during 1984 to do the work of the equivalent of more than 3 full-time judges.

A unified trial court administration is provided by the close working together of Chief Justice Clifford of the Superior Court and Chief Judge Bernard M. Devine and his Deputy, Judge Alan Pease, of the District Court. Along with the administrators of both courts and State Court Administrator Baggett, they form a smoothly working team constantly striving to improve trial court operations.

Under Chief Justice Clifford's leadership, the Superior Court is experimenting in four counties with expedited court management of civil cases in order to cut down unwarranted delay and excessive cost to the litigants. The goal is to move a large portion of the civil caseload, the less complex matters, through to final resolution within 6 to 12 months of filing.

Under Chief Judge Devine's leadership, the District Court is starting a program in two counties of using volunteer lay guardians ad litem for children involved in abuse and neglect proceedings. At present when the Department of Human Services files a complaint alleging child abuse or neglect, the court appoints a guardian ad litem for the child, usually a lawyer. The child does have legal rights to be protected, but even more, at such a time the child needs the sustained support, in and out of court, of a concerned adult. By this program, which has been tested and proven in other states, dedicated volunteers are recruited and trained to help the child through the court proceedings. A properly selected volunteer will have the time and the interest to investigate the child's circumstances, to monitor the progress of his case, and to help the court reach a decision that serves the best interests of the child. This program taps the same wells of voluntarism that our in-court mediation program has tapped over the past seven and a half years. It holds great promise for improving the way the courts handle these sensitive and most important cases.

On the same general subject, three trial judges served with the Governor's Working Group on Child Abuse and Neglect Legal Proceedings. Some weeks ago you received that Group's report with its 51 recommendations. Commissioner Petit and others of his Working Group recently met with the Supreme Judicial Court and several trial judges, and we have identified a dozen of the recommendations that do not require legislation for implementation by the courts. Here is another fruitful application of the Policy of the Three C's, applied this time between the Executive and the Judicial Branches.

Sensitivity to the needs, concerns, and insights of other public officials and professionals also played a part in our continuing judicial education programs in 1984. The December Sentencing Institute, sponsored by the Judicial Council, in addition to getting trial judges to talk about and compare their sentencing philosophies, brought before our judges a range of professionals with experience in dealing with sex offenders of all types. The State Judicial Conference in September also brought to Maine a nationally recognized expert on the sentencing and treatment of such offenders, and devoted another time slot to a presentation on "Children in the Courts."

I now move to discuss some recommendations for legislative action on behalf of our trial courts. I have already mentioned the need for taking the second step in adding 3 judges to each of the Superior and District Courts. At the same time I recommend two bills to save money. First, I recommend that an experimental investigating unit be set up within the Division of Probation and Parole to screen and audit the financial circumstances of criminal defendants who ask for counsel at State expense. The Maine Constitution mandates that the State provide counsel to an indigent criminal defendant on any charge on which he might be imprisoned. This mandated cost bulks large in our Judicial Department budget. A statistical study headed

by Justice Wathen has determined that the rates of compensation paid lawyers are relatively low and uniformly applied. However, the study pointed out that the indigency determination has to be made by the judge only upon the statements of the defendant, with no time or no help of staff to check those statements for accuracy. I would be very surprised if the two investigators that are proposed could not save far more than they will cost by slowing the rate of increase in this mandated expense.

Second, the District Court proposes to merge three of its low-volume courts into other locations that are nearby. I am conscious of the extreme reluctance any community automatically feels for losing its District Court, but financial responsibility dictates that we in the courts bring this recommendation to you. One of the three courts handled only 270 cases during all of 1984, only one case per working day, and it is located only 22 miles from another District Court that could easily absorb that small caseload. At least two of these District Courts will require expenditures to make them accessible to the handicapped, if they are not phased out. The decision on this matter is yours to make.

Third, I recommend that the operations of the trial courts be computerized so that they may join the rest of the world of the mid-1980s. The great advantages of computers to give the judge the information he needs at the bench and to help judges and clerks manage their heavy caseloads are so obvious to all of us that I think the only question is how much money you can allocate to this undertaking.

Fourth, the serious facilities problems of our trial courts continue to get worse. I suggest that you simultaneously address those problems in a variety of ways. In the first place, the Cumberland County Commissioners are joining the Judicial Department in filing a bill that will permit a Cumberland County referendum on a county bond issue to build the additional courtrooms and other facilities urgently needed there. I remind you that in Portland the workload of the Superior Court and the District Court represents about 20% of all trial court business in the whole state. Although we were disappointed that voters statewide turned down a state court bond issue in 1983 and again in 1984, we note that Cumberland County voters supported both bond issues. County ownership of court facilities with lease to the Judicial Department is not a new idea. Out of our 33 District Court locations, 15 lease space from counties and 11 from municipalities. Also, at all 17 locations where our state Superior Court sits, it occupies county-owned buildings.

Another way to finance state court improvements is of course by direct appropriation. We have filed a bill that would do just that, in the happy event that you find current funds for capital investment.

Finally, for the longer term we need a more permanent solution to the continuing question of how to finance the construction of state court facilities throughout Maine. Court space needs are most urgent, and are by no means restricted to Cumberland County. We are a large state geographically, and our state trial courts have at each location maintained a lot of their local character. That is good. But we need a way for meeting local facilities needs for State courts. We therefore propose, with the Governor's support, the creation of a state court building authority. That authority would be empowered to construct court facilities around the state when and where the need is identified and to lease them to the state Judicial Department. The state of Rhode Island has used this method for financing court facilities, and a similar method of revenue bond financing is familiar to us in Maine in the areas of turnpike construction and industrial development. I commend to you

this new approach for meeting our long-term needs for more adequate court facilities.

I have been speaking of the facilities needs of the trial courts. Last year the Supreme Judicial Court concluded that ultimately it ought to be headquartered in Augusta along with the Administrative Office of the Courts and the Chiefs of our principal trial courts. Moving the Judicial Department headquarters here to the seat of State government would advance the Policy of the Three C's among the three branches. Also, the consolidation could well improve the management of the court system, and the move would, at 6 courthouses around the state, free up some space for use by the trial courts. I encourage you to study plans for an appropriate building for the Supreme Judicial Court in Augusta. I personally support that move, provided that the facilities needs of our trial courts are also taken care of. In my judgment, the trial courts must have first priority.

As my last recommendation relative to our trial courts, I transmit to you the proposal of the Maine Judicial Council that the present 16 county-funded probate courts with part-time elected judges be phased out, in the same way as the old part-time municipal courts and trial justices were phased out by the Legislature in the early Sixties. The Judicial Council makes its proposal after receiving the report of a broadly representative committee, chaired by President Cotter of Colby College, on which Senator Richard Trafton and Representative Susan Bell served. The Judicial Council proposes that jurisdiction over estate and trust matters be transferred to the Superior Court; family law matters, to the District Court; and guardianship, conservatorship and other protective proceedings, to both courts concurrently. The registries of probate will stay where they are, to serve as repositories of real estate and like records. Only four additional judges in the Superior and District Courts will be needed when all the present work of 16 probate courts is transferred; and the Cotter Committee estimates that no additional expense to the public will result. In normal course the phase-out would start on January 1, 1987, when the current terms of 7 probate judges elected in 1982 will have expired. This structural change of Maine's court system is similar to that proposed by the Probate Law Revision Commission that drafted our new Probate Code. The Code has now been in effect for 4 years. The time has now come to take the final step in probate reform for the State of Maine.

I have purposely reported to you first on the trial courts. All too often their critical importance in the administration of justice is forgotten, while we on the Supreme Judicial Court get the media attention. The truth is that our trial courts handle about a quarter of a million cases every year, and out of that staggering number only about 500 cases ever reach the Law Court. Over 99 and 44/100% of all cases end in the trial courts. Thus, the quality of justice in Maine depends heavily upon their performance. The quality of that performance is high. In those cases that do reach the Law Court, most of its work can be compared to that of the quality control department in a large manufacturing concern. The Law Court corrects error wherever it finds it has occurred in the trial courts, and also lays down precedent for their future guidance. But when you read the news that the Law Court has reversed a trial court decision, keep that news in perspective: Remember that the Law Court is performing its quality control function in correcting error found in a relative handful of the quarter of a million cases disposed of by trial judges.

In addition to its appellate functions as the Law Court, the Supreme Judicial Court carries other heavy loads. The Court has many functions. It is the policymaking board of directors of the Judicial Department. The Court

is given by statute “general supervisory and administrative authority” over the Department—authority that it exercises by making rules for all the courts and by issuing administrative orders and by giving advice to me as the head of the Department.

The Supreme Judicial Court also has responsibility for admissions to the bar and for lawyer discipline, and, as you are aware from recent events, responsibility for judicial discipline short of the ultimate sanction of impeachment or address by the legislature.

All of us will do well to remind ourselves constantly that you and we alike are charged with high responsibilities for the administration of justice. In 1820 the founders of our State declared as their first goals “to establish justice” and to “insure tranquility,” and so on. The Preamble to our State Constitution commences: “We the people of Maine, in order to establish justice, insure tranquility.” By that fundamental document, you of the Legislature have your assigned role in establishing justice, along with the different assigned roles of the Executive and the Judiciary. Ours is a common task of strengthening the processes of justice. It is a task requiring our constant attention. We can say of justice exactly what Robert H. Jackson of the United States Supreme Court said of liberty:

“There is no such thing as . . . achieved [justice]; like electricity, there can be no substantial storage and it must be generated as it is enjoyed, or the lights go out.”

I am confident that between us, both pursuing the Policy of the Three C’s, we will be sure that the lights of justice do not go out, or even dim, in the State of Maine. I thank you very much.