

MAINE STATE LEGISLATURE

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STATE OF THE JUDICIARY ADDRESS

February 20, 1990

by

CHIEF JUSTICE VINCENT L. McCUSICK

A Report to the Joint Convention

of the

One Hundred and Fourteenth Legislature

I come to this podium for the 12th time to report to you of the Legislature on the “State of the Judiciary.” I come before you at a time when you are wrestling with money problems caused by a slowing economy. We who work in the courts know we must do what we can to help you meet those problems. It is times like these when the three C’s of communication, cooperation, and comity among the three great branches are more important than ever. In a moment I will have something to say about budget matters, but my first obligation to you is to report on how the Maine courts are doing — where we’ve been in the last year and where we should be going.

The State of the Judiciary is sound. We are fulfilling our role as the backbone of a democratic society by ensuring the rule of law. In the most elementary terms an effective judiciary ensures that those who do violence against society can be prosecuted and punished; that a forum is available to resolve disputes among private citizens so that resort to lawlessness is avoided; and that elected and appointed boards and officials, whether state regulatory agencies, local zoning boards, police officers or others, are held to the rule of law by judicial review of their actions. Courts are the prerequisite to a society living under the rule of law as opposed to rule by force. The central place occupied by courts in our constitutional democracy is dramatized by the fact that from our earliest days the principal government building in every county has been designated the “Courthouse.”

Going beyond those basic functions that have always made our courts of premier importance in maintaining the kind of society we all desire, we in Maine have in recent decades turned time and again to the courts for help in addressing emerging public needs. Let me tick off some of the many areas in which the Legislature has added to the responsibilities of the courts: Fighting drunk driving, consumer protection, creation of strict product liability, protection against discrimination, protection of children and spouses from abuse and neglect, protection against harassment, environmental protection and regulation of land use, protection of our institutionalized citizens, control of health care costs, and the list goes on. In each case the courts become involved by the Legislature’s creation of a new criminal offense or a new civil cause of action or a new right to judicial review of administrative action, or some combination of the three. In the last session alone, 40 new laws increased access to the courts; each of them represents the application of a judicial solution to a public problem. The Maine judiciary is performing well its steadily increasing role in society. At the same time we do it with a remarkably small judiciary. Maine stands either 48th or 49th among the states in the number of judges per capita.

In 1989, the work loads of all our courts continued at an all-time high. Filings in the Law Court fell just short of setting a new record; yet the Court again heard and decided that heavy load of appeals with reasonable promptness. No State Supreme Court in the country has a better record for sustained diligence and promptness in handling its appellate case load.

More than 340,000 new cases — an astonishing number to contemplate — were filed in our trial courts last year. The District Court did experience a drop in the number of traffic infractions brought to court, but that drop was more than offset by a 6.7 percent increase in all the rest of its civil and criminal case filings. It is those other cases, numbering 179,000 new cases last year, that make the greatest demand on District Court time and resources. The Superior Court saw a significant increase in the filings of both civil and criminal cases. Superior Court criminal filings were up 13 percent over 1988. At the same time, the cases in both of our basic trial courts are becoming more complex and take more time to try.

In the Superior Court the prelitigation screening panels for medical malpractice cases continue to produce a success story. In the three years the program has been in operation, about 100 notices of malpractice claims have been filed each year. The screening panels are succeeding in disposing of the great bulk of these cases, thus avoiding suit being brought on those claims.

In 1989, the Court Mediation Service, under its director Jane Orbeton, had its busiest year ever, conducting almost 4,700 mediations; over 70 percent in domestic relations. The high quality of the Maine Mediation Service has been recognized by the State Justice Institute. The Institute has given us a substantial grant to determine whether mediation can be safely and appropriately used for cases where domestic violence has occurred and if so to design a program of special mediation techniques and special mediator training for those cases.

1989 was a year of tremendous growth in our Court Appointed Special Advocates or CASA program. CASA, directed by Mary-Gay Kennedy, provides volunteer guardians ad litem in child protection proceedings. 306 new cases were assigned to CASA volunteers at 16 different court locations across the State. Typically a CASA volunteer works 10 to 15 hours a month for about 24 months on each case. At year’s end, 195 dedicated and specially trained volunteers were actively representing the needs of children in 527 pending cases. Without these public-spirited volunteers, the courts would have to appoint lawyers as guardians ad litem for the children. The CASA volunteers are saving the courts money and at the same time are rendering an invaluable service to children at risk.

Last summer, the Supreme Judicial Court appointed a blue ribbon committee to review the Maine Code of Judicial Conduct. That Code has been in place since 1974. Colin Hampton, the former Chairman of the Committee on Judicial Responsibility and Disability, chairs the committee and Dean Wroth of the University of Maine Law School serves as consultant. As its first task, the committee is drafting extensive financial reporting requirements for judges. I understand that in a matter of days the committee’s draft will be distributed to the public for comment. My Court intends to take prompt action on this matter of financial disclosure by judges.

Last fall, our trial courts put into effect uniform child support guidelines. The federal government had mandated that all states adopt child support guidelines by October 12, 1989. In response to that mandate and to state legislation, the Supreme Judicial Court, on the recommendation of an advisory committee experienced in such matters, promulgated child support guidelines to meet the federal

deadline. Pending before you is legislation on the same subject to remove any question of the proper division of responsibility between the legislative and judicial branches.

You also have before you a proposed resolve to support the creation of a Task Force on Gender Bias in the Courts, such as the task forces that now exist in more than half the states. This proposal results from my appointment last summer of an exploratory committee on that subject, cochaired by Attorney Estelle Lavoie and Superior Court Justice G. Arthur Brennan. Most certainly gender bias has no place whatsoever in the Temple of Justice. All of us who have any responsibility with respect to the courts must be sensitized to guard against gender discrimination of any form or description. I commend that legislation to your favorable consideration.

In 1989, the Judicial Department's Education Committee, headed by my colleague Justice Hornby, developed an arrangement with the University of Maine Law School for the expanded and more effective use of our own in-state resources for continuing training for our judges. The arrangement recognizes that the law is becoming more complex and that continuing judicial education is essential to make best use of our department's most valuable resource — our judges. Professor Zarr at the Law School has already produced two excellent programs for all of us judges and has started a library of video and other judicial education materials. The current budget strictures have forced us to cut the program back to a mere holding position, but in the long haul it will be false economy not to make use of our resources right here at home in keeping our judges informed and productive.

All the promise of the Maine Court Facilities Authority that I reported to you last year is coming true. The addition to the Cumberland County Courthouse, financed in part by the Authority, is now well into construction and will be open by July 1 next year. The need to rebid that project turned out to be a blessing in disguise; the redesigned building has an additional large courtroom and is more functional and efficient, and still the second time around the project came in within budget. The Authority is now working on the bond issue to construct the new District Court building in West Bath (which will consolidate the Bath and Brunswick courts) and the District Court building in Presque Isle. That bond issue will also fund planning for court improvements in Dover-Foxcroft, Machias and York County. Under the guidance of the experts in finance and real estate development who serve on the Authority, we are achieving a more standardized and professional approach to planning court facilities.

I now turn to the budget. We have been working diligently on these matters with Finance Commissioner Millett and your Joint Committee on Appropriations and Financial Affairs. We in the courts have taken up the challenge to control expense. We now regularly ask ourselves the same question that was asked in the gas rationing days of World War II — some of us can remember those days — we ask, "Is this trip necessary?"

It is very difficult indeed for the courts to make adjustments of the magnitude asked of us. In my appearance before you last year, I identified our number-one need to be 50 new people in the clerks' offices at our 49 trial court locations. That need remains unmet. We have always run a tight ship. Now it must be an even tighter ship, but the opportunity for savings in our operational budgets is limited.

In this connection, let me make three points. First, the services rendered by the courts are not discretionary on the part of the courts. Most of what the courts do is mandated by constitution or statute. The discretion to use the courts lies elsewhere. The courts have to take each case that comes in the door and address it fairly, judiciously and promptly. Once the Legislature defines criminal offenses, what comes to court depends upon law enforcement activity and prosecutorial discretion. On the civil side, nearly every session of the Legislature creates new causes of action or new areas of judicial review of governmental action. Discretion rests with the litigants who can obtain on demand the services of the courts. Let me give you one example of how that discretion was exercised under a statute now only 2½ years old. Pursuant to the Protection from Harassment Act enacted in 1987, a person subjected by another to repeated acts of intimidation may obtain a court protective order. The Act requires the District Court to give clerical assistance to the plaintiffs in preparing the petition and other papers and then requires the court to hold a full hearing within 21 days. In its first full year in effect this new law produced about 3,400 cases; almost as many as were produced that same year by the Protection from Family Abuse statute enacted eight years earlier. The courts are entirely willing to take on this task — which the figures show is a necessary service for an harmonious society — but my point is that the courts have no discretion in the volume of additional work resulting from an expansion of the litigation rights of our citizens. Another very large item in the courts' budget is made nondiscretionary by the United States and Maine Constitutions which mandate that the State provide counsel to indigent criminal defendants. In sum, the courts have relatively little in discretionary spending to eliminate.

My second point is that the courts are not big spenders. Our *gross* budget this year is of the order of \$32 million, only 1 percent of the total state budget. Furthermore, on the other side of the revenue-and-expenditure account, the courts collect fines and fees of well over \$22 million. Though the courts don't have any dedicated revenues for their support, the net burden of the Judicial Department on the public fisc is a relatively small one. I must note also that a curtailment in the operations of the courts can have a counterproductive effect on court revenues.

My third point is this: Our budget problems present a challenge to all of us in State Government. A joint challenge is presented to us in the courts and you in the Legislature to identify and implement all those other savings in court expenditures that can be accomplished only by legislative action. To meet this joint challenge we look forward to working closely with a special subcommittee

of your Appropriations Committee. Let me suggest merely by way of illustration three areas where you might help us in achieving desirable economies and budget control.

First, for two years the Probation and Parole Division of Corrections has conducted an indigency screening program in York and Cumberland Counties. This pilot program, which screens out criminal defendants who do not qualify by indigency for appointment of state-paid counsel, is scheduled next month to be ended by Probation and Parole. Indigency screening more than pays for itself by reducing calls upon the sizeable line item for court-appointed counsel in our court budget. I hope we can find a way to continue and expand that program. The integrity of our court-appointed counsel system is also at stake.

Second, by an historical anomaly the Judicial Department pays the fees for police officers and other prosecution witnesses in the District Court, even though the courts have no effective way of monitoring and controlling those expenses. Rationally, these witness fees, substantial in total amount, should be paid from the budgets of the district attorney offices, where those expenses can be monitored and controlled in the same way as all other prosecution expenses. Indeed, the district attorney offices do assume these expenses when the cases get into the Superior Court. Of course, we must work out a way for the district attorneys to have the wherewithal to take over this budget expense.

Third, in a time of fiscal stringency we might well consider consolidation of some of our 50 trial court facilities. Many are part-time courts. Some operate with a judge one day or less a week, yet must be maintained and staffed full time to receive filings and to process necessary paperwork. The challenge is to carry out these cost-saving consolidations with a minimum of inconvenience to the public.

These three suggestions I submit to you as examples of what we jointly might do to meet the budget challenge. I know there are others. If we take joint action to make improvements in the operations of the courts, we will turn that budget challenge into a budget opportunity for the long pull.

Your Joint Committee on the Judiciary, through a subcommittee, has issued a final report on its Court Jurisdiction Study. I applaud its recommendations for increased liaison between the Legislature and the courts, including membership of the Judiciary Committee chairs on the Judicial Council. The Judicial Council is the body created by statute to “make a continuous study . . . of the judicial system” of Maine. I also believe firmly in the study’s recommendation that our Administrative Court be merged into our basic trial courts — its appellate jurisdiction going to the Superior Court and its licensing jurisdiction to the District Court. Now is the time for that sensible restructuring. By it we will be able to make the best use possible of our judicial resources. We in the courts look forward to implementing the study’s correlative recommendation that we set up a Family and Administrative Law Division for a two-year test at the Portland District Court. Our Chief Administrative Court Judge Dana A. Cleaves, very experienced in family law matters, will be in charge of that experiment. In organizing that new division and developing its method of operation, Judge Cleaves will have the full support and the personal involvement of myself and the other Chiefs, Pease, Goranites, and Brody.

The principal recommendation of the Judiciary Committee’s Report I leave to the last. It recommends the creation of a commission to study the future of Maine’s courts. It is timely that we lift our eyes up from our daily chores to look at the horizon ahead of us. Like the rest of the world, Maine is facing a host of demographic, economic, environmental, technological and other societal changes. We must all become futurists to anticipate what new demands the 21st century — less than a decade away — will make of our courts. I concur that a wide-ranging review of our court system could well be undertaken either by a special commission or by the existing Judicial Council.

We can be proud of our Maine courts. You in the Legislature and we in the Third Branch, year in and year out, in good times and not so good times, have worked together step-by-step to improve our courts — and thereby to improve the quality of justice rendered Maine citizens. We have made steady progress toward our goal — that’s the State of Maine way. What I see as I go around the country as President-Elect of the Conference of Chief Justices confirms the high quality of our Maine courts. We must do our best in addressing budget exigencies of the moment to preserve the quality of justice in our beloved State. That is our challenge!