

MAINE STATE LEGISLATURE

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**STATE OF THE
JUDICIARY ADDRESS**

OF

CHIEF JUSTICE VINCENT L. McKUSICK

February 26, 1991

"The State of the Judiciary"

A Report to the Joint Convention of the 115th Legislature
By Chief Justice Vincent L. McKusick

February 26, 1991

I'm proud to come before you again to give the annual report from the Judicial Branch. Today is an anniversary of special significance to the McKusick family. It was fifty years ago last month, in the 90th Legislature, that my father Carroll McKusick began his 12 years of service in the House and Senate from Piscataquis County. Through him I first gained my high respect for this institution, and came to appreciate the big responsibilities you carry and your dedication to the job. My respect has never dimmed.

We meet in somber circumstances. We have shared the deep sorrow of Peter McKernan's family, and our thoughts are constantly on the Gulf War and our men and women over there. And as I entered this chamber just now I was reminded of the tragic absence of Don Carter from Seat 122, back there on the aisle. In recent years, I have made much of the Three C's needed to be practiced between the Great Branches of State Government -- communication, cooperation, and comity. Don Carter as House Chairman of Appropriations had the lead in reviewing the judicial budget. In his relationship with us, he practiced the Three C's as a matter of course. It was simply his nature to do so.

Financially these are tough times for all of us in government -- as they are for much private business and for many family budgets. For us in the three Great Branches to handle our current budget crunch, those Three C's -- communication, cooperation, and comity -- are more necessary than ever. I was pointing this out to my colleagues a while ago. One of them quipped that what we really need is a Fourth C -- Cash!

Yes, we are in tough times. But I believe in the optimistic wisdom of the adage: Tough times will not last; it's tough people who will last. We Maine folk are tough and resilient. We are going to come through all right. We will because we must. We will because we will work together.

In tough times we do well to go back to first principles. We meet in the fifth and final year of the bicentennial celebration of the U.S. Constitution. This year we celebrate the ratification of the Federal Bill of Rights in 1791. There we Americans guarantee to one another our most precious individual rights and freedoms. Every day our state courts, where some 98% of all litigation takes place, are called upon to apply and vindicate those federal guarantees. Our State Constitution contains counterparts of all the federal guarantees, and more. For example, Maine recognizes the fundamental right of every citizen to have access to the courts. Section 19 of our Declaration of Rights states:

Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.

From 1820, the preamble to the Maine Constitution has declared the very first two goals of our state government to be "to establish justice" and to "insure tranquility." The Judicial or Third Branch created by the Constitution performs one of the core functions of government -- parallel to and at the same level as the indispensable functions of the other two Great Branches -- the Legislature and the Chief Executive. Either the courts perform the tasks they are set up to perform or no one in society performs them. Alexander Hamilton called the "ordinary administration of civil and criminal justice" -- that is, the operation of the state courts, day in and day out -- the "great cement of society." The central place occupied by the courts in Maine affairs has been symbolized from our earliest days by the building called the "Courthouse" in every county. We've never called it the County Building. Woodrow Wilson said it all: "A society is as good as its courts -- no better and no worse."

Like Speaker Martin, I am this year presiding over the national organization representing my branch of state government. Like the Speaker, I have many opportunities to make interstate comparisons. In general, what I see elsewhere makes me feel good about the courts of our State. You in the Legislature and we in the Third Branch, year in and year out, have worked together step-by-step to improve the quality of justice rendered Maine citizens. But a clear challenge faces all three Branches today. Can we ride through our financial crisis in a way that maintains the quality of justice in the State of Maine? I say to you, "We can and we must!"

We are being asked: Can the courts do more with less? The more part of that question is inexorable. Our case loads, already nearly overwhelming, continue to increase. The courts have constitutional and statutory duties to perform and have no control over the volume of their workload. That is decided on the criminal side by the police and the prosecutors, on the civil side by the public, the litigants.

The Judicial Department is already a very minor net burden on the State's budget that runs into the billions. The total appropriation for the courts for this fiscal year is only about \$32 million, less than 2% of the State's budget. At the same time, the courts will collect this year we expect about \$28 million. These revenues are not dedicated to the courts, and I by no means suggest they should be. Nor should one look upon the courts merely as revenue-producers that should support themselves. Nonetheless, in practical result the courts are, I repeat, a very small net burden indeed on the State's budget.

Can the courts do more with still less? It is very difficult, but we are determined to do our part. We are already hurting badly from the cuts we made to help meet the \$210 million shortfall a year ago. For example, we had to eliminate all except emergency overtime and cancel \$1 million of capital expenditures, much of it for computers essential in our efforts to get our ever-growing caseloads under control and to give better service to the public. Even though the courts were already critically understaffed, we had to lay off 17 full-time contract employees. Three judicial vacancies are temporarily unfilled, and this comes when we need more judges, not fewer. Maine has had a remarkably small judiciary for its size and caseload. Maine is 50th among the States in the number of trial judges per 100,000 of population.

But, as I say, we are determined to do our part in the budget crisis. I announced last month the appointment of a Volunteer Business Committee to review the administrative and financial operations of the Judicial Department. John M. Daigle, the retired CEO of Casco Northern Bank, is its chairman. He is joined by John R. DiMatteo, President of Guy Gannett Publishing Company, and by Arthur M. Johnson, former University of Maine President and former Harvard Business School Professor. I have asked these businessmen to give us their best answer to this question: Are we in the courts making the most efficient use of the resources provided by the Legislature? The committee plans to complete its work by the end of March. However much I believe we're running the courts efficiently, I welcome any suggestions for running them even better. The management audit I have asked our Volunteer Business Committee to give our operations is sure to bear valuable fruit for many years to come.

I now report on court operations in 1990. Last year the Law Court set a new record in both case filings and case dispositions. New filings went to an all-time high of 622, 15% higher than the year before, foretelling a continuing heavy workload in the months ahead. Those 622 appeals of last year compare with only 269 cases filed as recently as 1976, the year before I came on the bench. Also, in 1990 the Law Court produced a record average of 51 opinions written by each justice, for a total of 359. My hard-working colleagues continue to merit their national reputation for the diligent discharge of their heavy decision-making responsibilities. At the same time, they carry an administrative load by serving in effect as the "Board of Directors" of the Judicial Department. The Court sets Department policy, makes rules for all the courts, including the Probate Courts, and superintends the legal profession through the Board of Bar Admissions and the Board of Overseers of the Bar.

In 1990 the Supreme Judicial Court amended the Code of Judicial Conduct to add detailed provisions for public financial disclosure. Judges made their initial filing last November 15, and will hereafter file public reports by May 15th of each year.

Last fall the Supreme Judicial Court received a media petition for an experiment with allowing cameras in the trial courts. After a public hearing, the Court by a divided vote early this month authorized a two-year experiment at two locations for each trial court. The experiment will start on July 1 or as soon thereafter as the Court shall have approved detailed operating guidelines for television coverage of trials, along with a comprehensive plan for monitoring and evaluating the experiment.

I report now on our trial courts. During 1990 all three trial courts gained new leadership. The three new chiefs are with us this morning. Chief Justice Thomas E. Delahanty, II, of the Superior Court succeeded Justice Brody, who joined us on the Supreme Judicial Court. Chief Judge Susan W. Calkins and her deputy, Judge S. Kirk Studstrup, came to the leadership of the District Court following the successive retirements of Judge Devine and Judge Pease. Chief Administrative Court Judge Dana A. Cleaves took over on Judge Rogers' retirement.

I am proud of the women and the men who work in the courts. I'm proud of their renewed dedication in the face of fiscal stringencies. The work of the courts is very labor-intensive. Yet many of our busiest clerks' offices were understaffed even before the budget crisis. Measures taken to meet the revenue shortfall of a year ago and again this year pile even more work on a reduced judiciary and a reduced staff. This comes at the same time that continued increases in case filings put even more demands on the judges and clerks. We in 1990 had to cancel all out-of-state judicial education and we did not have the funds to hold either the Judicial Conference or the Sentencing Institute, both provided by statute. We also had to cut back on training sessions for clerks and other court personnel. These cutbacks must be only temporary. To continue them for long would be false economy. Well-trained clerks are essential for efficient operations. For our judges to continue to merit their national reputation for high quality judging, they must keep current with the law.

Our active retired judges perform an indispensable role in keeping the courts abreast of their heavy workloads. In 1990 their combined service on the bench equaled that of about 4 additional full-time judges -- and they served at a bargain rate. We are much indebted to them. In appropriate circumstances I also use the authority the Legislature has granted me to assign judges of one court to serve briefly or for a special purpose in another court. For example, under the statute enacted last year, District Court Judge Ronald Daigle is sitting one day each quarter for Administrative Court hearings in Caribou. Such cross-assignments between the trial courts maximize the productivity of our small judiciary.

The budget crunch of last year to my regret prevented funding of a task force on gender bias in the courts. Even though we have thus been unable to do a study of the problem in Maine, all of us judges last month joined with lawyers in a program, funded by the State Bar Association, designed to sensitize both groups to the kinds of gender discrimination found to exist in neighboring states. We in Maine cannot assume we are immune from similar blind spots. I repeat what I said last year: Gender bias has no place whatsoever in the Temple of Justice.

The Superior Court is our court of general trial jurisdiction, and is our only jury court. It sits in every county. It is authorized to have 16 full-time judges, but now has one temporary vacancy. Almost any criminal or civil case can be brought in the Superior Court, and all the most serious criminal cases must come there. And the Superior Court hears appeals from zoning and other municipal decisions and from decisions of state administrative agencies. It hears appeals on question of law from the District and Administrative Courts. In 1990 the Superior Court's total case filings for the first time passed the 20,000 mark. Seventy percent of those filings are criminal. Despite some recent publicity that the crime rate in Maine has declined, criminal case filings in the Superior Court increased 15% in the last fiscal year. Since 1981, criminal cases have increased about 50%. Yet in that time, the Superior Court has had only two additional judgeships authorized, and very small additions to clerical and other supporting staff. In the last two years, the increased number of criminal jury trials has raised costs for juries, for court security, and for indigent defense, and has reduced judicial time available for civil matters.

The pre-litigation screening panels for medical malpractice cases, created by statute starting in 1987, continue to be highly successful in diverting potentially complex and lengthy litigation from court. Under the administrative direction of Chief Justice Delahanty, the panels review about 100 malpractice claims each year. The panels, many of which are currently presided over by retired Justice William McCarthy of Rumford, are disposing of the bulk of these malpractice claims short of trial, to the advantage of all concerned.

Now, the District Court. Although that court is technically a court of limited jurisdiction, I like to call it our "court of not-so-limited jurisdiction." At almost every session, the Legislature has added to its powers, last year giving the District Court almost full equity jurisdiction. Its annual case filings have reached the staggering number of about 320,000. This caseload is handled at 32 District Court locations, reduced by one by the consolidation of the separate courts that previously operated in Bath and Brunswick. The court has 25 authorized judgeships, but two of those positions are now vacant. This must be only a temporary measure.

The District Court is the closest we come to having a family court. It is our juvenile court and it handles most civil family matters -- such as divorce, protection from domestic abuse, and termination of parental rights. Our Court Mediation Service and our Court-Appointed Special Advocate (or CASA) Program are now integral parts -- and valuable parts -- of court operations in family matters. In fiscal '90, 5,600 cases were mediated, mediations in domestic relations cases increasing 15 1/2% over the year before. The CASA Program, now in operation for five years and available in most of the state, has provided over 360 carefully selected and trained volunteers to act as guardians ad litem for children at risk. A total of more than 1,200 children involved in court proceedings have now received the benefits of the volunteer program.

Last year the Legislature authorized the Chiefs of our three trial courts to set up a pilot project for handling family law matters. Planning for that pilot project has begun under the front line responsibility of Chief Administrative Court Judge Cleaves. The project will gather in one place the family law cases in Portland of both the Superior and District Courts. It will start as soon as the extra courtrooms in the courthouse addition are available. This project will test whether we can achieve a functional unification of the Administrative Court with the District Court and whether we can give better service to family law cases, while using our existing judicial and clerical resources to the fullest.

Guidelines for determining the level of child support payments in divorce and like situations were promulgated by the Supreme Judicial Court in October 1989 to meet the federal deadline and then were enacted into statute by the Legislature last April. Those Guidelines are now in use in all court orders for child support, regardless of the means of the parents. The courts are going to have to prepare themselves for a heavy added workload when two years hence a federal mandate kicks in requiring the courts to review existing child support orders against the Guidelines.

Good news comes from the Maine Court Facilities Authority. The Legislature created the Authority to raise funds for court buildings through the issuance of revenue bonds. The State will own the buildings when the bonds are paid off through rent payments. Up to this year the State has owned the court building at only one of the 51 locations where the

courts operate -- and that one state-owned building is the Augusta District Court down here on the rotary. The other 50 court locations operate in county courthouses or in other space that is leased from counties, municipalities, and private landlords. That situation will start to change this year. Now under construction by the Court Facilities Authority are buildings for the Presque Isle District Court and for the consolidated Bath/Brunswick District Court. Those buildings are critically needed. By legislative resolve of last year, the Presque Isle courthouse will proudly bear the name of the late Judge Julian Turner, the resident judge there for 26 years.

The Cumberland County Courthouse addition is on schedule for completion before the end of this fiscal year. This fine building will provide a new home for the Ninth District Court and expanded facilities for the Superior Court. Some 20% of the entire caseload statewide of our trial courts is handled in that one courthouse. The Legislature can take pride, along with Cumberland County and the Judicial Department, for meeting at last the longstanding need for more courtrooms in Portland.

The courts continue to have serious facilities needs elsewhere around the state -- for example, in York County for both the District and Superior Courts, and in Androscoggin and Kennebec Counties for the Superior Court. We will continue to work with the Court Facilities Authority to address those needs as funding permits.

I commend our administrative staff for their ongoing efforts to help us produce maximum results with limited resources. By national comparisons our Administrative Office of the Courts is a relatively small one, and Dana Baggett's staff continues to face the same increasing demands as our trial courts. The budget crunch makes even more work for the Administrative Office in controlling costs throughout the Department. Let me give some examples of the special activities they were involved in last year. They revamped many of our payment and payroll functions consistent with the State's new MFASIS program, introduced Macintosh computers into the Law Court to help us keep up with our heavy caseload, installed computers in the Superior Court to reduce the time and cost involved in paying jurors, provided your legislative Office of Fiscal and Program Review with as comprehensive fiscal impact statements as any state agency, provided supervision for the courts of the planning and construction of the Cumberland County addition, obtained over \$400,000 in federal grant moneys for computers -- and the list goes on.

In conclusion, I wish I could report that our trial courts are able to keep up fully with the constant growth in case filings, that their pending caseloads are being reduced, and that the time between filing and disposition of cases is shortening. I wish I could report that we are able to continue innovative pilot projects, such as the Alternative Dispute Resolution program started by the Superior Court in York and Knox Counties two years ago, and such as the indigency screening program we conducted for two years to out unqualified applicants for appointed counsel at State expense, and such as the valuable in-state judicial education project undertaken by Professor Zarr of the University of Maine Law School working with a judges committee headed by Justice Roberts. I wish I could report that we are able to do the very necessary full computerization of the Superior Court and of the District Court. Yes, I wish I could report all that to you, but I cannot. They have all fallen victim to the budget shortfalls of last year and this. I can, however, report that every one of us who work in the courts, judges and nonjudges alike, are determined despite the fiscal crisis to maintain the quality of the service we are providing Maine people under our constitutional and statutory mandates. That is our challenge.

You and we also have a second challenge. It is very easy when times are tough to become absorbed in the crisis of the moment and to give no thought to the future. I am pleased that the Legislature last year created a Commission to Study the Future of Maine's Courts, though regrettably it found no funds for the study. We four leaders of the three Great Branches have appointed retired District Court Judge Harriet P. Henry as Chair of the Court Futures Commission. Her 17 years on the bench and her leadership experience in national bar and court organizations qualify her splendidly for leading this study, including the initial job of finding outside funding. Five of your fellow legislators are members of the Futures Commission and five judges are advisory members. We face a host of societal changes as we move rapidly toward the next century. We must lift our eyes from our daily chores, however tasking, to look at the horizon ahead of us. Our current financial woes must not blind us from seeing the demands the new century will make on Maine's courts. Franklin D. Roosevelt once said, admittedly in a grander context: "The promise of the future is only diminished by our limitations of today." In looking at the future of Maine's courts we are all challenged to surmount the limitations imposed by the fiscal crisis of today.

In the next several months you 186 citizen legislators are facing particularly difficult responsibilities. Included among them is the duty of preserving the high quality of Maine's courts, of assuring that they have the resources essential to carry out their constitutional and statutory obligations. On behalf of all of us in the Third Branch, I reaffirm our pledge to work closely with you of the Legislature to that end.

Thank you very much for your time and attention.