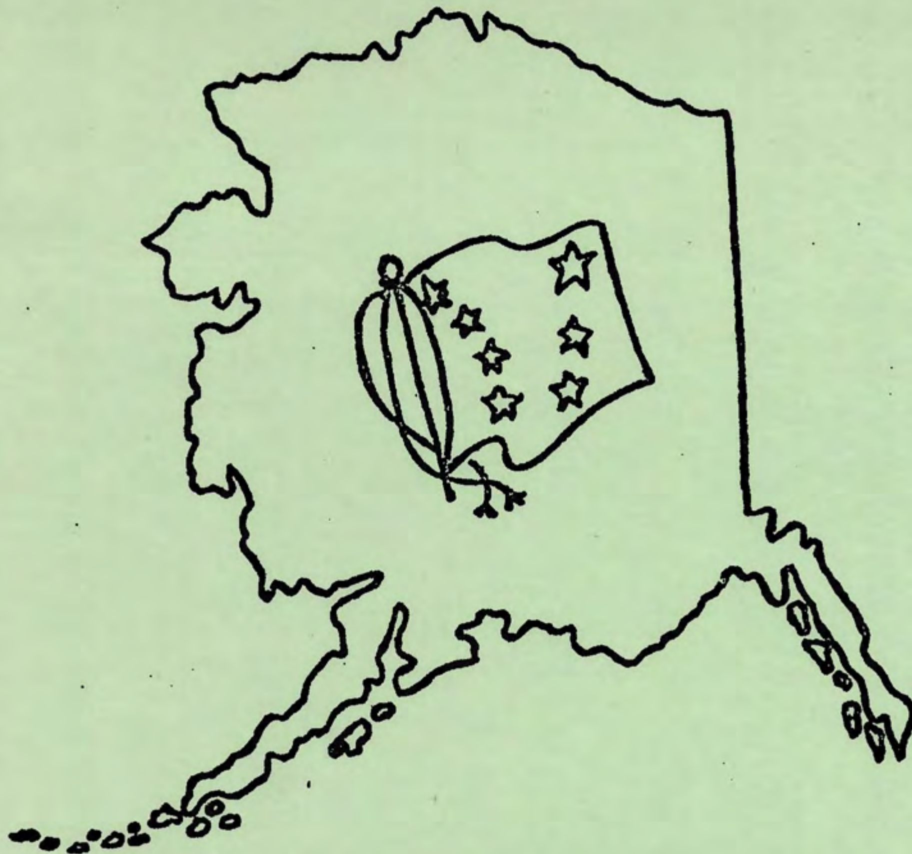


THE STATE OF THE JUDICIARY

AN ADDRESS BY

CHIEF JUSTICE ROBERT BOOCHEVER

BEFORE THE JOINT SESSION

OF THE ALASKA LEGISLATURE

APRIL 15, 1976

Alaska State Legislature

1971

Source:

SCR 42

SENATE
CONCURRENT RESOLUTION NO. 42

Relating to a "State of the Judiciary" message to the Legislature.

BE IT RESOLVED
BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS, although the Judicial branch of government is an equal branch of our government, along with the Executive and Legislative branches, many legislators, as well as members of the public feel that a communications gap exists concerning the operation of the Judiciary; and

WHEREAS all legislators should have and would welcome the opportunity to be addressed by a representative of the Judicial branch of government; and

WHEREAS such a presentation concerning the state of the Judiciary would be beneficial to both the Judicial and Legislative branches of government, as well as give the Legislature an in-depth view of the successes, problems, and goals of the Judiciary; and

WHEREAS the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court, has recommended that an excellent manner in which to strengthen the cooperation and understanding between the Legislative and Judicial branches of government would be to implement, on an annual basis, a "State of the Judiciary" address to the state legislatures by the chief justice of each state's highest court;

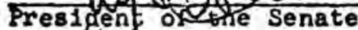
BE IT RESOLVED by the Alaska Legislature that the Chief Justice of the Alaska Supreme Court is cordially invited to address a joint session of the legislature at a time to be determined by the leadership of both houses; and be it

FURTHER RESOLVED that it is the intent of the Legislature to make the "State of the Judiciary" address an annual occurrence, the first "State of the Judiciary" presentation to be made to the Seventh Legislature, Second Session.

Authentication

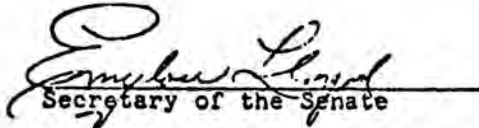
The following officers of the Legislature certify that the attached enrolled resolution, Senate Concurrent Resolution No. 42, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

Passed by the Senate April 16, 1971



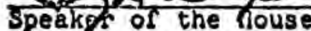
President of the Senate

ATTEST:



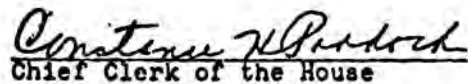
Secretary of the Senate

Passed by the House May 7, 1971



Speaker of the House

ATTEST:



Chief Clerk of the House

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STATE OF THE JUDICIARY

Introduction:

In 1971, the legislature passed SCR 42 inviting the Chief Justice of the Alaska Supreme Court to address a joint session of the legislature and providing that the intent of the legislature was to make the State of the Judiciary address an annual occurrence. We in the judiciary have been very appreciative of that invitation and of the opportunity afforded to improve communication between the judicial and legislative branches of the government. I personally consider it a great privilege to address this body.

Under Alaska's Constitution, the Chief Justice is selected by the justices of the Supreme Court to serve a term of three years. In September 1975, Chief Justice Rabinowitz's term expired, and I was selected to succeed him. To the extent that this report reflects creditably on the judiciary, it is due to a considerable extent to his outstanding, intelligent, conscientious and diligent leadership. As Chief Justice, he adopted a collegium procedure for resolving the important policy questions so that decision making was a joint product of the Supreme Court. I have endeavored to follow that procedure in order to avail myself of the valued counsel of the other justices who have had such a wide variety of experience both as members of the bar and, in the case of Justices Burke and Rabinowitz, as distinguished judges of the trial bench. Additionally, in administrative matters, we all appreciate the advice that we receive from our

outstanding Administrative Director, a man with whom many of you are very familiar, Arthur Snowden, II, and his fine, hardworking staff.

Supreme Court Workload:

During the calendar year 1975, the Supreme Court handled 334 matters, up from 278 in 1974 and 252 in 1973. This amounts to an increase of almost one-third over the 1973 workload. The 1975 breakdown of cases indicates 145 civil appeals, 68 criminal appeals, 83 petitions for review, 23 sentence appeals and 15 other matters; 123 full opinions were written on a wide variety of subjects. As you know, the Supreme Court does not, as a rule, hear testimony of witnesses, but rules on legal questions resulting from claims of error in the trial proceedings. I am constantly amazed at the variety and complexity of the issues coming before us.

Among the cases of significant interest decided during the past year were two which directly affected the legislature. In one case, we construed the constitutional provision prohibiting a legislator from being appointed to a position, the emoluments of which were increased during his term in office. In the second, we were obliged to hold against the legislative position with reference to the power of the legislature to require confirmation of gubernatorial appointments other than the heads of departments and certain board members.

The oft-criticized rule of law whereby a plaintiff who in any manner was contributorily negligent was barred from recovering, even if his fault was very slight and that of the defendant

substantial, was changed to the doctrine of comparative negligence. Since the contributory negligence rule was one of common law (that is, court-made) rather than of statutory origin, we believed that since the reasons behind the rule were no longer valid, if ever they were, we were free to make the change without invading the legislature's prerogatives.

Other cases of particular interest involve the state's power to regulate the crab fishery beyond traditional territorial waters; difficult search and seizure questions; prisoners' rights in disciplinary proceedings; the right of privacy as it pertains to possession of marijuana in the home for personal consumption, and a contrasting case which upheld a conviction when a quantity of marijuana was found in the defendant's possesion in an automobile; the constitutional provision requiring the legislature to establish a system of public schools open to all children of the state, which was held not necessarily to require secondary schools in every community while leaving open the equal protection and due process arguments; a loan in the form of a lease with a purchase option, which was held to be subject to the usury laws and the contempt power of the court and its relationship to statutes passed by the legislature.

In addition to its function of ruling on cases, the Supreme Court is charged by the constitution with promulgating rules governing the procedure and administration of the Court System. Extensive work was performed on the Small Claims Rules, which are awaiting final revision of a handbook and forms supplement before becoming effective. A draft of new Children's Rules is under study at the present time. The court is studying a

report prepared by Mr. Carpeneti as to changes which may be required in our rules and statutes to conform with the American Bar Association's Standards Relating to Criminal Justice.

Our Criminal and Civil Rules as well as our Administrative Rules are constantly under study, and I shall discuss some of the changes which have been made in them in portions of this address dealing with the efficiency of the trial courts.

A study of appellate delay has recently been completed, and we are working on implementing some of the suggestions to expedite decisions on appeal. I am pleased to report, however, that the Supreme Court is in the most current position it has been in for years, although we recognize that there is still room for improvement. At this time, there are but five matters under advisement by individual justices that have been held for more than three months. That period, which covers the time from when a case is first assigned to a justice for drafting an opinion to when the draft is distributed to the other justices, is the only period directly under the control of an individual justice. It is, however, but one facet of the time consumed by appeals. We have been endeavoring to improve our procedures with reference to preparation of the records on appeal, that is, the transcript of the trial proceedings and the copying of the relevant papers filed in the trial court. We are becoming stricter in granting extensions of time for filing briefs. The final portion of the appeal process involves comments by each justice on a draft opinion, incorporating suggestions and resolving differences when possible. We have established time constraints for this function.

Our court works very cooperatively in that regard, with each of the justices contributing by his suggestions towards improvement of the draft opinions. As a result, there are probably fewer dissents and separate concurrences than there would be otherwise. The final step after carefully checking opinions for technical errors is the actual publication of the opinion. I hope that some of the nonlawyer members of the legislature will avail themselves of some of the opinions of the court, which I believe will enable you better to understand the care and work that goes into them. I am pleased to say that the opinions of your court have received high acclaim from scholars in the lower states.

The court has prepared a pamphlet explaining its internal procedures. For many attorneys, those procedures have been one of the great mysteries, almost akin to that of the Sphinx, so we thought that it was healthy for all to know the court's methods of operations. The internal procedures are set forth in the 1975 Annual Report of the Alaska Court System.

Trial Courts:

As might be expected, the construction of the oil pipeline has had a significant impact upon the caseload of the trial courts--95,584 cases were filed in the Alaska Court System during 1975, up 9 percent over 1974 and 13 percent over 1973. There was a 12 percent increase in the superior court filings, which amounted to 11,570 cases. Felonies in the district court increased by 12 percent, while misdemeanors were up 15 percent. Traffic cases were only up 4 percent, in part due to a substantial

reduction in Fairbanks where the police officers just did not have time to enforce traffic regulations.

Anticipating the increased pressures attributable to the pipeline, the court initiated a study of the efficiency of the trial courts in Anchorage, where we have the largest number of cases. A study was made by Ernest Friesen, a nationally-recognized expert. The Friesen report pointed out shortcomings and recommended improvements. The Supreme Court immediately appointed a task force of judges and prominent attorneys under the leadership of Justice Erwin to evaluate the Friesen report and make specific recommendations within one month. The committee performed its task well, and its recommendations have been followed resulting in motion practice rule changes, having all trial judges available for all types of trials and utilizing a master calendar concept. All matters taken under advisement by a judge are monitored by weekly reports so as to identify delays. This monitoring is also carried out in the Supreme Court.

In addition to the pipeline impact, the courts were confronted with new procedures whereby plea bargaining was eliminated by the Attorney General's directions. There have been many criticisms in the past of the use of plea bargaining as a method of disposition of criminal cases, although there are substantial arguments in favor of it. Alaska is the first state to attempt to eliminate plea bargaining statewide, and we were apprehensive that as a result, there would be a great deluge of criminal trials. For awhile, it looked as though

this would be the case, and that civil trials would have to be taken off the calendar.

As a result of the changes which were instituted after the Friesen report and those of the task force, and due to a considerable extent to forceful leadership furnished by Judge Ralph E. Moody, I am pleased to report that at this time it appears that the anticipated logjam has not occurred. By hard work, the trial judges in both the district and superior courts have, at least for the time being, weathered the storm. Many cases pleaded out when the trial dates were maintained and judges ready to proceed. We shall continue to watch this situation closely.

I don't want to slight the hardworking judges in other than the Third Judicial District. Fairbanks has had the most significant increase in caseload, and we are proud of the manner in which the Fairbanks judges and the other judges throughout the state have kept pace with the increases in matters to be handled.

In response to legislation passed during your last session, a one-level trial court was established at Kodiak by appointment of Roy Madsen as Superior Court Judge and by the elimination of the district court judgeship in that city. Previously, much inefficient travel time was involved to furnish superior court services, and the new system seems to be functioning well. Judge Madsen has been able to visit villages in his district that had never previously seen a superior court judge, and has been serving as training judge for the magistrates as well as conducting court in Kodiak.

With the concurrence of the Judicial Council, the Supreme Court has recommended that a superior court judge be appointed for Sitka in place of the district court judge previously stationed there. We believe that this will improve the service to the community and do away with unnecessary travel by a superior court judge from Juneau or Ketchikan.

Similar considerations make it advisable to establish a superior court rather than a district court at Bethel. We have there had the benefit of an outstanding district court judge, Nora Guinn, who not only has a keen understanding of legal issues but is also able to communicate and has a deep understanding of the people who reside in this area. Mrs. Guinn has indicated a desire to retire if provisions with reference to the retirement act are amended so as to give her credit for prior service. Rather than reappoint a district judge and require constant travel and visits by a superior court judge, we believe that Bethel will be better served by a superior court judge at little, if any, increased expense.

Despite these recommendations for superior court judgeships in locations which may be served by a single judge, I do not at this time advocate a single-level trial court for the state; but I do believe that, when possible, a thorough study should be made to ascertain whether Alaska, with its unique problems, would be better served by such a court.

JUDICIAL COUNCIL

The Judicial Council, which is composed of the Chief Justice, three lay members appointed by the Governor and three attorneys appointed by the Board of Governors of the Alaska Bar Association, has continued to make valuable contributions due to your having financed the office of an Executive Director and small staff. In addition to its function in screening applicants for judgeships and furnishing nominees to the governor for appointment, it is engaged in some thought-provoking projects for the improvement of the administration of justice. Among the studies made have been studies of bail and sentencing, the use of the grand jury, improved methods of screening applicants for judgeships and, in accordance with your recently-passed legislation, procedures for improved evaluation of judges' performance so as to assist the public in voting at judicial retention elections.

Under Law Enforcement Assistance Administration financing, a massive two-year study of plea bargaining will be undertaken by the Council. This study will be looked upon throughout the United States as guidance in this troublesome area.

The Supreme Court, as well as the Council, has been very concerned with the rise of crime in Alaska, which parallels that in the nation itself. The causes of crime are, of course, extremely complex, and the bulk of the solutions must be worked out in a sociological context. Nevertheless, a portion of the problem confronting the Court System, even though it be but the

tip of the iceberg, is recognized by us to be highly important. With this in mind, we have had several sentencing seminars for all of our trial judges. This, together with the power that has been granted by the legislature to the Supreme Court to review sentences, have been used to endeavor to promote uniform standards for imposition of sentence. In that regard, Justice Erwin has written an excellent study of the Alaska experience in sentence appeals. It appears in 5 U.C.L.A.-Alaska Law Review, and I recommend it to you.

Each sentence, in addition to being based on the crime, must be tailored to the individual and his particular background, but unfortunately there is also a great deal of divergency based on the outlook of the particular judge who imposes the sentence. I am sure that if I presented very specific factual examples to this august body, and asked each of you to give your recommended sentence, we would have the same result as we did at one of the trial seminars where the sentences ranged from complete suspension to many years in prison. We can appreciate the desire of some for mandatory sentences as at least this establishes a fixed period of years for a particular offense. Unfortunately, this does not take into consideration the discrepancies that arise in individual cases. The Judicial Council has been exploring a very recent study made by the 20th Century Fund pertaining to fair and certain punishment. This involves a new concept of the presumptive sentence. To accomplish this, it would be necessary for the legislature to have studies made of the average type of crime involved in each category and then to establish a presumptive

sentence for that offense. For example, it might be ascertained that the average robbery involves a 19 year old who steals a relatively small amount of money by putting people in fear with the use of a pistol; as opposed to the sadist who knocks a man to the floor and clicks his pistol pointed at the victim's head or, on the other hand, of a father who uses a toy pistol in attempting to secure funds for a necessary operation for his child. If it were determined that an appropriate sentence for the average burglary would be two years, for example, there then would be percentages of increased terms if the crime was aggravated or if the defendant had a prior felony conviction. Similarly, the sentence might be reduced if the offender was not the instigator of the offense and was very young. The factors affecting sentence would be spelled out, and specific percentages established. A judge would be permitted to vary from the presumptive sentence only for compelling reasons, and those reasons would have to be specified in detail. It is a thought-provoking concept, and the Judicial Council hopes to have specific recommendations in the near future.

I might say that in my brief period of chairing the meetings of the Council, I have been impressed with the conscientious manner in which its members approach their duties, as well as at the intelligent leadership furnished by Michael Rubinstein, the Council's Executive Director.

Capital Improvements:

The past year has seen some major improvements in the physical facilities available to the courts. The largest project

has been the completion of the Alaska Court and Office Building located across the street. For the first time in years, the courts here are adequately housed, and there is space for a library able to serve the needs of the community, including the Attorney General's Office and the Legislative Affairs Agency. The building also furnishes space for many other agencies in addition to the courts.

The Court System moved into a new building in Palmer under a lease arrangement, and a new court and state office building was occupied in Valdez last August. In September, a court and state office building was dedicated in Kenai. The new court and state office building in Sitka will be dedicated in May.

Badly needed remodeling of the Fairbanks court building is underway. While in view of the state's present urgent financial needs, the facility can be used for several more years; it is obvious that a new court building will be needed before long to service that burgeoning community.

The most urgent requirement for new space confronts us at Barrow, where it is essential that more adequate quarters be furnished. The present facilities are totally inadequate.

The Court System has also supervised the placement of 13 modular criminal justice facilities in smaller communities. These facilities were financed through LEAA grants.

In addition, there have been significant improvements in court libraries throughout the state.

Administration:

The administrative functions of the Court System have continued to make strides under Mr. Snowden's leadership. The computer system for furnishing Alaska Justice Information now makes it possible to ascertain the status of any case activity, furnish a history of criminal activity and furnish data pertaining to jury utilization, all of which will help greatly in properly administering the Court System.

An automatic traffic processing system providing immediate access to a driver's file history has been established. Automation has also resulted in ready-to-mail jury questionnaires, punch cards for fines and notices of delinquent child support.

Microfilming of court records will be completed by this summer. Some 10,000,000 documents will be placed on microfilm, resulting in a great savings in space requirements. A system has been established for preserving important historical and cultural records while eliminating vast amounts of unneeded paper.

A project is underway to standardize and minimize the forms used throughout the state by the Alaska Court System.

The consolidation of trial clerks' offices rather than having separate offices for district and superior courts was initiated in Anchorage and has now been accomplished in Juneau, Ketchikan and Nome. With the alteration of the Fairbanks court building, the clerks' offices there will be consolidated soon.

Former municipal employees have been incorporated into the Court System as a result of the court handling violations of

municipal ordinances. All court case processing is now the responsibility of state employees. This seems appropropriate under the constitutional mandate of a unified Court System.

You will each receive a copy of the Annual Report from the Administrative Director of the Court System covering the numerous projects being undertaken to improve the administration of judicial services in much more detail than is allowed by the time now available.

Rural Justice:

Upon assuming the office of Chief Justice, I realized that one of the pressing problems confronting us was the improvement of judicial services and their adoption to the unique problems of bush Alaska. Although I have visited many of the smaller communities in my more than 30 years in Alaska, I realize my lack of familiarity with other regions of our state. With this in mind, one of my first undertakings was to visit Bethel and some of the surrounding villages of the Lower Yukon and Kuskokwim Rivers. I hope to be able to visit many more of the villages during my term of office so that I may have a better understanding of their problems. In that regard, most of the members of the Supreme Court have had extensive contact with our rural communities.

We have several exciting projects underway in attempting to meet the demands of scattered small communities having distinct cultural backgrounds. Conciliation boards have been established in several villages in an attempt to utilize

traditional means of resolving disputes. The results of this experiment are being watched closely.

An interpreter program has been started in Bethel involving the translation of legal terms into Yupik, the language of the Eskimos in that area.

Magistrates' training has been improved with a formalized training program held in each judicial district for all magistrates. In addition, training judges have been assigned to work with magistrates in specified areas. A magistrate committee under the leadership of Justice Rabinowitz has been meeting and is studying the entire magistrate system. The committee will make recommendations to the Supreme Court when it completes its work.

We have also been cooperating with the Bush Justice Implementation Committee of the Alaska Federation of Natives and have carefully reviewed their reports.

Legislative Programs:

The judicial branch of the government historically has been assigned a number of nonjudicial functions, and we believe it will make for better administration if those functions are assigned to appropriate executive departments. Last year, absentee voting was withdrawn from the courts. The recording function should also be removed. In addition, the collection of vital statistics more properly belongs in the Department of Health and Social Services.

One area that has presented serious problems is the use of court trustees to collect arrearages in child and spouse

support payments. The Supreme Court has held that it is improper for these court employees who work very closely with the judges to prosecute support cases. We appreciate that it is urgent that some source be made available to assist in the collection of support payments. Senate Bill 659 is now pending which would assign this function to the Department of Health and Social Services, and we urge its passage.

We also believe that under the unified court concept established by our constitution, the court should be responsible for all judicial services. Political subdivisions are now charged for judicial services of the state Court System involved in enforcement of municipal ordinances. We support House Bill 170 which would eliminate the requirement of such payments. House Bill 774 is pending to provide for cost-of-living differentials for magistrates. We consider it only fair that they receive equivalent differentials to those received by other state employees living in high cost areas.

One matter that I wish to call again to your attention deals with reapportionment. As you know, our constitution requires reapportionment after each dicennial census. Our constitutional provisions were written before the United States Supreme Court made its historic decisions requiring both houses to be apportioned on the basis of population. We have no appropriate constitutional procedure for reapportionment of the Senate or for such troublesome questions as to whether existing senators' four-year terms should be truncated when reapportionment occurs. On three occasions, the Alaska Supreme Court has had to

wrestle with reapportionment problems, and each opinion has urged the legislature to initiate steps to amend the constitution to provide a suitable means of reapportioning the Senate. The year 1980 will be upon us in all too short a time, and I urge you to see that proper studies are immediately undertaken so that an appropriate constitutional amendment may be proposed. Such an amendment must be placed on the ballot at a statewide election. Unless this legislature is in a position to propose one, it will have to await the 1980 elections. At the very least, I would recommend that you refer this matter to the Legislative Affairs Agency for preparation of an appropriate constitutional amendment.

In discussing pending legislation, I would be remiss if I didn't mention our budget which, of course, is a matter of great concern to us. The budget is essentially a maintenance one with increases attributable to built-in salary and inflation costs as well as additional building expenses occasioned by the maintenance of new facilities. We have requested a few modest change items. Specifically, we would like to have prepared a code of evidence; that is, one document embodying all the evidence rules for the state. Those rules must now be guessed at in many cases because they are to be found not only in scattered statutes and rules, but also in decisions which are subject to modification.

Pattern civil and criminal jury instructions are also highly desirable tools to simplify trials.

A few additional positions have been requested to upgrade judicial services. We have attempted to keep such

requests to a minimum despite our increased caseloads. We consider the positions necessary to provide the level of judicial services expected by citizens of our state.

CONCLUSION:

My remarks today are unique in one respect. This will be the only judiciary message given to the Alaska legislature in a bicentennial year. As we celebrate the 200th anniversary of the Declaration of Independence, it is fitting that we re-evaluate our functions in the light of the noble concepts illuminated by the brilliant founders of this Nation. The Declaration of Independence is a fiery exposition of liberty and the right to be free:

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.

For that concept of liberty to be successful, individuals must exercise self restraint so as not to impinge on the rights and liberties of others. But even if all were so motivated, the manner in which the lives of each of us are entwined with those of others requires the imposition by our legislature of wise laws to regulate conduct--to "insure the domestic tranquillity" as referred to in the Preamble to the United States Constitution. The judiciary is necessary to resolve disputes peacefully, and many disputes involve arguments which deal with construction of legislative enactments. And, of course, the executive initiates programs, carries out the laws and enforces the decrees

of the courts. This over-simplified summary of our form of government indicates the importance of each branch working cooperatively with the others while maintaining its independence. To paraphrase the poet Gibran:

> We were born together, and together we
> shall be forever more
> But let there be spaces in our togetherness
> We stand together, but not too near together
> Yet, like the pillars of the temple, stand
> apart.

But if each of us, in our separate functions, endeavors to fulfill the mandates of the Alaska and United States Constitutions, we hopefully shall achieve for Alaska a substantial degree of that ordered liberty so nobly envisioned 200 years ago.