



THE STATE OF THE JUDICIARY

AN ADDRESS BY
CHIEF JUSTICE ROBERT BOOCHEVER
BEFORE THE JOINT SESSION
OF THE ALASKA LEGISLATURE
April 5, 1977

INTRODUCTION

This is the seventh time that the Chief Justice of the Alaska Supreme Court has addressed a Joint Session of the Legislature in response to an invitation originally extended in 1971 by Senate Concurrent Resolution No. 42. This will be the first time, however, that the message has been given live statewide television coverage. We in the judiciary welcome this opportunity to discuss our problems and achievements not only with the members of the legislature but also with citizens throughout the state. Today, I want to go over the various functions of our judicial branch of government, discuss some of the directions in which it is going and a few of the important and, to me, exciting new developments. I intend to refer to some general statistical conclusions, but I do not plan to go into any detail as to the statistical analysis. These statistics are fully set forth in the Annual Report of the judicial branch of government which is prepared by the Administrative Director's Office. Each of you legislators will have a copy of the Report, and you are in a position to reach your own conclusions as to the significance of the figures.

Before proceeding, it is my pleasure to introduce to you my colleagues on the Alaska Supreme Court. We have

been hearing cases in Juneau today and have cases scheduled tomorrow in Ketchikan. Present with me are: Justices Jay A. Rabinowitz, Roger G. Connor and Edmond W. Burke. Senior Justice John H. Dimond is sitting with us at this time in view of the recently-announced retirement of Justice Robert C. Erwin. We are deeply appreciative of the assistance that Justice Dimond is rendering.

I also would like to take this opportunity to express the appreciation of the court for the outstanding services of Justice Erwin who has resigned to re-enter private practice. He has been a conscientious, highly-productive jurist. His quick mind, his energy and his willingness to take on numerous assignments will be sorely missed.

I think that probably the most significant feature of the past year has been the increase in number of cases filed in all branches of the Court System. There were approximately 105,000 cases filed. To me, this is an astounding number. It represents almost one case for every four men, women and children resident in Alaska. The other significant finding is that, oddly enough, the number of felony cases filed was down from last year.

The Court System has been straining to keep up with this burgeoning caseload, but through the cooperation of personnel at all levels, including not only the judges but also the supporting administrative and clerical personnel, serious backlogs have not developed.

MAGISTRATES:

The backbone of the judicial system in rural Alaska is composed of magistrates. There are 54 magistrates located in scattered villages and in some of the larger communities throughout the state. The magistrates have no formal training as lawyers, yet they perform vital services in the remote areas of our state. They issue warrants, writs of habeas corpus, conduct preliminary examinations in criminal cases, order temporary detention of children, conduct small claims cases involving values under \$1,000.00 and enter judgments in cases of pleas of guilty. Additionally, with the written consent of the accused, they may try misdemeanors.

Obviously, to be effective in their important judicial roles, the magistrates must have adequate training. Training judges have been assigned to supervise the work of the magistrates in each section of the state, and the judges have been instructed to make yearly visits to all of the magistrates in their particular area. There are six week-long training sessions held in different areas of the state throughout the year, and all of the magistrates have the opportunity to attend one of the sessions. We have been able to send some of the magistrates to nonlawyer jurist courses held by the National College of the State Judiciary and the American Academy of Judicial Education.

Closely related to the work of the magistrates is the interpreter program. This program trains personnel to interpret the different languages spoken in the state and to explain judicial concepts in those languages. I doubt if many of us realize that there are 20 Native languages spoken in Alaska. Fortunately, the magistrates in most of the communities speak the prevailing language of that community and thus are able to communicate effectively even when English is a second language.

The significance attached to the rural judicial system was emphasized at a recent program held in Bethel. At that time, recognition was given to the outstanding services of a Native district judge, Nora Guinn, who was retiring. Judge Christopher Cooke was installed as the first superior court judge to sit in that area, and a much needed court facility, built by the City of Bethel and leased to the Court System, was dedicated.

At the present time, the most pressing need for a new facility is in Barrow where Magistrate Sadie Neakok does a splendid job under the most primitive of conditions. Barrow has grown to a sizeable community, and we anticipate a substantial increase in judicial business in that area. It is absolutely essential that we have a suitable court facility there.

One of the interesting projects which has been underway in the villages over the past year involves the work of the Village Conciliation Boards. Through these

Boards, an effort is being made to resolve disputes in a manner approximating the traditional pattern. Respected members of the community endeavor to settle conflicts before they develop to the point at which full court procedures are required. The conciliation program is being evaluated at this time, and we will know better by June of this year whether the model should be expanded or the effort abandoned.

DISTRICT COURTS:

The district court has jurisdiction over civil cases up to \$10,000.00 in value and over motor vehicle accident cases up to \$15,000.00. In addition, the court handles misdemeanors and the preliminary stages of felonies. It may be of some interest that less than one-quarter of the cases coming before the district court are criminal. Sixty-five percent of the cases are traffic cases other than those serious ones such as drunken driving and reckless driving which we consider to be of a criminal nature. Felonies constitute only 2 percent of the cases filed in the district court.

Last year when I gave this address, I spoke of the new small claims rules which were then being completed. I am pleased to report that the small claims rules have gone into effect, and that a handbook has been made available to litigants. The small claims procedures are being used successfully in a large number of cases involving less than \$1,000.00. By this means, people are receiving the

assistance of our courts without the costs, formalities of full trial procedures or the need of attorneys.

One favorable aspect of the district court work is that the dispositions per judge are up 21 percent over a year ago--2,982 cases were handled per judge in 1976.

SUPERIOR COURT:

Filings in the superior court are up 15 percent this year. Again, we were pleased to see that dispositions of cases were up even more substantially with an increase of 31 percent. The superior court has jurisdiction over all types of civil and criminal cases. The greatest increase has been in criminal trials. The number of misdemeanor trials in all courts has doubled in the past year, and the number of felony trials increased 2 1/2 times over the past year although there were fewer felony cases filed. The specific causes of the increase in criminal trials is hard to pinpoint. We assume that in part it has been due to the abolition of plea bargaining. Another factor is the availability of prepaid legal services. People who have their legal services paid are more apt to exercise their right to trial than to enter a plea.

Another favorable development during the year has been the speed with which felony cases have been completed. Last year, the average case took 201 days to complete, while this year, it was completed in 155 days--a 40 percent decrease. Thus our courts have become more efficient in processing criminal cases.

SUPREME COURT:

There were 466 matters filed in the supreme court this past year, up from 337 in 1975 and 255 in 1973. So it is apparent that the workload has almost doubled since 1973. The primary function of the supreme court is to handle appeals from the superior court. In these appeals, the court does not hear witnesses but studies briefs and the record of the trial below, hears oral argument--usually one hour in length--and renders written opinions. The court has a number of additional functions in connection with its constitutional duty to promulgate rules governing the administration of all the courts and the practice and procedure in civil and criminal cases. Moreover, the supreme court has the function of supervising the admission and disciplinary matters of the Bar Association. At this time, we are particularly concerned about the backlog that has occurred in Bar disciplinary matters. The Board of Governors of the Bar Association is also very concerned and is attempting to secure a full-time attorney to process complaints against lawyers. The legislature is being asked to assist in financing this function, and I urge you to give this request favorable consideration.

With the increased caseload of the supreme court, we have heard the voices of some Cassandras prophesizing doom. So far, the court has been able to keep up with the cases pending. Particularly in view of Justice Erwin's retirement and the necessary lag before we will secure a substitute, we all realize that it is going to take extra

effort, and we expect to work a considerable number of nights and weekends. Fortunately, we are being given a great deal of assistance through the experienced services of Justice Dimond.

There has been talk about the fact that the justices of the court do not all reside in one city. I reside in Juneau, Justice Rabinowitz resides in Fairbanks and Justices Burke and Connor reside in Anchorage. In a number of states, the supreme court justices reside in different cities, and most of the judges of the United States Courts of Appeal follow that practice. Their work is very similar to ours. The bulk of the work of a supreme court justice consists of reviewing briefs, conducting research and writing drafts of opinions. Performance of these functions does not require that all of the justices work at one location. The court does confer at the time of hearings and at least twice monthly.

Historically, when Alaska became a state, the first Chief Justice lived in Anchorage and did not care to move to the capital. As a result, one of the justices at that time resided in Anchorage, one in Fairbanks and one in Juneau. There were only three justices then. There doubtlessly would be some increase in efficiency if all of the members of the court were under one roof. Nevertheless, I think that there are offsetting benefits from having justices in different sections of our enormous state. Generally, supreme courts in the lower states now look with favor on

holding court sessions in various portions of the state so that the citizens may have the opportunity to observe their court in action. Moreover, it would be very easy for the justices to adopt a rather insular attitude if all resided in one locale, and court was not held in other locations. It also is of considerable benefit to have a justice located at the capital so that he is available for conferences with legislative leaders and members of the executive branch of the government on matters requiring coordination and cooperation. Finally, there is an advantage in having justices present in the major sections of the state to handle emergency motions promptly.

I do believe that it is highly important that a staff attorney position be approved for the supreme court. During the past year, in addition to the cases that were filed, the justices handled 325 motions. These motions are in addition to the routine motions which are automatically handled by the clerk of court. All five justices must pass on these motions, and a great deal of time is spent in reviewing the relevant documents. We believe that a staff attorney could screen the motions and summarize them, thus saving a great deal of the justices' time. The use of central staff attorneys has proved very effective in some of the other states.

We have been very fortunate in having an extremely well-qualified and able lawyer as clerk, Ms. Donna Pegues. She has been assisted by a devoted and competent staff, but

they are possessed with increased workloads and are not able to handle the functions a central staff attorney could perform.

There have been numerous significant opinions issued during the past year, but I shall only mention a very few at this time. The case of State v. Lewis involved a swap of land between the state and the Cook Inlet Native Association. A difficult question arose as to the constitutionality of the transfer because mineral rights were to pass with the land. A majority of the court upheld the swap.

In Allred v. State, the court held that there was a psychotherapist privilege protecting confidential communications made to psychiatrists and psychotherapists. In Else v. State, the requirement of informing a defendant of the elements of his crime before acceptance of a guilty plea was affirmed. In Blue v. State, requirements of fair pre-trial line-ups for identification were set forth.

Other cases prohibited judges from participating in plea bargaining. Efforts had been made to have judges indicate in advance what sentence they would impose if a party pleaded guilty. The court believed that this procedure could have had effects because of the implied coercion if a plea of guilty was not entered.

The court decided a number of cases concerning the state's liability for injury caused by violation of its safety codes. In a case where state inspectors had found and discussed violations and took no action, the state was

held liable; however, where construction inspectors were on a job site without the specific function of safety inspections, it was held that the state was not liable for a death resulting from violation of the safety code provisions.

In the Katchemak Bay case, Moore v. State, regulations requiring consultation with local planning agencies were held to apply before a determination could be made to sell oil and gas leases.

In the past year, we have also noticed cases beginning to arise under the Alaska Native Claims Settlement Act. An interesting case was recently argued involving the ownership of Native corporation stock. At issue was whether informal adoption proceedings were valid so that the adopted children succeeded to ownership of the stock.

JUDICIAL COUNCIL:

One of the duties of the Chief Justice is to serve as chairman of the Judicial Council. The most important function of the Council relates to selection of new judges. The Council interviews and investigates the qualifications of all applicants and then nominates several candidates. The Governor selects new members of the judiciary from among these candidates. In another week, the Council will be meeting to interview candidates to fill the vacancy on the supreme court.

Another important function of the Council involves judicial retention elections. After serving specified

periods of time, all the names of judges must be placed on the ballot so that the people can decide whether to retain them for a further term. Since it is difficult for most citizens to evaluate the performance of judges, the legislature has required the Judicial Council to perform that task and publicize the results. Sophisticated polls were devised to assess the view of the Bar Association, peace officers and jurors. The Judicial Council, however, has been looking into further means of broadening the base for information about the performance of judges and is now developing a new court watchers' program. This program would train people to attend court sessions and evaluate the performance of the judges intelligently.

The Council initiated the sentencing study resulting in the presumptive sentencing bill which I shall discuss in a moment. Under a Law Enforcement Assistance Administration (LEAA) grant, it is presently working on a plea bargaining study to evaluate the efforts at abolishing plea bargaining. In addition, a study has been made of the grand jury system, and suggestions for improvements have been advanced. A further study of alternate means of dispute resolution is being undertaken.

I would like at this time to express my appreciation for the dedicated service of the members of the Council who volunteer their time. The public members are: Kenneth Brady of Anchorage, Robert Moss of Homer and Lew Williams of Ketchikan; and the three attorney members are Mike Stepovich

of Fairbanks, Joe Young of Anchorage and Mike Holmes of Juneau. The Council's programs are undertaken by its able Executive Director, Michael Rubinstein, and his staff.

CRIMINAL JUSTICE SYSTEM:

With this brief overview of the judicial system of Alaska, I would like to discuss some of the aspects of the criminal justice system. The judicial branch represents only a small portion of the criminal justice system. The work of the police and State Troopers, probation and parole officers are all under the executive department. The correctional system, at the other end of the system, is also separate from the judiciary. Our function is to see that a fair and prompt trial takes place, and that a just sentence is rendered.

Last year, in my address, I discussed a new proposal for sentencing--presumptive sentences. Under that proposal, an average sentence would be prescribed for a particular offense. This sentence could then be increased by aggravating factors such as prior convictions or an unusually cruel manner of committing the offense or reduced by mitigating factors such as youth and peripheral involvement in the offense. Apparently, last year the legislature was favorably impressed with this proposal. The Judicial Council was requested to study the matter further and to present a bill embodying the general concepts. Also under consideration was a determinate sentencing plan

whereby a person convicted of a crime would actually serve the time specified in the sentence subject only to one day good behavior time reduction for each two days served. In other words, a prisoner would not be eligible for early parole. Parole, however, was provided for the period of time during which the prisoner was released as a result of his good behavior so that the convicted person would have the benefit of parole services and assistance in adapting to nonprison life. Although not directly related to the presumptive sentencing bill, we have had a statistical analysis made of the amount of time actually served by those convicted of crimes in Alaska. I know that it has been considered by many that prisoners are automatically released on parole after serving one-third of their time. We have found that this is not the case, and that less than 50 percent of prisoners are granted parole. On the average, prisoners without parole serve 76 percent of the time sentenced, and with parole, the average served is 47 percent. Two-thirds of the prisoners served 67 percent of the time sentenced. Therefore, most prisoners serve two-thirds of their sentences.

Through the work of the Judicial Council and its Executive Director, proposed legislation was drafted and then reviewed by representatives from the Governor's staff and the Attorney General's Office. Dan Hickey, Chief Prosecutor for the state, was particularly instrumental in final revisions of the proposed bill which has now been

introduced into both houses of the legislature. The supreme court strongly endorses this bill and believes that it holds the promise of a significant improvement in sentencing practices.

The Judicial Council has made studies of sentencing patterns over the past two years. The most significant factor accounting for variances in the terms of years imposed for a certain crime is the sentencing judge. Despite all efforts which we have made through sentencing seminars and judicial review of sentences, the statistics show dramatic differences. In reference to violent crimes, for example, the sentences in some cases could range from 6 months to 10 years, dependent upon the particular judge. Each judge who approaches the task of sentencing brings with him his own personal philosophy and background. We are fortunate in Alaska in having very fine judges, but, nevertheless, they are subject to being influenced by their individual philosophies. It certainly does not seem proper that two people with identical backgrounds who commit identical offenses should receive different sentences. We believe that the presumptive sentencing law sets forth specific criteria for judicial guidance. The law, nevertheless, permits the sentencing judge to recommend a different sentence in the unusual case. In that instance, however, the sentence must be reviewed and imposed by a three-judge panel. I realize that I am oversimplifying the law in this brief discussion and that many of you in the legislature have made a very careful and exhaustive study of its provisions.

Recently, a judicial panel specially appointed to study the bill has made a comprehensive report which has been submitted to your judiciary committees. The judicial panel consisted of Judges Schulz of Ketchikan, Buckalew of Anchorage and Taylor of Fairbanks. They have strongly recommended passage of the bill and have made specific suggestions regarding certain provisions. I do not believe, however, that the members of the judiciary could agree on the appropriate specific sentence for each of the prescribed offenses. We are pleased that the Judicial Council has been able to make a study of past sentencing practices so that those figures are available to you for your deliberation on the bills, but we believe that it is peculiarly a legislative function to decide what those sentences should be. It is my sincere hope that this important legislation will be passed.

REVISIONS IN PRACTICE AND PROCEDURE:

The Alaska Court System has submitted an application to the LEAA for funds to finance a major study in overhauling the general practice and procedure followed in the courts. When I went to law school, we were still taught common law causes of action, although a number of states had changed to code pleadings. Under the old system, one had to plead a cause of action with great precision, or the case would be dismissed. The procedures were based on ancient English common law, and at trial, each side came to court in ignorance of what the other side intended to prove.

A major change in pleading and practice occurred with introduction of the Federal Rules of Civil Procedure in 1938. Congress applied those rules to the Territory of Alaska in 1949, and I can remember what a time attorneys had in adapting to the new rules. The Federal rules made many fine improvements. Claims for relief could be stated in simple language. Each side could discover what the other side intended to prove so that the actual trial became less a game of chance. With fuller knowledge of the other side's case, many more cases were settled without actual trial. In fact, at this time, only 7 percent of the civil cases actually go through the final stages of trial. But the procedures prior to trial have become immensely complicated over the years. With automation of typewriters, burdensome interrogatories are almost invariably served on opposing parties. Sometimes these interrogatories will number 200 and 300 questions. Almost all witnesses are deposed prior to trial, that is, their testimony is taken in advance of trial and a second time at the trial. Complicated motions for production, objections to interrogatories and similar matters clog the courts. In the past year, 2,500,000 documents were filed in the Alaska Court System.

It has now been 40 years since the innovations of the Federal Rules of Civil Procedure. As a result of the changes in practice which have occurred, costs of litigation have mounted. At the present time, the poor in Alaska are furnished free legal services, and members of certain groups

have prepaid legal services. Large corporations and businesses are able to afford litigation, but the person of average means has little chance to compete in this costly arena. We believe that it is time to look again to see if there aren't ways of substantially improving the system. We aren't talking about minor tinkering but rather looking to the basic concepts and ascertaining whether a major overhaul is desirable. Some cases may be diverted from the system or may be disposed of under simplified rules, in much the same way that small claims are now handled. Arbitration or mediation may be the answer for certain other types of cases. Pursuant to an act passed by last year's legislature, we have adopted forms to enable parties to process simple noncontested divorce cases through the courts on their own. There may be a broader use of the conciliation board concept. There appears to be no reason why all cases should be processed in the same manner. Why, if fairness can be insured by a simple process, should an automobile collision case involving \$3,000.00 have the same discovery, depositions and paperwork as complicated multi-million-dollar product liability litigation?

With this in mind, the suggested project is to develop new mechanisms, practices and procedures for dispute resolution, mechanisms which are more responsive to the relationships of the parties and of dispute types and which are less complex, less expensive, faster and more accessible to the public. It is our hope that some nationally-

recognized experts will work with selected Alaskans to review our present practices and look to the fundamental requirements for adjudicating various types of disputes. The LEAA has indicated a favorable response to this proposal and has sent a distinguished group including former deans of the law schools of Cornell, N.Y.U. and Stanford; the Executive Director of the National Center for State Courts; a professor from the U.S.C. Law Center and representatives of LEAA to make a preliminary study. They will soon make a recommendation as to whether the LEAA should fund this project. The Alaska Supreme Court has endorsed the project, and the application was drafted under the supervision of Administrative Director Snowden.

We do not know as yet whether the study will be funded, and if so, it is impossible to predict whether significant practical changes will be developed. Of course, before implementation of any recommendations, there would have to be a thorough review by the courts, the attorneys and others in the state. While we do not know whether anything will result from this application, we believe that it is incumbent upon us to explore this exciting possibility of improving the administration of justice and making it more accessible to the citizens of our state.

CONCLUSION:

In one way or another, the judiciary affects the lives of all citizens. There is a vast body of common law

not set forth by acts of the legislature. The courts must define that law and change it according to changing social conditions. Changes, however, must be carefully limited so that reliance may be made on existing law in conducting affairs. Additionally, the courts have the function of resolving disputed provisions of statutes enacted by the legislature and of upholding those precious rights granted to us by the United States and Alaska's Constitutions. Probably the most awesome power of the courts is that of sentencing, ruling on whether a person shall have the right to remain free and balancing his rights with those of society.

We have a fine system under the Alaska Constitution: our judges are insulated from political pressures and are selected on the basis of merit. In fact, Alaska's system is frequently held up as a model in other states.

It is my hope that with the continued cooperation from the other branches of our government and with reliance upon that tremendous reservoir of strength, the citizens of Alaska, we may strive towards making Alaska's judicial system match the integrity and fulfill the inspiration of its magnificent natural endowment.