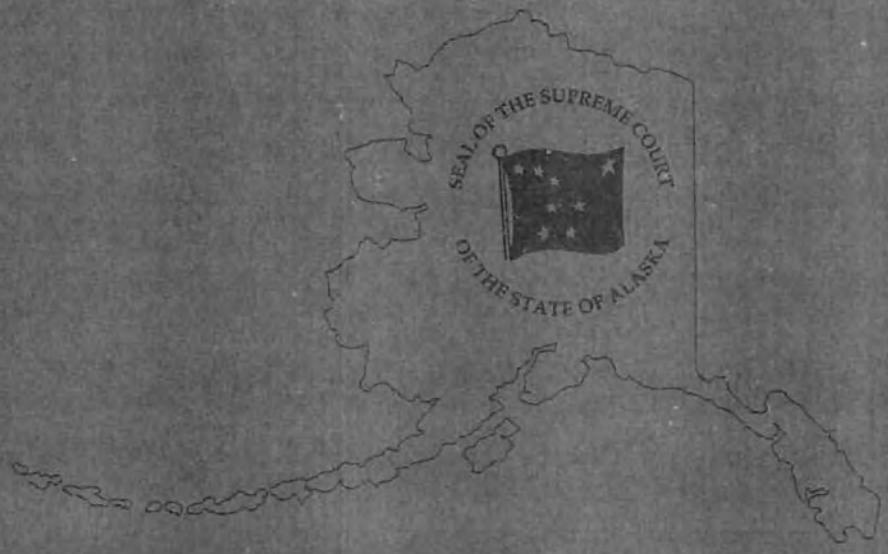
THE STATE OF THE JUDICIARY



A MESSAGE BY
CHIEF JUSTICE WARREN W. MATTHEWS
TO THE SECOND SESSION OF THE
TWENTY-FIRST ALASKA LEGISLATURE
MARCH 8, 2000

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INTRODUCTION

President Pearce, Speaker Porter, members of the 21st Alaska Legislature, I am pleased to come before you once again to report on the state of the Alaska judiciary. The first State of the Judiciary address was given by Chief Justice George F. Boney on January 20, 1972. Each year since then the chief justice has appeared before you to make an annual report. I am happy to be able to continue this tradition. I think that it is valuable, and I hope you think so as well.

I have divided this report into four parts. First, I will discuss the basics -- caseload, staffing, facilities, and the budget. Second, I will talk about court system efforts made in furtherance of legislative programs. Third, I will talk about why judicial independence in adjudication is essential. And fourth, I will mention restorative justice and therapeutic court trends that might change the way courts do business in the future.

THE BASICS

Caseload

Trial Courts

In the trial courts, we saw a moderate increase in total case filings in fiscal year 1999. There were 156,212 new cases filed. This represents a 5.4% increase in filings from 1998. Most of the increases occurred in the district courts. Statewide, superior court case filings were little changed. But there were major increases in some locations. In the Second District, consisting of Barrow, Kotzebue and Nome, total felony filings were up 19% from 1998 and 28% from 1997. In 1999 we disposed of 9% more cases than in 1998. Anchorage was particularly efficient, increasing its disposition rate by some 20%.

It is a much discussed question whether this year marks the beginning of the new millennium or the end of the old. I won't enter that fray, but at least it is clear that this year marks the end of the 90's. I looked at the statistics concerning trial court filings in the 90's to see what the longer term trends have been. This is what I have found. First, total non-traffic filings have increased at almost exactly the same rate as the state's population, about 14% in each case. During the same period, the number of trial judges has increased by only 4%, from 47 in 1990 to 49 in 1999. Two categories of cases have grown at a much faster rate than would have been predicted by our

population growth. They are felonies and children's cases. Felony filings increased during the 90's by 26% and children's cases increased by some 39%. These are labor-intensive cases because a high percentage of them go to trial. Finally, traffic cases are up by 47%.

Although this might be a little too much to absorb, I'd like to add one further statistic. According to the Uniform Crime Reports, the crime rate in Alaska has decreased since 1990 by 7%. If this is right, the fact that felony filings have increased faster than the rate of our population growth looks like very good news. Fewer crimes are committed, but more of them are solved and more criminals are brought to justice.

Appellate Courts

In the appellate courts the filing rate showed no important changes for 1999. Indeed, there has been little change in filings over the past three years. Our time-to-disposition statistics have improved in some respects, although they are still not what we would like them to be. The average time between submission of a case to the supreme court for decision and publication of an opinion was more than a month faster this year than last -- 7.9 months this year as compared to 9.1 months in 1998. It is also worth noting that the 1999 time is nearly three months faster than just two years before, when the time was 10.7 months. In the court of appeals the time between submission to the court and publication was 6.8 months, about two weeks faster than in 1998.

We continue to make a special effort to expedite cases involving child custody. In 1999, 50% of these cases went from submission to publication within 49 days, 75% of the cases were completed in 68 days, and 90% of the cases went from submission to publication in 85 days or less. These are all significant improvements over prior years.

I looked at the case filing statistics in the appellate courts over the decade. Unlike in the trial court, where the growth of case filings has matched or exceeded population growth, no particular trends are evident in the appellate filings.

I have touched on disposition rates in the trial and appellate courts. Before leaving this subject, I want to emphasize that delay is a matter of serious concern to us. We are looking at the problem systematically and we have taken a number of steps that we hope will reduce delay.

Last year I appointed a Time Standards Committee. The committee was charged with the task of recommending time standards for Alaska's trial courts for particular types of cases. The committee has finished its work. It has made its recommendation and its recommendations have been adopted by the supreme court. The standards cover all categories of cases. I'll give you an example of how they are designed to work. The standards for felonies provide that 75% of all felony cases should be processed to judgment (excluding sentencing) within 120 days, 90% should go to

judgment within 210 days, and 98% within 270 days. Expressing the standards in terms of percentiles leaves room for the truly extraordinary cases that cannot be brought to judgment within prescribed periods. Now that the standards are in place, we will be asking our area court administrators to manage the case flow in their districts in compliance with the standards.

Also on the subject of delay reduction, we have a committee charged with reducing appellate delay. This committee has been examining various aspects of appellate operations to see where appeals might be accelerated. The committee has also been charged with developing time standards for appellate case processing and we look forward to its recommendations.

An appellate settlement program is being developed that will identify cases that are appropriate for settlement before they get too far along in the appellate process. We anticipate that settlement conferences will be conducted by retired judges and justices and by private neutrals. The primary goal of this program will be to reduce costs and delays for parties in cases that are relatively routine and where the result is thought to be predictable. Currently, trial courts have the authority to order settlement conferences and they often do so with good results. Senior Justice Rabinowitz, for example, has acted as a settlement conference judge in the First District in 65 cases over the past 18 months. In 60 of those cases a settlement was reached. If our new

appellate rule can even partially approach this level of success, the appellate settlement program will be fully worthwhile.

New Judges

Since I spoke to you last, we have welcomed a new judge to the superior court and two new judges to the district court. In April, Patricia Collins of Ketchikan was appointed to serve as a superior court judge in Juneau. Judge Collins filled the vacancy created by Justice Carpeneti's appointment to the supreme court. Judge Collins at the time of her appointment was serving as a district court judge in Ketchikan and had done so since 1995.

In August, Governor Knowles appointed Kevin Miller of Ketchikan to fill the district court vacancy created by Judge Collins's appointment. Judge Miller had been in private practice in Ketchikan before his appointment. In September, the Governor appointed Samuel Adams of Anchorage to the Anchorage district court. Judge Adams filled the vacancy created by the retirement of Judge Bill Fuld. Prior to his appointment Judge Adams had worked in private practice and for 11 years was a prosecutor in the district attorney's office in Anchorage.

Each of these three new judges is very well qualified, and we wish them the best in their judicial careers.

Need for a New Judicial Position

Last year I spoke to you about the need for an additional judge in Bethel, but we did not request funding for a new Bethel position at that time. The Bethel court continues to experience rapid growth. The one superior court judge presently in Bethel carries a caseload far in excess of any other superior court judge in the state. Not only are the numbers of cases in his caseload extraordinarily high, but the composition of the caseload is difficult and labor intensive with a heavy concentration of violent felonies and children's proceedings.

We have dealt with Bethel's growing caseload with regular assignments from Fairbanks and Anchorage of both sitting and retired judges. Senior Justice Compton has graciously volunteered to help out in Bethel, and he currently is calendared to try seven termination of parental rights cases there beginning this month. Senior Judge Bill Fuld is also doing much work in Bethel.

But the practice of serving the caseload in Bethel with retired judges and judges who sit elsewhere is expensive and inefficient. After a full analysis of the Bethel situation and a series of meetings, the supreme court last month decided that an additional judge in Bethel will be necessary. Funding for this position is not in our budget request this year. We will continue to attempt to meet Bethel's needs with existing resources. But there is now no longer any question in our view as to the need

for an additional judge in Bethel, and next year we will ask you for funds for such a position.

New Facilities

This year I can report on three building projects which should improve court services in their respective communities.

The first is in Bethel. There the court has just moved into a new space. The new Bethel courthouse, which comes from the renovation of an existing building, provides two full-size courtrooms and has a hearing room for non-jury proceedings. The new facility also provides for a jury assembly area, which is a vast improvement over the old courthouse where people who were drawn for jury service had to line the hallways and sit on the floor. Security for members of the public and court staff is also much improved since prisoners can now be transported directly from a holding cell to the courtroom, rather than through crowded public hallways.

The second new facility is in Palmer. There we are in the final stages of an expansion that will provide two additional courtrooms and associated spaces. Palmer is also one of our fastest growing courts. The new space is sorely needed to address caseload increases.

The third, and by far the largest, new facility will be in Fairbanks. The new Fairbanks courthouse will have five stories and contain fourteen courtrooms. It will

improve security and is specifically designed to accommodate the unique needs presented by domestic violence and children's proceedings. Construction of the new Fairbanks courthouse has begun. Steel erection should start this month and we are still on schedule for substantial completion in January of 2001.

Good courthouses are essential to the functioning of the judicial branch. We thank you for providing these fine new facilities.

Budget

We are one of the three co-equal branches of state government. We have a resident presence in 41 cities and villages across the state. In some of these communities I think we are the only direct state government presence. Nonetheless our budget represents only about 1.3% of the state's total operating budget. We recognize that it is a core responsibility of the legislature to decide the level of appropriations for the judiciary along with all other branches of government. This is our constitutional system. We respect your role and appreciate its complexity.

Last year our appropriations were cut by approximately $300,000. That reduction has necessarily had an effect on our operations. We found ways of increasing our efficiency, but we could not absorb this cut without some reduction in service to the public. We were able to save some money by closing a magistrate court in the city of Pelican. We are able to justify this because the caseload there was low and seemed

to be getting lower. But we also had to eliminate 24-hour service in Anchorage for domestic violence victims. We closed the courthouse during the night hours and were thereby able to realize a savings in contract security services. But this means that domestic violence petitioners must now go to the police department rather than the court for after-hours assistance. With our already small budget and increasing caseload, it is not possible to reduce expenditures without also reducing service levels.

Our budget request for fiscal year 2001 has been submitted and I will not discuss it in detail here. But I do want to mention two items. We have made a capital request of $1,450,000 for the first half of a two-phase project to obtain a comprehensive centralized case management system. Our current system is old and inadequate. It also cannot provide the type of justice-related information that is needed by law enforcement agencies. And the system we have hinders our ability to gather information about prior criminal histories of defendants and their compliance with sentences that have been imposed. I urge your support for this item.

The second item that I want to mention is $109,800 to increase jury pay from $25 to $27.50 per day. We have requested larger increases in the past without success and so we decided to request small incremental changes. Our goal is to pay a fee that more nearly compensates jurors for their out-of-pocket expenses. The current pay was set in July of 1981, and since then the cost of living has increased over 55%. Statewide

more than 28,000 Alaskans are called to jury service each year. The right to jury trial is basic to our system. Jurors serve at considerable personal sacrifice, and we believe that our system should at least try to defray their out-of-pocket costs.

Let me relate an anecdote that puts a human face on jury service in some of our smaller communities. It shows the sacrifices and frustrations that often accompany such service. Presiding Judge Beistline of Fairbanks told me recently about a jury trial that he was conducting in Fort Yukon. A young man who lived 20 miles from the courthouse was summoned to jury duty. It was winter and the only way to town was by snow machine. His snow machine broke down halfway to the courthouse and the young man walked the last 10 miles to town. He arrived covered with frost but ready to serve. Word of his predicament reached the courthouse before he did and so when he entered the courtroom he received a standing ovation from everybody who was there. As a postscript, it turned out that he was related to one of the parties so he had to be excused, and after some hot coffee and cookies he began his journey back to deal with the broken machine.

Again, we depend on the jury system, jurors must make considerable sacrifices to serve, and we believe it is appropriate to raise the level of juror fees.

IMPLEMENTATION OF LEGISLATION

Although each branch of government has core areas where it must act independently, there are also many areas of shared responsibility. These take many and varied forms. What I propose to do now is list a number of activities the court system took last year in response to legislative initiatives.

Mediation and Alternative Dispute Resolution

In 1997 you enacted legislation to encourage broader use of mediation. The Alaska Court System agrees with this goal. I will briefly describe the mediation programs which are now underway.

- The Third District has established a child custody and visitation mediation program. This is funded through a federal grant. The court provides trained mediators to low-income parents in order to help them resolve contested child custody or visitation issues. The program is in place in Anchorage, Fairbanks and Kenai, and is scheduled to begin soon in Southeast Alaska. So far our statistics show that 82 cases have been referred and that complete or partial agreements have been reached in about 70% of these cases.
- There are mediation programs for child-in-need-of-aid cases in Anchorage, Bethel, Fairbanks, Kenai, and Kotzebue. These are also

funded by a federal grant. Two months ago we provided 32 hours of specialized mediation training to 15 contract mediators. Two weeks ago the programs opened for business. We are anticipating a heavy demand for this service and we will be tracking referrals and resolutions.

- In Juneau, Presiding Judge Larry Weeks reports that the judges continue to order the mediation of many domestic relations cases by private mediators. A high percentage of mediated cases are partially or wholly resolved.
- The Anchorage district court recently began a project using trained volunteer mediators to mediate small claims cases. The mediators make themselves available one day a week to any person who has a small claims trial scheduled.
- Also in Anchorage, a nonprofit corporation, the Resolution Center, is conducting a juvenile mediation program based upon principles of restorative justice. Under this program, when a youth is accused of a crime, Department of Health and Social Services intake officers evaluate the case to see whether it is appropriate for referral. If it is, and if the offender and the victim both agree to participate, a team of volunteer mediators conducts a meeting between the offender and the victim. At the

meeting, the victim relates the effects of the crime and the offender is expected to take responsibility for his or her actions. The victim and the offender often negotiate a sentence, which can include the payment of money, community work service and, necessarily, an apology. This program seems to be working well. It handled 104 cases in 1999. Offenders paid over $10,000 in restitution and the recidivism rate of offenders is said to be low.

- Also on the subject of mediation, the supreme court amended the rules of professional conduct governing lawyers. They must now inform their clients about mediation and alternative dispute resolution in any matter involving or expected to involve litigation. The court also facilitates private mediation by maintaining a directory of mediators on its home page.

Child Protection, Support and Custody

In 1998 the legislature made important changes in the child protection statutes. To reflect these changes, the supreme court has revised the rules governing child protection proceedings. We also added new provisions to ensure that these cases proceed expeditiously.

The legislature recently enacted a law requiring that a person's occupational or driver's license be suspended for nonpayment of child support. As required by this law, we promulgated rules that provide for judicial review of such suspensions. Also, as required by federal law, we conducted a comprehensive review of the child support rule. As a result of this review we made a number of substantive changes.

A number of legislators were critical of the fact that practices concerning appointment of child custody investigators and the use of guardians ad litem varied significantly among our judicial districts. The supreme court conducted a review of this subject. As a result, we adopted new rules governing the use of investigators and guardians. The rules should ensure uniform practices statewide.

Criminal Rule 39 Update

In 1990 you passed legislation allowing the court to order reimbursement of some of the costs of appointed counsel for criminal defendants who are convicted. In response we promulgated Criminal Rule 39. This rule continues to work well. In 1999 the state collected more than $800,000 from judgments entered under this rule, and the Municipality of Anchorage collected another $300,000. In the current year the state has collected more than $900,000. You have before you a bill that would authorize expansion of this program to all who receive appointed counsel regardless of whether

they are convicted. We favor this, for it is our view that the duty to pay for appointed counsel should not depend on the ultimate resolution of a particular case.

District Court Rule 8 Update

Last year I reported that we had changed the primary method for dealing with the situation where people do not respond to traffic citations and citations for other minor offenses. Now, instead of issuing bench warrants, money judgments are entered. The year 1999 was the first full year in which this new rule was in effect. The Municipality of Anchorage reports collections of approximately $1,500,000 under this rule. And these collections represent over 12,000 bench warrants that did not have to be served, saving another significant sum. The new rule appears to be a successful method for enforcing sanctions for minor municipal and state violations.

JUDICIAL INDEPENDENCE

The legislative resolve that invited Chief Justice Boney to make the first State of the Judiciary address some 28 years ago mentioned that it was important to strengthen the understanding between the legislative and judicial branches and that an annual State of the Judiciary address would further that goal. In the spirit of this resolution, I think it is worthwhile to discuss the subject of judicial independence.

In adjudication, judges must be independent. By this I mean they must be able to decide cases without fear or favor. Plainly put, cases must be decided based on the

judge's considered judgment as to the law and the facts, uninfluenced by public opinion and without apprehension of personal consequences to the judge.

In English history, under the Stuart kings, judges were not independent. When a judge made a decision that displeased the king, the king could simply remove him. Even the great Lord Coke was dismissed for not ruling the way King James wanted him to rule. Service at the pleasure of the king was changed in England before the American Revolution. Instead of serving at the whim of the king, judges served during good behavior and for a fixed salary. Neither the king nor parliament could then influence judicial decisions.

But this change was not brought wholesale to the American colonies. One of the listed tyrannies in our Declaration of Independence was a charge that the king controlled the judges. The Declaration states that the king "has obstructed the administration of justice . . . , he has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries." The founders of our country took judicial independence seriously. They built it into our constitution by creating an independent judicial branch staffed by judges who were tenured for life.

But it is interesting that when American justice was first brought to Alaska after the Alaska Purchase, judicial independence was not brought with it. (In much the same way that judicial independence was left behind when English justice was brought to the

original colonies.) I'll briefly tell you the story of Alaska's first judge. His name was Ward McAlister. He arrived in Sitka in 1884 and was immediately presented with a series of cases that quickly led to his judicial downfall.

Sheldon Jackson was a Presbyterian missionary of national prominence. He had founded a boarding school for Natives in Sitka. He had a contract with the government to educate Native children at the school for a monthly fee for each student. To ensure financial and educational stability, Reverend Jackson had the Native parents sign agreements with the school that relinquished custody and control of the children for a five-year period. As might be expected, sometimes these children wanted to go home, and sometimes their parents wanted them to come home. But this was contrary to the agreement and so the Reverend Jackson held the Native children at the school. The U.S. Attorney brought a series of habeas corpus petitions on behalf of the Native parents before Judge McAlister. The U.S. Attorney argued that these contracts were indentured servitude and therefore illegal. Judge McAlister agreed and so ruled. He was clearly right, at least by today's standards. But the Reverend Jackson was outraged. He wrote to many people in positions of influence, including another Presbyterian minister, who was President Cleveland's brother, and to President Cleveland's daughter, who was a dedicated supporter of his missionary work. Without

a hearing or much hesitation, President Cleveland fired Judge McAlister and, for completeness, the U.S. Attorney.

Reverend Jackson's efforts were legally helpful to his cause. We can read the resulting case in the Alaska Federal Reports.[1] Judge McAlister's replacement as the judge for Alaska decided the next habeas corpus petition by a Native mother seeking to regain custody of her child from the mission school in favor of Reverend Jackson. The new judge held that the five-year contract was valid, and thus the Native mother had no right to bring her child home.

This is an excellent illustration of what happens when judicial independence is not safeguarded. A judge ruled in accordance with the law and the facts. But because the ruling was against the interests of a powerful litigant, the judge was removed. His replacement was duly instructed by events. When the issue next arose, the new judge ruled in favor of the powerful litigant.

We are proud of our constitutional freedoms. But they are often not popular when applied in actual cases. In order to preserve our freedoms, judges must be able to rule without the threat of repercussions. Credible threats, as in the case of Judge McAlister and his successor, have the effect of biasing and distorting fair decision making. And that is why judicial independence is such an essential part of our system.

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[1] See In re Can-Ah-Couqua, 29 F. 687 (D. Alaska 1887).

LOOKING TO THE FUTURE

Speaking to you 28 years ago, Chief Justice Boney remarked that Abraham Lincoln would feel very much at home in most of the courts in America, since they really haven't changed very much since he practiced law in the 1840's in Illinois. In many respects that is still true in Alaska and in the other states. I find it comforting in a way, because common law trials are well designed to achieve justice. But it is also worthwhile to reflect on a trend that might signal an important shift in the way courts do business.

I'm speaking of the restorative justice and therapeutic court movements. Nationally the best known therapeutic court is the drug court, although the same model has been applied to other types of chronic destructive behavior. In the therapeutic court a single judge is assigned a certain class of cases and the judge uses the threat of sanctions to compel compliance with a long term treatment plan. Nationwide some remarkable successes have been reported in drug courts. Recidivism is said to be greatly reduced. In the therapeutic court the judge retains active control over cases for a long period of time, and many hearings are scheduled to ensure that defendants are complying with rehabilitation plans. Thus therapeutic courts are labor intensive and expensive. But advocates say the added costs are much less, viewed overall, than the costs of recidivism experienced in the present system.

In Alaska, the only therapeutic court is the mental health court conducted in the Anchorage district court. This project focuses on misdemeanor offenders who suffer from mental disabilities. These people have historically cycled through the district court following arrests for disorderly conduct or trespassing. In the mental health court, treatment is ordered and monitored closely, as an alternative to incarceration. The project was started in 1998 as a collaboration between the court system, the Department of Corrections, and a number of law enforcement and social service agencies. The program is funded in part by a grant from the Alaska Mental Health Trust. To date, the mental health court has handled the cases of 139 people. Positive results have been achieved. For example, one evaluation studied 36 mental health court participants. In the year prior to their participation, these individuals spent collectively 3,062 days in jail. In the year of their participation in mental health court, jail days were reduced to 585. Alaska Psychiatric Institution days were similarly reduced. Much credit for the initiative that led to the establishment of the mental health court should go to District Court Judge Stephanie Rhoades. We hope to see the program continue, and we also hope that the model can be used outside of Anchorage.

We have recently completed a study of the feasibility of a drug court for Anchorage. This was found to be feasible and a federal grant to begin operating such a project has been applied for.

The term restorative justice refers to an approach to criminal sentencing that is intended to be therapeutic not only for the offender, but also for the victim and the community. The goals of restorative justice are sometimes described as accountability and rehabilitation for offenders, restitution and healing for victims, and for the community. In each case a plan involving punishment, rehabilitation, restitution, apology, and often absolution is agreed to by all concerned, and then implementation of the plan is closely supervised. In Alaska, one adaptation of restorative justice is the use of sentencing circles. These have been used most systematically by Mike Jackson, our magistrate in Kake. He convenes sentencing circles that use restorative justice principles and local customs and traditions. Magistrate Jackson has convened 20 circles to date, usually involving misdemeanor assault and alcohol-related crimes. He reports that the process has worked well in most cases and that some offenders have turned their lives around after years of problems.

We are encouraging therapeutic court and restorative justice initiatives. We will monitor the results. Only time will tell whether these movements become important permanent elements of the administration of justice in Alaska.

But I should add that the youth court movement is a specific example of restorative justice, and it seems to be well on its way to becoming a permanent feature of our justice system. The Anchorage and Fairbanks youth courts are well established.

Anchorage handled more than 400 cases last year and Fairbanks more than 100. Youth court defendants have performed many thousands of hours of community service. The recidivism rate in both programs is low, only around 10%. Youth courts are underway or in the process of development in many other communities. We continue to support the youth courts and applaud the efforts of the many volunteers who participate in their operation.

CONCLUSION

This concludes the substance of my report to you. It has been detailed, perhaps overly so, but I do not want this mass of detail to obscure the central point. The justice system in Alaska is functioning well. Cases are being promptly tried before judges who are fair and highly competent. Our non-judicial employees are doing an excellent job and their morale is good. Innovative initiatives to improve the system are underway, and we encourage them.

The Alaska Legislature has always supported the goal of providing the state with an outstanding justice system. We in the judiciary are also committed to that goal, and with your help we will continue to strive to achieve it.

On a personal note, I would like to observe that this year marks the end of my term as chief justice. This is the sixth time that I have given a State of the Judiciary

address to you. I want to say that I appreciate the high degree of courtesy you have always shown me. Thank you again and I wish you well in your difficult deliberations.