

THE STATE OF THE JUDICIARY

February 8, 2006

Chief Justice Alexander Bryner

Senator Stevens, Speaker Harris, Senators and Representatives, and guests.

Thank you very much for this opportunity to report on the state of Alaska's judiciary. This is my third and final chance to address the Alaska Legislature during my term as Chief, which ends in July.

Three members of the Supreme Court are here with me today. Justice Robert Eastaugh has served on our court since 1994. He heads the Supreme Court's Fairness and Access Committee, and serves on our Appellate Rules Committee. Although he now lives in Anchorage, his roots are in Juneau. Justice Eastaugh's father was a leader of Juneau's legal community, and before that his grandfather started one of Juneau's earliest law firms and served as a delegate to the Alaska Constitutional Convention.

Justice Dana Fabe is here too. Justice Fabe was appointed to the Supreme Court in 1996, becoming the first woman to serve on Alaska's Supreme Court. She heads the Alaska Supreme Court Outreach Commission and our Civil Rules Committee, serves as a Board Member of the American Judicature Society, and co-chairs the Alaska Teaching Justice Network.

The third member of the court with us today is Justice Walter Carpeneti, who makes his home here in Juneau. Justice Carpeneti was appointed to the court in 1998 after a long and distinguished career as a superior court judge in Juneau. He chairs our

Judicial Education Committee, which works hard to ensure that judges receive the training they need to tackle the difficult issues that come before them.

Next, I'd like to introduce the Court's Administrative Director, Stephanie Cole, and two members of our senior staff. Stephanie Cole has served in the Court System for 28 years; she has been our Director since 1997. Deputy Director Chris Christensen is here today too; as is Administrative Attorney, Doug Wooliver. As those of you who have worked with Stephanie, Chris, and Doug already know, they are talented, hard working, and dedicated members of the court system team, and we appreciate their unflagging efforts.

I also want to extend greetings and regrets on behalf of Justice Warren Matthews, who couldn't attend today. Justice Matthews has been a member of our court since being appointed by the late Governor Jay Hammond nearly 30 years ago. As our longest serving member, he acts our de facto historian, and recently presented a history of Alaska's judicial branch at a luncheon honoring the 50th Anniversary of Alaska's Constitutional Convention. Representative John Coghill honored us by attending that luncheon, and we suspect his presence might have had something to do with the fact that his father, former Lt. Governor and long-time civic leader Jack Coghill, was there too — to be honored for his role as a constitutional delegate fifty years ago.

That brings me to the subject at hand: the state of our judiciary. This week marks the 50th Anniversary of a monumental milestone in the history of our state. On February 5, 1956, the delegates to Alaska's Constitutional Convention in Fairbanks signed their approval to the document that has guided all of us so well for half a century: the

Alaska Constitution. Included in the constitution's provisions is Article IV, the Judiciary Article, which became the foundation and cornerstone for the Alaska Court System.

Today, fifty years later, I can say without hesitation that Alaska's judicial branch of government is strong and sound. But we face challenges, too, just as we did in 1956. Many of our system's current strengths and challenges find their source in the historic action that our constitutional founders took in 1956. So in reporting on the state of our judiciary on its 50th Anniversary it seems fitting to begin by glancing back to see what Alaska faced fifty years ago.

During the push for Alaska Statehood in the 1950s, the primitive condition of Alaska's territorial courts was a big issue for Statehood advocates. Alaskans had no judiciary of their own, and were at the mercy of the federal government. Territorial judges were appointed directly by the President for four-year terms, and often were not even residents of Alaska or members of its bar. Only four judges served the entire state.

One result of this system was a tremendous backlog of cases, which in turn led to widespread lack of faith in the territorial justice system. Charlie Cole, Fairbanks Territorial lawyer and former Alaska Attorney General, once observed that when you filed territorial civil cases, they "sort of disappeared in the great pool of cases that were pending. We essentially had a lawless civil society."

The Alaska Statehood Committee, chaired by the late Bob Atwood, saw the task of creating a judiciary as a challenge and opportunity for our constitution's framers. "The challenge is great," the Committee said in a 1955 press statement,

because in the judiciary rests the ultimate protection of the fundamental rights of persons traditionally guaranteed by our American federal and state constitutions; only a well-designed judiciary can efficiently and fairly perform this guardianship function. The opportunity is rare because Alaska, not having as a Territory its own judicial system, is free to choose from the best of modern concepts of a judiciary without being hampered by that resistance to change which so often characterizes long-established systems.

The delegates to the Alaska Constitutional Convention seized the opportunity and met this challenge by adopting the Constitution's Judiciary Article. Thanks to their efforts, today we have a unified, centrally administered judicial system that is among the most efficient in the country. Our system nominates judges on the basis of merit through a constitutionally independent judicial council. The system provides for judicial accountability by allowing the public to vote regularly on whether judges will be retained; and it protects against judicial misconduct through an independent judicial conduct commission. Over the half-century since Statehood, these constitutional features have become recognized nationally as the hallmarks of a model court system.

But the constitutional framework for Alaska's judicial branch was only the beginning step in creating a successful court system. Even more challenging was the practical problem of how to build a system "from scratch" that would serve all the people and communities of the biggest state in the Union. Yet despite unparalleled hardships and overwhelming odds, the Alaska Court System became fully operational within a year of Statehood.

In May 1959 the Alaska Judicial Council met to undertake the first judicial selection process by making nominations for the Alaska Supreme Court. In August and September 1959, Governor William Egan appointed the first justices: Justice Walter Hodge, who later became the first U.S. District Court Judge for the District of Alaska; Justice John Dimond, after whom the Juneau Courthouse is named; and the legendary Chief Justice Buell Nesbett, namesake of the Anchorage trial court building.

When Chief Justice Nesbett first reported to his new post, there were no state court facilities except a tiny office in downtown Anchorage with “rag-tag desks,” no staff, and no phones. According to Jerry Kurtz, Nesbett’s first law clerk, the court had “absolutely nothing to work with.” There were no law books and no law libraries; no rules and procedures, and no case law. The vast body of federal precedent that applied under the territorial system was no longer binding on the new state, and appellate cases that came before the new court were almost always cases of first impression. Complete sets of state codes and session laws were rare, and the new court system spent months scaring up enough copies for the judges’ chambers.

The justices immediately set to work adopting rules and procedures for the new court system. They also hired an administrative director and staff to address the many organizational tasks at hand, including contracts for space and services, personnel recruiting, accounting systems, fee schedules, inventories, and budgets.

By November 1959, the first eight superior court judges were appointed and took the oath of office in Juneau. Because none had served on the bench before and there were no predecessors to guide them, their first task was to board a plane for a week of

judicial training in New Jersey. By February 1960, when President Eisenhower signed the proclamation authorizing Alaska to assume jurisdiction for the first time, the judges were prepared to call their first cases. The new state system was in business, and the old territorial courts were closed for good.

Trials and hearings got underway, but the physical constraints remained daunting. State courthouses in Anchorage and Fairbanks would not be built for another five years, so space was shared with the federal courts. In Anchorage, a strip of tape running down the middle of the clerk's counter in the old federal building marked the divide between state and federal jurisdiction.

Rural magistrates and deputy magistrates faced even more unique challenges in finding adequate physical space. The monthly rental allowance for a deputy magistrate was only \$25.00, and most worked out of their homes. Margaret Blackman's biography of Barrow Magistrate Sadie Neakok paints a picture that was typical of Bush justice:

In 1960 arraignments and sentencing were conducted at Sadie's kitchen table; her kitchen filing cabinets bulged with dockets and the vital statistics she was required to keep for the North Slope; she had no law clerk or even a typewriter; jail was a spare room at the school and later a two-cell holding facility that she often had to clean herself on the weekends; the state trooper flew in to investigate serious cases, as there were no resident police; court was held after hours in a schoolroom, and juries deliberated in the church.

Other rural magistrates were just as resourceful. In Aniak, Magistrate Arlene Clay traveled her village circuit through the wilderness — by boat in summer and dog team in winter. Kenai Magistrate Jess Nicholas used a blazo crate as a judge's bench after the card table he had borrowed was reclaimed by its rightful owner. Magistrate Martha Avey of Yakutat converted her living room into her chambers while her husband was out commercial fishing. "I can hear him now," she wrote in anticipation of his return " 'Something's gotta go!' "

Being a village magistrate meant making additional sacrifices to one's personal privacy. As Sadie Neakok's biography says,

The (magistrate) job requires only a high school education, but the unwritten criteria include the ability to withstand the loneliness of being an airplane flight away from anyone else in a similar position, the strength to disentangle oneself from the loyalties of kinship and friendship in imposing sanctions, and the endurance to suffer being viewed as a judge twenty-four hours a day, three hundred and sixty-five days a year.

Despite these difficulties, the early years of the Alaska Court System were years of remarkable achievement. We transferred nearly 5,000 cases from the territorial system to our system, and many were in poor shape. In Fairbanks for example, 25 open probate files were discovered that had been pending since between 1905 and 1915. Currency and uncashed checks were sometimes found amid old papers, along with serious questions of title to property that had never been resolved. Within months, many such cases were resolved, and the territorial backlog was reduced by 20%.

New case filings suddenly soared in the revitalized system — enough to offset the reductions in backlog. As the court's first Annual Report observed:

There is no certain or definable reason for the increased activity in case filings. It is believed that the fact that the state courts are handling cases with a rapidity heretofore unknown in Alaska may be a contributing factor. Attorneys and litigants know that when a case is filed a real attempt is made to process it without delay.

Given a justice system they could trust and believe in, then, Alaskans accepted Alaska's new courts as their own, and began to use our court system as it had never been used before.

So our first judges had their hands full. At Statehood, many observers predicted that doubling the number of judges from four to eight would mean that no Alaskan would, in the words of our first Governor Bill Egan, ever again "have to wait and wait and wait" for justice. Yet it soon became clear that Alaska was growing and would continue to grow. Throughout the 1960s Alaska's steady growth required judges to be added to the supreme court and superior court, and new district courts were established in communities across the state. This pattern of growth intensified with the oil boom of the 1970s; and it has continued steadily since then.

We now have offices in 44 locations throughout Alaska, ranging from our 353,000 square-foot headquarters in Anchorage to our 160 square-foot complex in Unalakleet. Our system encompasses about 750 employees; only about 62 are justices or judges; and about 39 more are magistrates. The vast majority are clerical and technical

workers. In fact, 61% work at range 14 or below — most of them in busy trial-court settings. These employees form the backbone of our system and deserve special recognition.

Throughout our history, we've had the good fortune to be served by highly qualified and committed judges and staff. Two of our first superior court judges — Judge James Fitzgerald and Judge James von der Heydt — were eventually elevated to the federal bench, and though both are now in their late 80s, they remain active today as Senior Judges of the U.S. District Court for Alaska. Each has labored for the cause of justice in Alaska for over 46 years.

The late Justice Jay Rabinowitz, namesake of our Fairbanks courthouse, served on the state bench for nearly as long — from his appointment to the superior court in Fairbanks in 1960 to his work as a settlement judge in Juneau at the time of his death over 40 years later, in 2001. In between, he was a legendary justice on the Alaska Supreme Court, where he served with great distinction for 32 years.

Judges like these exemplify the finest traditions of Alaska's court system. From its inception half a century ago, our system has relied on outstanding, dedicated public servants. And we have tended to take it for granted as Alaska grew that there would always be plenty more. But times are changing. More and more talented judges are leaving the bench, many choosing to go long before retirement, citing overwhelming demands and diminishing rewards. In the last six years, turnover in the superior court for both the 3rd and 4th Judicial Districts has topped 50%. Last year alone six judges retired or announced their retirement.

At the same time, we have welcomed many new appointments to our bench: Judges Pat Hanley and Alex Swiderski to the District Court in Anchorage; Daniel Schally to the District Court in Valdez; Keith Levy to the District Court in Juneau; Margaret Murphy to the District Court in Homer; Dennis Cummings to the District Court in Bethel; Robert Downes to the Superior Court in Fairbanks; and most recently, Patrick McKay and Eric Aarseth to the Superior Court in Anchorage.

This turnover marks a tremendous change to our institution: we are losing untold years of accumulated experience, skill, and institutional memory. I'm confident that we can make up for this loss and maintain the high standards we have adhered to since Statehood. But we can only do so if the most talented, experienced, and dedicated members of Alaska's legal community continue to apply for Alaska judgeships. So far we have been fortunate in attracting applicants from this select pool of proven and experienced lawyers; the continued excellence of our most recent appointments has been reassuring. Yet there are disturbing signs of change in our future.

For the first time in memory, judicial vacancies in several locations have been re-advertised or are remaining unfilled because not enough qualified candidates are applying. The problem is most acute in Bethel, where the current superior court vacancy has been advertised twice unsuccessfully; we now expect that the post may remain open for up to two years. This trend is alarming: it sounds a clear warning that we can no longer take it for granted that Alaska's most talented practitioners will aspire to be judges.

Although we cannot be certain why so many experienced judges are leaving and so many of our brightest prospects are losing interest, several possibilities need to be mentioned.

First judicial positions seem to have lost some luster as caseloads have steadily grown over the years. In 1960, our courts handled 12,000 civil and criminal filings; in 2005, 147,518 cases were filed. Although the number of judges has also increased the expansion has not kept pace with the caseloads. Our body of law has also grown to be broader and more complex, so cases often take longer to resolve. These days, judges routinely find themselves at the mercy of packed calendars. For example, Judge Dale Curda, who will step down in March after 15 years on the bench in Bethel, recalls a recent child welfare hearing that ran past midnight because there simply was no other courtroom time available.

Heavy caseloads have been especially stressful in areas that are growing quickly, like the Mat-Su Valley. At Statehood, the Mat-Su was home to a few thousand scattered residents who were served by a lone deputy magistrate. I remember that as a District Court Judge in Anchorage in 1975 I would drive to Palmer once every few months to hold a jury trial in a fish and game or DWI case; Palmer Magistrate Dorothy Saxton handled the rest of the court's business there all by herself. But the area's population has boomed to nearly 75,000 people, and is still growing. The Valley now has two superior court judges, three district court judges, and one magistrate, all of whom have to struggle just to keep up with rising demands. Fortunately, these critical needs are being recognized

and addressed by the Governor and the legislature; but resolving them will take a coordinated and sustained long-term effort.

A second reason why judicial vacancies may be less attractive now than they have been before lies in the kinds of cases we currently handle: In 1960, drug-related crimes and the devastation they cause were a relatively infrequent problem; today they account for a sizable percentage of criminal caseloads. In 1960, divorces, custody disputes and child welfare proceedings were fairly rare; today they account for over 35% of the superior court's civil caseload. Nationwide, courts are seeing a disturbing increase in the number of child abuse and neglect cases, and Alaska is hardly immune from this trend. While all of us recognize that these types of cases are vitally important, they are emotionally charged and draining. Presiding over these difficult cases on a daily basis can tax the commitment of even the most seasoned judges.

The third, and possibly most important, reason why fewer qualified candidates seem interested in applying for Alaska judgeships is that judicial pay in Alaska has failed to keep pace with salaries in other areas of the legal profession and with judicial salaries in other courts of our nation. Historically, our state superior court judges earned approximately the same pay as their federal counterparts, United States District Court judges. But federal salaries began a steady rise in the 1980s; so did judicial pay in most other states. Alaska did not keep up. We now rank near the bottom of the national average. When adjusted for cost of living, Alaska's judicial salaries place our state 47th out of 48 states that have COLA data. And today Federal District Court judges earn about 43% more than our superior court judges, who, by comparison, handle far heavier caseloads.

And the problem grows dramatically worse in remote areas of Alaska, where arbitrary limits on cost-of-living adjustments for judges effectively promise to penalize anyone who considers accepting a Bush judgeship.

We greatly appreciate the Governor's proposal in this year's budget to add court positions; these judgeships are an important step to addressing the burgeoning demands on our system. But unless we also address the difficult issues of judicial recruitment and retention, we will not be able to count on filling these new positions with qualified judges. And this is a risk we simply can't take: we cannot afford to lower our traditional standards for selecting new judges. Alaskans need to be sure that their cases will be decided by competent judges: experienced and proven leaders of the legal profession who know how to correctly apply the law in a timely, thorough, and fair manner. Because the rise in judicial turnover and the prospect of extended vacancies jeopardize Alaska's hard-won traditions of trust in its system of justice, we must work together to resolve these issues.

Over the years since Statehood, the Alaska Court System has faced many challenges; today's challenges are no different. We continue to meet them with determination, innovation, and the same tools that made our early leaders so effective: enthusiasm, hard work, and commitment to public service. We continue to embrace new programs that show promise, such as therapeutic courts, mediation, and the Family Law Self-Help Center. We continue to implement new technologies such as the CourtView computer system to improve our case management and reporting capabilities. As you know, modern information technology is tremendously complicated and costly, and it

changes constantly. Keeping up with public expectations in the age of instant information places taxing demands on the entire justice system, and we continue to work closely with other justice agencies to ease this common burden.

We also remain committed to helping Alaska's citizens fulfill their role in our jury system. Our efforts range from implementing major changes that simplify jury service to simple improvements like making sure that we thank all Alaskans who report for jury duty so that they know how much we value their service. And we continue to foster community engagement through judicial outreach and activities such as Law Day and our annual *Educating on Law and Democracy* conference for teachers.

If Chief Justice Nesbett were still with us today, I think he would be pleased with the strides our court system has made. Today, the Alaska Court System serves a state population of over 663,661 — nearly three times larger than the 1960 population of 226,000. Case filings in our courts statewide are more than a dozen times greater than they were at the time of Statehood, and we handle the added load well. As a system, we remain lean and efficient. Although the judicial system forms a separate, co-equal branch of Alaska's government, we remain tiny by comparison to Alaska's two other branches: we annually spend only about 1% of the state's total operating budget.

Our justice system, like any human enterprise, requires constant adaptation to changing demands. From the time of Alaska's Constitutional Convention and the early days of Statehood, we have built a proud history of adapting to change and its challenges with vision, courage, and resilience. From making do with a kitchen courtroom, to fashioning a blazo crate into a judge's bench, to burning the midnight oil to protect a child,

the Alaska Court System constantly strives to meet the high standards that our constitution's framers set for us fifty years ago. With your help, we can ensure that we still meet these standards fifty years from now. As Judge von der Heydt said when he closed the first court session in Juneau so many years ago: "Let's all work together to make Alaska's court system the very finest in the nation."

Thank you very much for the opportunity to address you today.