

## Triage and Justice

Address by Senior Circuit Judge Frank M. Coffin to the Maine Judicial Conference, Ramada Inn, Portland, Maine, November 14, 1991

Twelve years ago, at your conference at the Samoset, I had the pleasure of speaking to you on the subject, "Judges and Jurisprudents." Tonight my subject is a somber one: "Triage and Justice." I start with line 1, scene 1, Act I of Richard III: "Now is the winter of our discontent." I stop after the first line because Shakespeare goes on and qualifies our discontented winter by adding that it is "Made glorious summer by the sun of York." But in our case we shall see no sun in York, or Cumberland — all the way to and including Aroostook and Washington.

These are some of the hardest of times. Our nation, state, and towns are in deep recession where each misfortune feeds on others: budget deficits forcing shrinkage in public programs which leads to greater unemployment and the chilling of investments in production, which dry up the sources of taxes, which only add fuel to the fires of further budget cuts . . . . Everywhere there is voter skepticism (or worse) of incumbents and, as the Turnpike referendum showed, distrust of the Establishment. Distrust, that is, of the executive and the legislative, but not the judiciary.

How ironic and tragic that in their desperate efforts at damage control, the other two branches, in state after state, have subjected the judiciary to triage, that ominous word which gained currency when medics at a wartime front are forced to decide which ones of the badly wounded to try to save and which to abandon. This is not a parochial problem just for us. Nor is it a problem just for the states. It affects our national justice system which, as Alexander Hamilton termed our dual federal-state arrangement: "ONE WHOLE." State courts, accounting for 85 percent of all appellate decisions and 98 percent of all decisions at trial, are clearly the major instrument of justice in this land.

I invite you now to take a brief tour with me through all the New England states and see how deeply the budgetary knife has cut into the very marrow of the entire third branch of government.

In New Hampshire delays in funding equipment and staff kept the brand new Hillsborough County Courthouse idle for more than a year. The press of criminal cases means that civil cases cannot be tried for from two to five years. Night sessions for some courts have been proposed without providing for additional judicial personnel. The governor proposed that private lawyers pay a yearly \$500 fee for the right to practice. Massive increases in filing fees have also been proposed. Vermont has gone beyond charging extra fees to litigants desiring civil jury trials; it has declared a moratorium on them for the last five months of its fiscal year, with the unexpected result of a halt in settlements.

In Massachusetts, Chief Justice Liacos reported the loss through attrition of 675 court employees, with an estimated further loss this year. Payless vacation days and deferring compensation until retirement are some of the heroic measures which have been taken. In a "Meet Your Judges" program this spring the audience gasped when Judge Nancy Dusek-Gomez of the Springfield District Court said that she has to clean her own chambers and that toilets in her courthouse have not been cleaned for a year. Only a week ago the Boston Globe reported that a judge tidied up and vacuumed a courtroom because no janitor was available. Chief Justice Liacos wrote in his First Annual Report concerning his first year and a half in office, "I have spent most of my time fighting to preserve our courts' capacity to function as a separate and co-

equal branch of government in the face of a continuing statewide fiscal crisis."

In Rhode Island, according to Bob Herold, Deputy State Court Administrator, the courts in calendar year 1989 gave back 10 percent of their funded budget; in the year ending last June 30th, reduced numbers of jurors were called, three district courts were closed, aging computers were not replaced, out-of-state travel was totally eliminated, hiring was frozen, maintenance service was privatized. This last step meant that waste is collected only three nights a week, resulting in a notable increase in the insect population. In short whatever "fat" there was has been squeezed out. There is nothing left to give up ... except justice itself. This is not mere rhetoric. The court system is now understaffed. If two-person offices are to be further reduced, the office must be closed if court is to be held.

In Connecticut, Judge Aaron Ment, the Chief Court Administrator, gave me this report on the recent efforts of the courts to cope with budget cuts. In preparation for this 1991-1992 fiscal year, the central office of the superior court was reorganized, work schedules of adult probation officers were revamped, the child support enforcement system was modernized, a vacancy rate three times that of normal was maintained, and 82 people were laid off. Notwithstanding these retrenchments, the judiciary's requested budget of \$143.8 million was cut by the governor to \$136 million, not counting additional reductions authorized by the general assembly. Now facing a critical \$4.8 million shortfall, Judge Ment reports:

To address this shortfall, we have already scheduled the suspension of jury trials, eliminated 40 middle management positions, and planned the consolidation of court facilities. Furthermore, we are currently exploring the closing of many probation, family and support enforcement offices and court locations, limiting the time within which clerks' offices will be able to provide assistance to the public, and laying off more than 200 additional employees.

In Maine our chief justice has reported the results of a two year austerity program: "reduction in work force, maintenance of four judicial vacancies, elimination of out-of-state travel and all judicial and clerical training programs, elimination of substantially all overtime, elimination of any contractual increases for court officers and bailiffs, and reductions in leased space". The Maine Supreme Judicial Court, striving, as Chief Justice McKusick put it, to "do more with still less," instituted a \$300 filing fee for any litigant demanding a civil jury trial, thereby provoking a formal protest from the state bar association. Various filing fees and fees for mandatory mediation of family matters have been increased. And last month, in a letter to the governor, the chief justice reported that the current Fiscal Year appropriation for the courts is at virtually the same level as last year, but that some \$3 million of additional mandatory, unavoidable expenses are expected to be absorbed. They include over \$1 million in debt service on bonds for newly constructed courthouses, over a million dollars for an extra pay period and mandated cost-of-living increases, as well as higher postal and utility rates. His stark conclusion was that [[T]he Third Branch will not be able to live within a \$31.7 million appropriation in this current year."

This is not all. You are in the throes of further cuts. Your short-handed clerical staff is frustrated over seeing paper work pile up and not being able to work overtime to catch up. After a brave start, your compensation levels have stagnated. You apparently do not share in supplemental appropriation requests because you are an "independent branch," but you do share in across-the-board cuts as if you were an office in the executive branch.

The process itself makes a mockery of separation of powers. Unlike the federal judicial branch, for some years you have had to run the gauntlet of two tiers of cuts, executive and

legislative. Even such a newly emerging democracy as Hungary grasps the significance of this. Its new legislation, creating its Constitutional Court, provides: "The Constitutional Court shall draw up its own budget and shall submit it, as part of the State Budget, for approval to Parliament."

It is not surprising that alarms have been sounded. Chief Justice Malcolm Lucas of California recently described the situation in these words:

We cannot wait for news from the governor or the legislature that we must cut back "just like every other state agency." If we do so, we not only risk losing the money we need, but we also risk undermining the stature of the courts as an independent branch of government and our basic ability to perform the very functions for which we are designed.

Chief Justice Wachtler of New York has even brought suit against Governor Cuomo on behalf of the judiciary.

One state supreme court has also used strong language:

From a breakdown or paralysis of government chaos is the inevitable result. This is no fanciful fear which we express. In these days of world unrest and the widespread breakdown of economic and governmental structures we are too prone to think and say it cannot happen here. The price of liberty is eternal vigilance. It is within the power, and is the duty as well as the function of this court to safeguard and protect within the borders of this State the fundamental principles of government vouchsafed to us by the State and Federal Constitutions. We should be ever alert to exercise our constitutional authority not only to uphold and maintain the Constitution against direct attack, but also to repel so far as lies within our power the first step toward an invasion of its guaranties. . . . [and] to insure the orderly conduct of government, and a proper discharge of the essential functions thereof. (Emphasis supplied.)

This was the language used by Associate Justice Merrill, writing for our Maine Supreme Judicial Court in *Morris et al. Pet'rs. v. Goss*. 147 Me. 89, 106, in 1951.

Well, I am not suggesting that courts contemplate using their ultimate power, whatever it may be, unless and until chaos is a real and present danger. But what I am suggesting are the following four things.

First, we should keep on striving to cut out non-essentials, to the extent they still exist. Like impartiality, not only the reality but the appearance of a judiciary sharing in the sacrifice expected of everyone is important. But you must distinguish between a sacrifice of convenience and comfort (which impacts chiefly on you) and a sacrifice of necessity, of access, of expedition (which impacts on all citizens).

Second, be alert for opportunities to describe the threat to justice and an independent judiciary — to legislators, people in the executive branch, citizens, and groups in your own community.

Third, recognize that these actions are not enough. The time has come when the courts need a real *amicus curiae*, a real friend and supporter of not just an issue in a case, but of the institution. People vote for legislators, for Governor. God forbid that we have elections for judges. But we do need people to demand the conditions making it possible for you to carry out your constitutional mission. It is not our prerogative that is at stake; it is their justice.

My thinking on this matter of an *amicus curiae* or a surrogate has gone through several stages. Two years ago at Denver, in a conference sponsored by the National Center for State

Courts and the National Conference of State Legislators, I pointed out that state bar associations should seize the opportunities open to them, more than the national organizations, to intercede with state executives and legislators' on behalf of their courts. The conference adopted a resolution, urging bar associations to become "intermediaries." Subsequently, I spoke to the Maine, New Hampshire, and New England Bar Associations, changing the emphasis from sole intermediary to that of a catalyst, stimulating and guiding the formation of coalitions of citizens and groups who care about the courts.

In New Hampshire the bar association has taken concrete steps to try to fulfill this responsibility. Recently the Boston and Massachusetts Bar Associations have tried to rally their members and citizens' groups to support court reform. But elsewhere little court-supporting activity is evident. I came to realize that the strength and vitality and outward orientation of bar associations differ and that in many places they, like other traditional organizations - the Grange, fraternal organizations, even political parties - are in a period of decline and wholly occupied with their own survival.

My most recent thinking has been sparked by attending, as a guest, a meeting of the kind of organization which might be adapted to our needs. In Maine, for thirteen years, there has existed the Maine Development Foundation. It is primarily an organ of the business community, dedicated to the public purpose of stimulating economic development. With 500 corporators, many legislators, and representatives of the executive branch, it seeks to put together public-private coalitions to accomplish specific objectives in general education, in fostering world trade, capital investment, and the provision of technical and scientific counsel. What I am suggesting is a similar organization, although led by lawyers, not businessmen, not to enhance economic development but to protect the necessary functions of the courts. I have the faith and the conviction that there are leaders, followers, organizations out there who would rally to the cause of supporting the courts in their time of crisis.

Those, then, are three planks of our platform. But I said I was going to suggest four things we could do in this time of troubles. So far, they have been activities we could pursue as a group. The last plank involves us as individuals, solitary individuals.

It is this. Hark back to the source that made you want to be a judge. After all, not every lawyer seeks this goal. Most don't. But you did. This thought sent me to a book written a half century ago by a long-time Maine summer resident, a judge of the Court of Common Pleas in Philadelphia County, Curtis Bok. Judge Bok crafted a masterful, ever inspirational book about our profession, "Backbone of the Herring." The title came from the judicial oath administered on the Isle of Man: You swear to "do justice between cause and cause as equally as the backbone of the herring doth lie midmost of the flesh."

In this book he told of the feelings he - or his protagonist - had when his good friend the governor said to him --

You've simply got to take this job, old man.

(Answer) Damn it, Henry, it's dull. I don't want to be in an ice-box the rest of my life.

Think it over and don't be an idiot. I've got a hunch this is the spot for you.

The story continues: "The stillness was listless and profound, like a halted current, [and he thought of the Bay in Maine where he had spent so many summers]. Here was the same stillness that lay beneath its silence of sounds and other little treasures of the eye and ear. When he recognized it, he realized there was no decision to be made, only the acknowledgement that he had come to rest."

And so have we.  
This time will pass.  
The important thing is: we shall do all we can to guard the flame.