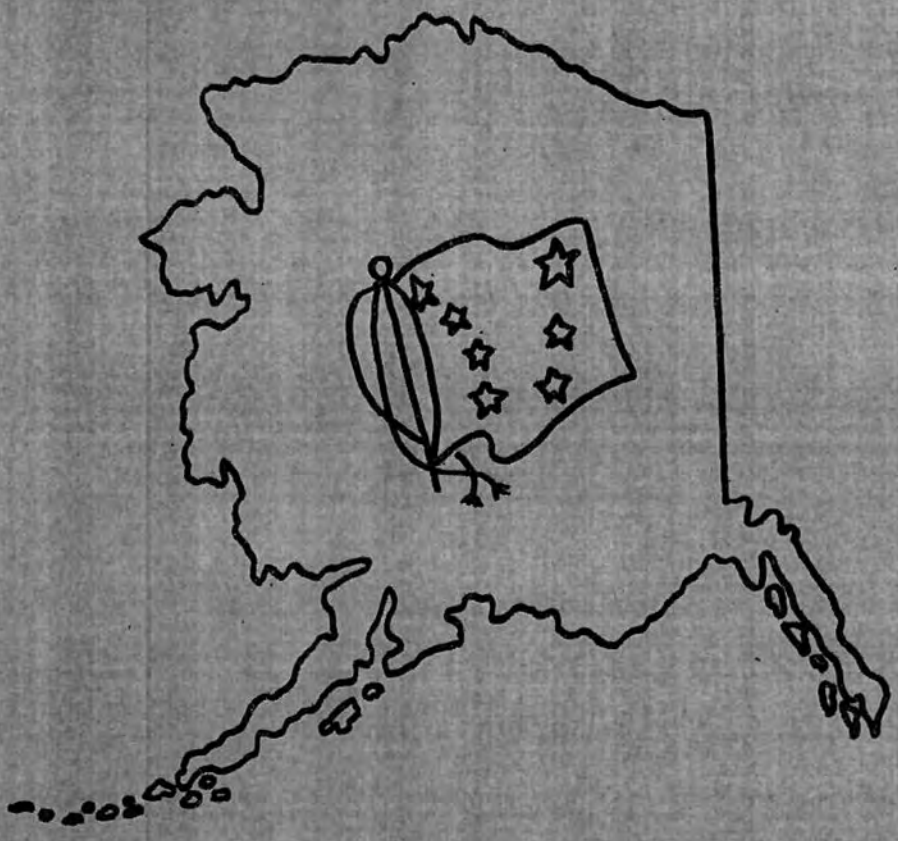

THE STATE OF THE JUDICIARY

AN ADDRESS BY

CHIEF JUSTICE ROBERT BOOCHEVER

BEFORE THE JOINT SESSION

OF THE ALASKA LEGISLATURE

April 11, 1978

STATE OF THE JUDICIARY

In 1971, by Senate Concurrent Resolution No. 42, the Chief Justice of the Alaska Supreme Court was first invited to address a joint session of the Alaska legislature. The resolution expressed the intent that the address on the State of the Judiciary be an annual occurrence. In accordance with that resolution, the President of the Senate and Speaker of the House of Representatives have been kind enough to invite me to address you again. I have accepted with pleasure as I consider it an excellent opportunity to improve communications between our two branches of government. I am also pleased that the other members of the court are with me today, as we have been hearing cases in Juneau. May I introduce them to you. We also have received assistance from time to time from retired Justice Dimond. Recently, Justice Dimond fractured his hip, and we all wish him a speedy recovery.

Several of your members gave me some suggestions after my last year's State of the Judiciary address. One suggestion was for me to tell stories of actual trials, and a second was to make the address shorter. I shall try to comply with both requests, although I must admit that it will be difficult to comply with both suggestions and still convey to you a meaningful message as to the present state of the Alaska judiciary.

I am reminded of a case that was tried by A. H. Ziegler, the father of Senator Ziegler, who so kindly escorted me to the rostrum. A.H. was an excellent trial attorney, and I still fondly remember his courtesy and advice to me when as a young Assistant District Attorney, I was trying cases in Ketchikan in 1946. Mr. Zeigler had a civil case representing a plaintiff in a suit against a dock company. His client had been injured when a board on which he was walking broke. Mr. Ziegler had so ably presented his case that the defense attorney decided that his only chance was to have the jury view the scene. He hoped that they would be impressed and would believe the dock was safely maintained. The court took the jury to the dock, and one of the jurors promptly fell through, breaking a leg. Needless to say, Mr. Ziegler won his case.

It would be pleasant to go on recounting trials, as lawyers are all too wont to do, but I am mindful of the second admonition to be brief, and I do have some serious problems to discuss with you.

I. CASELOADS

During the past year, the courts' caseloads continued to increase. Any hope that there would be an alleviation after completion of construction of the Alaska Oil Pipeline has proven illustory. There were approximately 126,000 cases filed last year, up from 105,000 the year before. This represented increases of 5 percent in the

superior court. But by hard work, the court increased the cases completed by 18 percent.

Similarly, the district court saw an increase in caseload of 20 percent, but managed to improve the number of cases disposed of by 30 percent.

It is obvious that the courts are working more efficiently than ever before. We don't find ourselves in the position of a college professor who was noted for writing kind letters of reference for his students. He was put to the test when the laziest student in his class asked for a recommendation. After some thought, the professor wrote: "You will be fortunate indeed if you can get this man to work for you."

Despite constant substantial increase in workload, the Court System, through increased efficiency by both the judges and the staff, have been able to cope. Only a few additional positions have been added. We are confronted with an unusual situation in the Anchorage area, however, that will require some additional district court judges. The number of police and state troopers will be increased by 46 percent in order to patrol additional police service areas. This is bound to result in a large increase in arrests and cases brought before the courts. If the desired result of promptly and fairly disposing of criminal cases is to be accomplished, two additional district court judges, a traffic master and staff personnel will be required.

II. SUPREME COURT

Our system is able to accommodate to increases in cases at the trial court level. When absolutely-needed, additional judges may be authorized. The supreme court, however, presents a different problem.

The supreme court under Alaska's Constitution has final appellate jurisdiction, and under AS 22.05.010, an appeal to the supreme court is made a matter of right. I think that most of us would agree that to prevent possible injustices, it is desirable to allow at least one appeal.

As a result of the number of appeals, the supreme court is facing a crisis. In 1970, there were 217 cases filed in the supreme court. By 1973, the number had risen to 255; by 1975, to 337 and in 1977, 613--almost three times as many cases as filed in 1970. We have some graphs illustrating the problem.[1]

There were also 1,200 motions presented to the supreme court in 1977. Of these, 217 required action by the full court, while the remaining motions were disposed of by individual justices and the clerk of court.

In addition to its work in handling appeals, the court, under our system, is charged with the responsibility of administering the entire Court System, promulgating its various rules--including civil, criminal, children's, administrative and rules for the Bar Association. Although a

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1 See Appendices A, B and C.

considerable portion of the administrative burden is alleviated by Arthur H. Snowden, II, our Administrative Director, and his efficient staff, those duties take a considerable amount of the court's time.

By working very hard, the court has increased its dispositions substantially. In 1974, there were 262 cases completed, whereas in 1977, there were 450 dispositions. We are unable, however, to keep up with the volume of cases being filed.

By authorization of the last session of the legislature, we were able to employ a central staff attorney, working under the supervision of our outstanding clerk of court Donna Spragg Pegues, to screen some of the appeals and motions. While this is helpful, it is far from a solution.

One possibility would be to increase the number of justices. Since each opinion requires either the approval or a dissent or concurrence from each of the other justices, a considerable amount of time is required to resolve questions presented by drafts. This time period, I fear, would be increased by adding additional members to the court.

The court could hear appeals in panels of three, but this could result in different rules of law, dependent upon which panel heard a case.

Other courts faced with similar problems have usually opted for an intermediate appellate court. All appeals would go to that court, and the supreme court would hear only those cases it considered of major importance. In

a state with as small a population as ours, I have been reluctant to suggest adding another tier to our Court System. For a full intermediate court of appeals to handle the workload, there would have to be at least two panels of three justices each.

One variation which would seem more feasible would be the establishment of a three-judge criminal court of appeals. Criminal cases and sentence appeals constitute slightly less than one-half of the court's caseload. If we were to hear only the major criminal cases appealed from the intermediate court, there would be a substantial reduction in our work.

Another possibility would be to establish an appellate division of the superior court to hear intermediate appeals. This has been successful in Puerto Rico. It would probably require additional superior court judges, however. Again, the supreme court would only hear selected cases of major significance.

We had hoped that there might be a reduction in appeals after the Pipeline was completed. This has not proven to be the case. Due to many new projects in our state, the sizeable increase in lawyers, pre-paid legal systems and the abolition of plea bargaining, it appears that we are faced with a continuing high level of appeals. The court is studying the various solutions to this problem and will have suggestions for specific legislation for the next session of the legislature.

III. RECENT OPINIONS

There have been many opinions of interest issued during the past year. I shall mention a very few that may be of particular interest to the legislature.

Hicklin v. Orbeck, 565 P.2d 159 (Alaska), prob. juris. noted, ___ U.S. ___, 54 L. Ed. 2d 275 (1977), struck down the one-year residency requirement of the Alaska local hire law but upheld, over dissent, the requirement that qualified Alaskan residents be hired in preference to non-residents. The case has been appealed to the United States Supreme Court where that court recently heard oral arguments.

Woods, Rohde, Inc. v. State Dept. of Labor, 565 P.2d 138 (Alaska 1977), held that warrantless administrative searches of commercial property under the Alaska Occupational Safety and Health Act violated the state constitutional protection against unreasonable search and seizure.

State v. Erickson, 574 P.2d 1 (Alaska 1978), held that the classification of cocaine with narcotics is not violative of equal protection or due process and that the prohibition against the use of cocaine in the home is not an infringement of the right to privacy. The opinion does suggest that the legislature review its treatment of cocaine, which does not come within the pharmacological definition of a narcotic.

Warren v. Thomas, 568 P.2d 400 (Alaska 1977), held that legislative amendments to a conflict of interest law

enacted by initiative did not effectively repeal that law in violation of the constitution.

Thomas v. Rosen, 569 P.2d 793 (Alaska 1977), held that a gubernatorial line item veto of a portion of a bond authorization is unconstitutional.

Zehrung v. State, 569 P.2d 189 (1977), on rehearing, 573 P.2d 858 (Alaska 1978), extended search and seizure law to hold that a person arrested for a minor crime listed on a bail schedule must be allowed a reasonable opportunity to raise bail before being subject to an inventory search more extensive than necessary to discover weapons.

Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977), held that, in the absence of regulations designed to protect the privacy of certain classes of patients, a physician could not be required to report the names of his patients under the Conflict of Interest Law.

Brown v. Wood, ___ P.2d ___, Opn. No. 1551 (Jan. 27, 1978), upheld a sex discrimination claim under the Equal Pay for Women Act.

IV. ADMINISTRATIVE IMPROVEMENTS

Mindful of the admonition to make this a brief address, I am not going to attempt to enumerate the many administrative improvements made to the Court System during the past year. They are set forth in the Annual Report, copies of which have been furnished to each of you.

One significant measure has been improved jury management. A frequent criticism of court systems is the inefficient handling of jury selections. Often, prospective jurors are required to wait endlessly for the possibility of being selected. Not only has Alaska developed a modern computerized method of calling jurors and sending them questionnaires, but recently we have developed a system in Anchorage whereby if a juror's services are not utilized on the day that he is called, he is excused for a two-year period. He is similarly excused after serving on one trial. This one-day or one-trial system should do much to lighten the burden of those called for jury duty.

We are completing a bench book for use by trial judges. Among other matters, it sets forth each of the steps required in arraignment and sentencing, thus preventing omissions which sometimes cause reversals.

We are in the finishing stages of adopting a Code of Evidence. Previously, attorneys principally had to depend on developing case law to anticipate what rule of evidence would apply; for example, whether testimony would be admissible or not under one of the exceptions to the hearsay rule. Now, most situations will be covered by printed rules leading to more certainty regarding the admissibility of certain types of evidence.

V. BUSH JUSTICE

The Court System has continued to place emphasis on improving the administration of justice in our rural communities. Training sessions have been upgraded. We now have a rural court coordinator improving communication with the magistrates. Written training courses have been developed.

Our Magistrates' Advisory Committee, under Justice Rabinowitz, has been very active, and a final report with its recommendations is expected shortly.

VI. CAPITAL IMPROVEMENTS

The new court building at Bethel was dedicated in January 1977. We now have a vastly-improved court facility being leased in Barrow. Substantial improvements were made in the Fairbanks court building. There are court facilities at 60 locations in the state and many received improvements.

The fine court buildings in Anchorage are becoming overcrowded. It is time now to commence planning for a new facility. Probably the most efficient use of space would be for a new building to be utilized by the supreme court and administrative staff, with the space presently occupied by them being taken over by the trial courts.

VII. SALARIES

Judicial salaries have remained fixed since 1975 while salaries of other state employees and most employees

in the private sector have risen substantially to offset increased costs of living. Most appointees to the bench take a substantial reduction in compensation. Moreover, under the Judicial Canons, they are severely limited in their activities, making it difficult for them to participate in investment opportunities.

By July 1, 1978, the Consumer Price Index will be approximately 22.8 percent over that of July 1975, and other state employees will have received increases of 22.6 percent. Moreover, most other state employees receive merit increases, based on proper performance of their work over specified periods of time. These usually amount to 3.75 percent a year or a total of 11.25 percent in the three years since 1975. So, by July, most state employees will have received increases of more than 33 percent, while the judiciary has received no increase.

There were so few applicants for a recent judicial vacancy in Fairbanks, that the position had to be readvertised. If we are to maintain the high standards for our judiciary that we all desire, it is essential that judges be adequately compensated so as to attract the best candidates for the positions.

VIII. LEGISLATION

A year ago, I attended a national conference on causes of dissatisfaction with the administration of

justice. Much of it was focused on court delay, the expense to litigants of court proceedings and alternate methods of resolving disputes. Our Judicial Council is presently working on a proposal for citizen dispute centers and is studying other alternate means of dispute resolution, including possible mediation and compelling arbitration plans. While all of these are important subjects to which we have been seeking improvements, in my mind, the principal popular cause of dissatisfaction with the judicial system pertains to criminal cases. For some time, the public has been properly concerned over what has become known as "crime in the streets." There is a feeling that too many criminals do not get their just deserts.

We all know that the causes of crime are complex, and you, as legislators, confront the many-faceted problems of society which give rise to crime. The apprehension of criminals by lawful means is the responsibility of the executive branch. The judiciary is responsible for furnishing a prompt, fair trial and for sentencing. At the other end of the spectrum, it is that executive again that operates our correctional system.

Two years ago, in addressing you, I suggested the possibility of a new sentencing concept known as presumptive sentencing. The plan involved giving an average length of imprisonment for certain crimes with increases and decreases to be meted out according to designated aggravating or mitigating circumstances, yet with discretion for the judge to

vary the formula in unusual cases. I am pleased that after much work by the legislature and the Judicial Council, a presumptive sentencing provision is now before you covering repeat felony offenders. It also involves determinant sentences whereby the offender knows that he will be required to serve out a full specified term.

The bill, if enacted, will do much to prevent disparity in sentences whereby under our present system, theoretically, two defendants could have identical backgrounds and be found guilty of identical crimes yet receive widely varying sentences, depending on the philosophy of the particular sentencing judge. Our studies indicate that despite judicial sentencing seminars and fine judges, such disparity does exist.

Associated with the bill is a resolution requesting the voluntary establishment by the judiciary of guidelines for sentencing first offenders. The guidelines are to establish criteria for length of sentences under a wide variety of circumstances, and would be subject to modification from time to time. It is a difficult subject to treat by means of legislation. We welcome suggestions for the judiciary to prepare such guidelines and have been working on such a program independently. In fact, much of our judicial educational conference to be held in May will be devoted to study of sentencing guidelines.

I also would be remiss if I did not mention the monumental Criminal Code Revision pending before you. I am

well aware of the work which has gone into that project. Our present code is a hodgepodge long overdue for revision. While I do not believe it is appropriate for me to comment on specific substantive provisions, I do strongly favor a revision of our antiquated criminal laws.

There is one other matter directly affecting the judiciary and all Alaskans which deserves comment. I refer to Senate Joint Resolution No. 29 which would place on the ballot an amendment to our constitutional method of selecting judges. Under our present selection system, the Judicial Council, which consists of three laymen appointed by the Governor, with three attorneys selected by the Board of Governors of the Alaska Bar Association and the Chief Justice (who votes only in case of a tie), reviews the qualifications of all candidates and nominates those it considers best qualified. The Governor must select from those named. After serving for specified periods, the judges are subject to election on a noncompetitive ballot asking whether the judge should be retained.

To a great extent, the system removes the selection of judges from partisan politics and is aimed at securing as candidates those best qualified for the office.

The concept of having voters elect their judges has an initial appeal. It takes little imagination, however, to see what would happen with judges engaged in statewide partisan campaigns. The use of television and other media required for statewide elections and other elections

in our urban areas has become tremendously expensive. Judges, of necessity, would be beholden to those contributing substantially to their campaigns. Many of the best candidates would refuse to become involved in such campaigns. The independence so vital to the judicial system would be gravely impaired.

Our judicial constitutional provision was enacted after much thought and study. It is generally considered to be the best plan for judicial selection and retention. While it may be that few judges lose at the polls in noncompetitive retention elections, the fact that they must face such elections serves a valid purpose in causing the rare judge, who otherwise would become overbearing, to be continuously aware that he is a servant of the people.

If a judge does not perform his functions properly, we have a Judicial Qualifications Commission that may recommend to the supreme court discipline or removal from office. That Commission consists of laymen, judges and attorneys; and if there should be any serious dereliction of judicial duties, it should be reported to the Commission for prompt investigation and action.

CONCLUSION

Under the American system of government which has served as the model for our state government, a strong independent judiciary is essential. The drafters of the United States Constitution placed a unique emphasis on the rights

of the individual. The first ten amendments provide among other rights for freedom of religion, speech and of the press; to be secure against unreasonable searches and seizures; to be free from being placed in double jeopardy. There is the right not to be compelled to be a witness against oneself or to be deprived of life, liberty or property without due process of law; and in criminal cases, the right to speedy and public trial by an impartial jury, to be confronted with witnesses against one and to have the assistance of counsel. Excessive bail is prohibited, and cruel and unusual punishment may not be inflicted. Those rights enumerated in the federal constitution have been reiterated in our state constitution. Although a right to privacy has been inferred from other constitutional rights, the federal constitution has no specific provision expressing a right to privacy. Alaskans, however, have adopted a provision expressly stating that the right of the people to privacy is recognized and shall not be infringed.

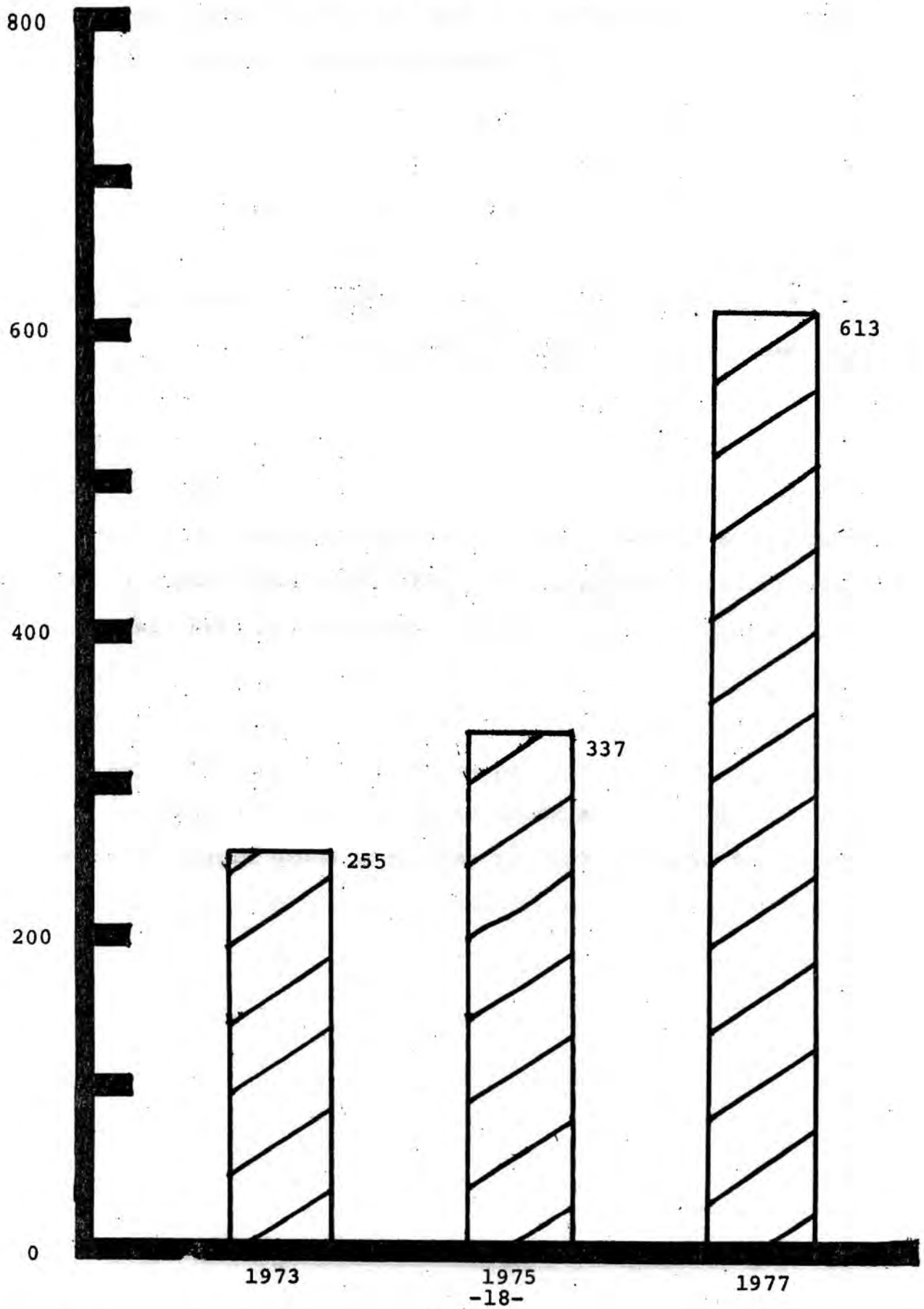
The judiciary is charged with upholding the Constitutions of the United States and the State of Alaska including those rights of the individual which are the bulwark of this nation's devotion to personal liberty. The protection of those rights is dependent upon an independent judiciary that will not be swayed by popular prejudice of the moment or changes in the climate of opinion.

As you all well know, another cornerstone of our government is its system of checks and balances. Substan-

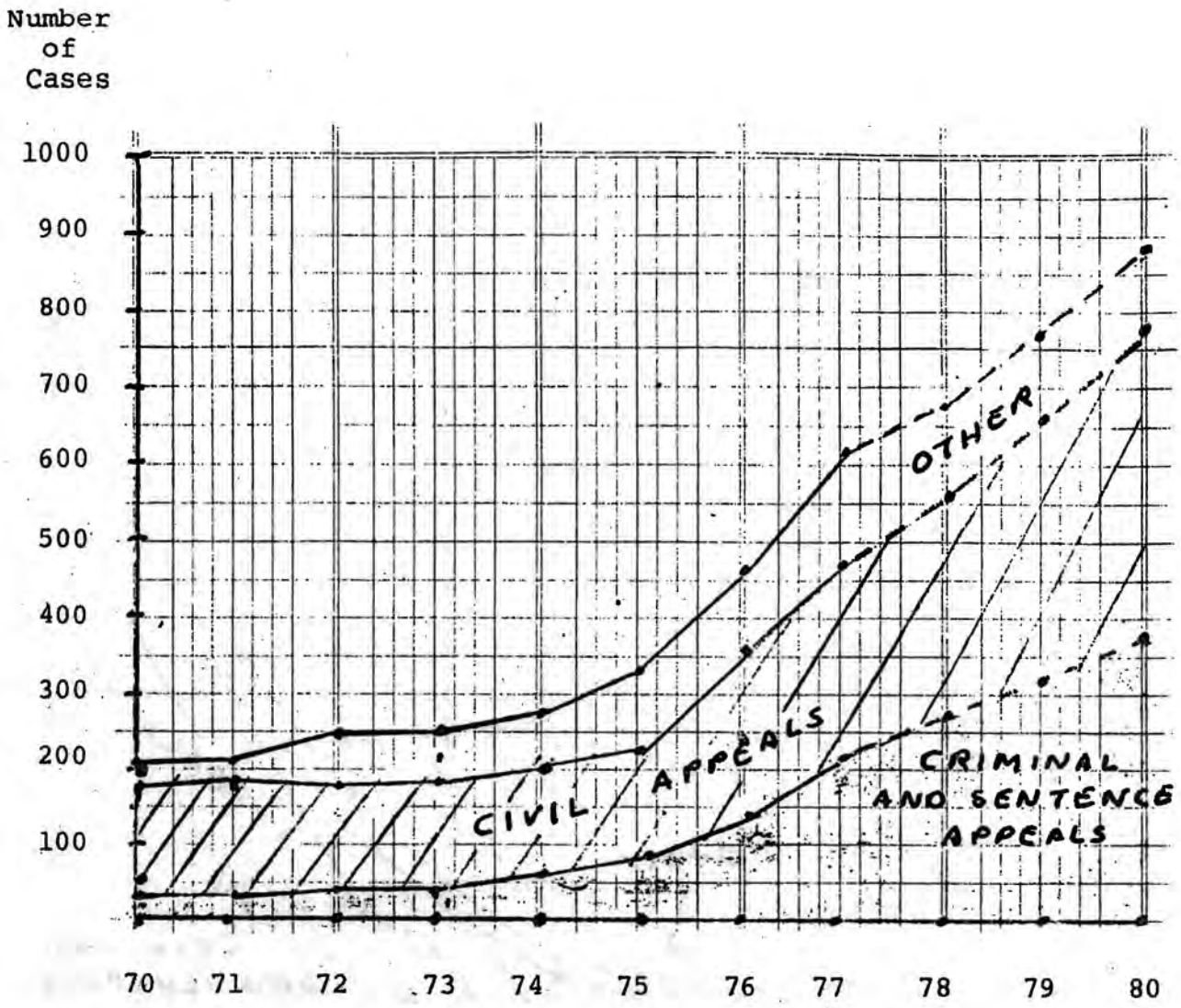
tive laws are enacted by the legislature which has the financial power to control government purse strings. The laws are construed by the courts which also are charged with declaring that great body of unwritten law, the common law. The executive branch initiates programs, executes the laws passed by the legislature and has the power of veto.

Since my term as Chief Justice will terminate next September, this is my last opportunity to address you. I think it only appropriate on behalf of the judiciary to express my appreciation at the excellent cooperation we have received from both the other branches of government. You in the legislature have shown a keen appreciation of the role of the judiciary and have given careful consideration to all of our requests. That is not to say that you have always acquiesced, but that is not to be expected. I am confident that with the continued cooperation of our separate branches of government while maintaining the proper separation of the roles of each, the State of Alaska will continue to prosper and preserve for its residents those rights of each individual which are so eloquently set forth in Alaska's Constitution.

APPENDIX A
SUPREME COURT FILINGS



APPENDIX B
SUPREME COURT FILINGS 1970-1980



APPENDIX C
SUPREME COURT PENDING CASES 1970-1980