

Maine Law Review

Volume 43
Number 2 A *Tribute to Chief Justice Vincent L.
McKusick*

Article 6

June 1991

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Recommended Citation

Edward S. Godfrey, *Structure of the Maine Court System, 1956-1991*, 43 Me. L. Rev. 353 (1991).
Available at: <https://digitalcommons.maine.law.maine.edu/mlr/vol43/iss2/6>

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STRUCTURE OF THE MAINE COURT SYSTEM, 1956—1991

*Edward S. Godfrey**

The preamble to the Constitution of the United States declares one purpose of the people in ordaining that Constitution to be the establishment of justice; the preamble to the Maine Constitution contains a similar declaration. Achievement of that purpose requires, among many other things, that there be impartial tribunals, accessible to all, for fairly and promptly resolving disputes based on claims of right and for carrying out the resulting resolutions. The judiciary has been the institution in American government most conspicuously devoted to resolving such disputes. Other institutions performing the same function, such as arbitral panels and administrative agencies in their adjudicative role, have found themselves constrained to adopt a court-like mode of operation even when they were created in part to escape from it: the felt need for at least minimal due process exerts a sort of gravitational force on most of our decision-making institutions and holds them in procedural orbits defined by the courts.¹

From such considerations one might suppose that the quality and efficiency of the courts would be among the prime concerns of the American people and their representatives. Regardless of the substantive justice of the laws, it seems fairly certain that a breakdown of institutional arrangements for deciding disputes and carrying out judicial decisions would lead to grave social disorder; widespread despair of getting institutional justice would lead to epidemic civil violence. Yet it has always been notoriously hard to achieve improvements in the judicial system.² It is easier to complain about slowness in adjudication than to examine the system to find particular institutional features that cause unwarranted delay—easier to complain

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1. Even in administrative rulemaking (which in one aspect is a method of resolving potential disputes), legislators often impose requirements of notice, fair hearing, and adherence to established procedural rules and other elements borrowed from the domain of adjudicative due process. Due process constraint is not confined to official bodies: private organizations are not free from the requirements of due process in disputes with their members, for example. See, e.g., *Berrien v. Pollitzer*, 165 F.2d 21 (D.C. Cir. 1947). See generally Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

2. "Improvements in the administration of justice unfortunately do not assist one lawyer in competition with others. Hence they usually come from the legislature or from judges and lawyers only in response to unusual public pressure." Warner & Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 609 (1937).

about the performance of some judge than to identify and correct institutional defects, thus diminishing the likelihood that abler persons will ever serve in the judiciary.

Even when systemic causes of dysfunction have been identified, it has been hard to convince those who have the authority to make the necessary changes to expend the energy and political capital needed to do so. An incumbent judicial bureaucracy — judges and their supporting personnel — is seldom happier than any other bureaucracy at the prospect of changes in its organization, policies and procedures, changes that may adversely affect individual income, workload, status and perquisites. In particular, when those changes also involve transfers of power from local to state officials, local office holders can usually rationalize adherence to the status quo and muster support from their constituents for maintaining it.

As a general proposition, the public wants a strong and efficient judiciary. But the establishment of justice competes with other important objectives of a civilized society, such as education, public health, and relief from destitution. The public institutions set up to realize our various social ideals and objectives necessarily compete with one another for limited resources. In that competition, the judicial system has two disadvantages: The need for structural improvement of the judiciary rarely appears to legislators to be as pressing as the needs of other social institutions, and changes that seem necessary to a knowledgeable observer often involve arcane technical considerations that are hard to explain to the citizenry at large. Effective structural change must usually be initiated by individuals who understand how the system operates as a whole and who are civic-minded enough to work to improve it despite possible loss of some personal advantage.

A leader who initiates improvement of the judicial system will have the support of citizens who understand the importance of the courts as an essential element in the establishment of justice and who will insist on a high priority for the resources needed for it. The resources in question are not merely money. They also include a constitutional and statutory framework permitting effective management of personnel, buildings and equipment, enough autonomy to make adjustments within the system promptly as need develops, and periodic assessment, internal and external, of the performance of the resulting arrangements.

During the past thirty-five years, with the strong support of three successive chief justices of the Maine Supreme Judicial Court, the judicial system of Maine has undergone a remarkable transformation. The celebration by the *Maine Law Review* of the accomplishments of Chief Justice McKusick provides an appropriate occasion to take note of that transformation and his great contributions to it.

It would require more space than a celebratory article should take to set forth a complete history of the ground swell of court reform

that began in Maine in 1957 and seems not even yet to have spent its force. Such a history would recount the activities of many persons, mostly judges and lawyers, but also lay members of the Legislature and executive department, whose efforts helped bring about the changes described in this essay. A full account would also explore the social and economic forces beneath the nationwide movement for court reform in the past fifty years, of which the Maine development is a particular manifestation.

A full account would show in detail the linkage between the restructuring of the courts and the great changes in the substantive law of the state during the same thirty-five years. In a barrage of statutes, the Legislature has extensively revised the substantive law of Maine during that period. Great changes have been enacted in commercial, banking and corporate law, the criminal law, family law, the law of decedents' estates and guardianships, environmental law, the law of debtor and creditor, administrative law, municipal law and labor law. Also during the same period, revolutionary changes occurred in American constitutional law: court-appointed counsel for indigent defendants became required;³ persons accused of crimes were given new protection in the state courts from admission of illegally obtained or intrinsically unreliable evidence;⁴ due process rights were recognized for children, debtors and institutionalized persons;⁵ and women and various minority groups gained greater rights to equal protection.⁶ Federal legislation controlling the uses of land and other resources proliferated,⁷ as did consumer-protective and welfare statutes and regulations.⁸ Those changes in American

3. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (all prosecutions resulting in imprisonment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (persons accused of felonies). In *Newell v. State*, 277 A.2d 731 (Me. 1971), the Maine Supreme Judicial Court, sitting as the Law Court, held that indigent defendants who face criminal charges that may result in imprisonment for more than six months or a fine of more than \$500 must be informed of their right to appointed counsel and, absent waiver, have such counsel appointed.

4. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (compelled self-incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (illegally obtained evidence).

5. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (confined mentally ill); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (debtors); *Johnson v. Avery*, 393 U.S. 483 (1969) (prisoners); *In re Gault*, 387 U.S. 1 (1967) (minors).

6. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (women); *Loring v. Virginia*, 388 U.S. 1 (1967) (anti-miscegenation law); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (racial discrimination in housing market); *Williams v. Lee*, 358 U.S. 217 (1959) (Indian tribes).

7. See, e.g., National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (environmental protection); ME. REV. STAT. ANN. tit. 38, ch. 2 (environmental protection), ch. 3 (protection of waters), ch. 4 (protection of air), ch. 13 (waste management), & ch. 19 (coastal management). See generally J. DAVIDSON & O. DELOGU, FEDERAL ENVIRONMENTAL REGULATION (1989).

8. For consumer protective legislation, see, e.g., Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (current version at 15 U.S.C. ch. 41 (1983));

law, combined with extensive changes in Maine statutory law, resulted in an increasing burden for all Maine courts, not merely in the amount of litigation but in its complexity and in the amount of judicial time required to deal with it.

The reorganization of the Maine courts can thus be viewed in two aspects: as a local response to the national movement for court reform and, within Maine itself, as one element in an extensive overhauling of the entire legal system of the state. Although this essay will not discuss in any detail the relationship of structural change to the revision of substantive law, the linkage cannot be totally ignored, for the contemporaneous changes in substantive law have increased the primary burden on the courts of resolving disputes fairly, according to law, intelligently, and as promptly as possible.

When Robert B. Williamson was appointed Chief Justice of the Supreme Judicial Court of Maine in 1956, the judicial system of the state lagged behind that of many American states in the efficiency of its organization and procedures. Hard-to-change statutes, rather than rules of court, supplied many important rules of practice. The common law writs and forms of action and common law methods of pleading were still entrenched in the statutes, albeit sometimes in modified form.⁹ Although the Supreme Judicial Court had authority to make all rules for the regulation of equity practice as long as the rules did not contravene existing statutes, it had no statutory authority to make other rules of procedure applicable generally to the trial courts. Except for rules of equity practice, the superior court could make its own rules.¹⁰ The probate courts were also authorized

Truth in Lending Regulations, 12 C.F.R. pt. 226 ("Regulation Z") (1990); Maine Unfair Trade Practices Act, P.L. 1969, ch. 577, § 1 (current version at ME. REV. STAT. ANN. tit. 5, ch. 10 (1989 & Supp. 1990)); Maine Consumer Credit Code, P.L. 1973, ch. 762, § 1 (current version at ME. REV. STAT. ANN. tit. 9-A (1980 & Supp. 1990)). For welfare legislation, *see, e.g.*, ME. REV. STAT. ANN. tit. 22, ch. 1071 (child and family services and child protection), and ch. 261-A (prevention of handicapping conditions) (Supp. 1990).

9. *See, e.g.*, R.S. ch. 112 (1954), entitled "Commencement of Civil Actions." *See also* address by Justice Francis W. Sullivan to the Maine State Bar Association, 45 ME. ST. BAR ASS'N PROC. 38, 42-43 (Aug. 28-30, 1956):

Our declaration in trover is fiction and uninformative. Our replevin pleading is a feat of memory. Pleading in a suit upon an indemnity bond is really formidable. Our law pleadings do not inform parties, attorneys or the court of bona fide issues and when read in openings to juries are in their technical verbiage soporific. Getting in and out of the Law Court is too complicated and technical. Review and Error should not be separate actions by themselves but simple furtherances of the original suits. Joinder of causes between the same parties and counterclaims should be permitted without restraint.

10. R.S. ch. 106, § 6 (1954) provided:

The justices of the superior court may adopt rules governing the proceedings in said court, but until such rules are adopted and published, the rules of the supreme judicial court shall govern the proceedings unless inconsis-

to make their own rules and devise their own forms, again subject to approval of the Supreme Judicial Court.¹¹ The municipal courts operated under procedural rules established by their several charters. Rules relating to pleadings and appellate review were riddled with nice distinctions often having little relevance to substantive merit.

The distinction between law and equity was maintained in various ways. For example, the Supreme Judicial Court and the superior courts had concurrent jurisdiction in equity. A justice of the Supreme Judicial Court could preside over a case in equity and often did so,¹² while trials of actions at law with a jury were reserved for the superior court. Dozens of independent municipal courts and local trial justices, with narrowly limited jurisdiction, operated with little supervision.¹³ Their decisions in the minor cases over which they had jurisdiction were reviewable in the superior court by trials *de novo*. The superior court also held trials *de novo* of contested issues of fact on appeals from the probate courts.

Although the Supreme Judicial Court had by statute "general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law [did] not expressly provide a remedy,"¹⁴ the court had ruled in 1856 that it could only exercise judicial power by means afforded by the common law, *i.e.*, by one of the common law writs, such as *quo warranto*, *mandamus* or certio-

tent with the provisions of this chapter. The supreme judicial court shall take judicial notice of the rules of the superior court.

The provision was repealed by P.L. 1963, ch. 226, § 2.

11. R.S. ch. 153, § 50 (1954). The problem of idiosyncratic procedures and forms in the probate courts was an old one. P.L. 1895, ch. 17, § 1 had tried to deal with it by creating a commission of probate judges and registers, appointed by the governor, to prepare rules of probate practice and procedure and devise forms for use in the probate courts when approved by the Supreme Judicial Court. The provisions for such a commission did not disappear from the statutes until 1971. P.L. 1971, ch. 94, § 2. By virtue of P.L. 1979, ch. 540, § 1, the Supreme Judicial Court acquired authority to prescribe rules and forms for the probate courts. That authority is now contained in ME. REV. STAT. ANN. tit. 18-A, § 1-304 (1981). Also, the civil rules enabling statute, ME. REV. STAT. ANN. tit. 4, § 8, was amended to include probate rules by P.L. 1983, ch. 653.

12. INSTITUTE OF JUDICIAL ADMIN., THE SUPREME JUDICIAL COURT AND THE SUPERIOR COURT OF THE STATE OF MAINE, January 1971, at 1, 3, 4, 6 [hereinafter 1971 IJA REPORT]. As recently as the time of that report, about half the time of the justices of the Supreme Judicial Court was spent on trial work. That time was again divided about equally between civil nonjury cases and habeas corpus proceedings. *Id.* at 3. An administrative problem was created by the justices' practice of taking on trial work without notifying the chief justice.

13. H. HENRY, THE MAINE DISTRICT COURT: A QUARTER CENTURY OF PROGRESS 31 (1987). The author is much indebted to Judge Henry's history of the district court, as he is also to Silsby, *History of the Maine Superior Court*, 14 ME. BAR BULL. 109 (pt. I); 149 (pt. II) (1980).

14. R.S. ch. 103, § 7 (1954) (current version at ME. REV. STAT. ANN. tit. 4, § 7 (1989)). The provision first appears in R.S. ch. 96, § 4 (1840).

rari, served by a complaint on one or more adverse parties.¹⁶ With such a cautious view of its judicial power, it is not surprising that the high court never undertook to extend control over the management of other courts of Maine without enabling legislation.

Both the Supreme Judicial Court and the superior courts depended in 1956 on the sixteen boards of county commissioners for support personnel, including clerks of court, and for courtrooms, chambers, and even furniture.¹⁶ Terms of the superior court in the several counties were mandated by statute,¹⁷ and the nettlesome task of assigning justices to meet the statutory term requirements fell to the chief justice of the Supreme Judicial Court.¹⁸ Indeed, a principal duty of the chief justice was keeping track of itinerant superior court justices and moving them about to meet emergencies as they arose.

The term system for the superior court complicated the task of deploying justices to deal with the caseload in counties with the heaviest calendars, and it promoted delay in the trial of cases in counties where the statute prescribed only two or three terms per year.¹⁹ In such counties a continuance could cause a built-in delay of several months in the disposition of cases. Moreover, many justices were lenient in granting continuances when the lawyers for both sides agreed to them. A last minute continuance or settlement often left the presiding justice in a rural county with little or nothing to do for the rest of the day on which the case had been set for trial.

15. *Ex parte Davis*, 41 Me. 38 (1856). The case did not involve "superintendence" of an "inferior court." The Governor of Maine had notified Justice Davis of the Supreme Judicial Court that he had been removed from office after proceedings in the House and Senate that Davis contended were not in compliance with the Maine Constitution. Davis presented a memorial to the Supreme Judicial Court, describing in some detail the acts of the Governor and Legislature in the matter and requesting a determination that those acts had been unconstitutional and that he was entitled to his office. The court, with one dissent, held that it had no jurisdiction to entertain such a memorial. Davis must proceed under some writ, said the court, and name one or more adverse parties.

16. R.S. ch. 89, § 18 (1954), *repealed* P.L. 1987, ch. 737, Part A, § 1.

17. R.S. ch. 106, § 11 (1954), *repealed and replaced* by P.L. 1969, ch. 57, *repealed and replaced* by P.L. 1975, ch. 408, § 9 (current version at ME. REV. STAT. ANN. tit. 4, § 110 (1989)). There were no statutory term times for hearing of appeals by the Supreme Judicial Court sitting as the Law Court, but R.S. ch. 103, § 11 (1954) provided that the Law Court must hold eight sessions per year at times and places to be determined by the chief justice and announced before December 1 of each year.

18. R.S. ch. 106, § 1 (1954) (current version at ME. REV. STAT. ANN. tit. 4, § 101 (1988)).

19. 1971 IJA REPORT, *supra* note 12, at 8-12. By the time of the Institute report, the statutory prescription of the terms in each county had been eliminated, but the chief justice was still required to determine in advance the times when terms would be held in each county. Among other evils, the term system caused undue delay in hearing cases where persons had been incarcerated in county jails for inability to make bail pending trial.

Practically speaking, the attorneys, not the justices, controlled the docket. Notoriously, the workloads of the justices varied greatly, and the time spent in travel over long distances between shire towns was considerable.

No one officer or official body had constitutional or statutory responsibility for operation of the judicial system as a whole. The chief justice of the Supreme Judicial Court, though designated by statute "head of the Judicial Department,"²⁰ had little effective control over the management of the trial courts except by moral suasion and the authority to assign the circuit-riding superior court justices to preside at various locations of that court. Finally, the judiciary had no reporting system that would yield the information required for gauging accurately the growing needs of all the courts. It was chronically difficult for the chief justice to make a case in the Legislature for additional judges, facilities, or emergency support personnel.

Fortunately there was one institution in Maine already established and functioning that was charged by statute with making "a continuous study of the organization, rules and methods of procedure and practice of the judicial system of the State, the work accomplished and the results produced by that system and its various parts."²¹ That institution was the Judicial Council of Maine, created by statute in 1935.²² Under the leadership of Chief Justice Williamson, ex officio chair of the Council, and spurred by the demands of a number of judges and lawyers dissatisfied with existing arrange-

20. R.S. ch. 103, § 1 (1954) (current version at ME. REV. STAT. ANN. tit. 4, § 1 (1989)).

21. R.S. ch. 153, §95 (1954) (current version at ME. REV. STAT. ANN. tit. 4, §51 (Supp. 1990)). At present the Council must be composed of the chief justice, who serves as chair, the attorney general, the chief justice of the superior court, the chief judge of the district court, the chairs of the joint standing committee of the Legislature (or their designees) having jurisdiction over judiciary matters, and the dean of the "University of Maine System School of Law" [sic], each to serve ex officio, and an active or retired justice of the Supreme Judicial Court, one justice of the superior court, one judge of the district court, one judge of a probate court, one clerk of the judicial courts, two members of the bar, and six members of the public to be appointed by the governor. The surveillance mission of the Maine Judicial Council has always been similar to that of the Massachusetts Judicial Council established by 1924 Mass. Acts ch. 244, (current version at MASS. GEN. LAWS ANN., ch. 221, §§ 34A, 34B, 34C (West 1958 & Supp. 1990)). For an early survey of the judicial council movement in the United States, see Pirsig, *A Survey of Judicial Councils, Judicial Conferences and Administrative Directors*, 47 THE BRIEF 181 (1952).

The Maine Judicial Council seems to have been quiescent, if not moribund, before Chief Justice Williamson began employing it as an instrument for change. "Mr. President, Mr. President-elect, and your Excellency, I suggest that action be taken to bring back to life the Maine Judicial Council. The job it was created to do is too important for it to be long asleeping." Address of Frank M. Coffin to the Maine State Bar Association, 40 M. ST. BAR ASS'N PROC. 86, 90 (1951).

22. P.L. 1935, ch. 52.

ments, that body began at long last to address the problems created by the disarray of the Maine judicial establishment.

The first step was to obtain for the Supreme Judicial Court statutory authority to prescribe rules of civil procedure in both law and equity for practice before the supreme, superior and municipal courts and trial justices. Legislation in 1957, as amended in 1959, enacted that authorization, with two new and crucial provisions: first, that the court could thereafter repeal, amend or add to such rules with or without a waiting period and, second, that after the effective date of the rules all laws in conflict with them were to be of no further force or effect.²³ With the help of an advisory committee of experienced lawyers and with Professor Richard Field of Harvard Law School and Mr. Vincent L. McKusick of Portland as consultants, the Supreme Judicial Court was ready by the summer of 1959 to promulgate the new civil rules, which became effective December 1, 1959.²⁴ To avoid even the possibility of conflict between the new rules and the old laws, an elaborate statute, effective December 1, 1959, directly repealed or amended laws in conflict with the new rules.²⁵

The enabling acts of 1957 and 1959 did not authorize the Supreme Judicial Court to make rules for the probate courts, which continued until 1981 to operate under their own rules and with their own blank forms, subject, however, to approval of the Supreme Judicial Court. The story of the probate courts and the resistance in the Legislature to their integration with the rest of the judicial system will be told later in this essay.²⁶

As its principal method of making a "continuous study" of the judicial system, the Judicial Council on several occasions between 1959 and 1981 retained the Institute of Judicial Administration to make reports on various features of the Maine judicial establishment. It was a report to the Legislature by the Institute in 1961 that led to creation of the Maine District Court, to supplant the municipal courts and trial justices.²⁷ The Judicial Council and influential

23. P.L. 1957, ch. 159, amended by P.L. 1959, ch. 309 (current version at ME. REV. STAT. ANN. tit. 4, § 8 (1989)). The rules-enabling statute gave the court authority to write rules for actions at law as well as for suits in equity "so as to secure one form of civil action and procedure for both." The 1957 statute did not eliminate the authority of the superior court to issue its own rules for actions at law. That concurrent but conflicting authority survived until 1963. *See supra* note 10.

24. The Maine Rules of Civil Procedure and the Municipal Court Civil Rules were promulgated by the Supreme Judicial Court on June 1, 1959, to become effective December 1 of that year. Order of Promulgation, 155 Me. 477 (1959).

25. P.L. 1959, ch. 317. *See* R. FIELD & V. MCKUSICK, MAINE CIVIL PRACTICE vi (1959).

26. *See infra* text accompanying notes 63-81.

27. INSTITUTE OF JUDICIAL ADMINISTRATION, A DISTRICT COURT FOR MAINE: REPORT TO THE LEGISLATIVE RESEARCH COMMITTEE OF MAINE ON THE DESIRABILITY OF INTEGRATING ACTIVITIES OF MUNICIPAL COURTS AND TRIAL JUSTICES, LEGISLATIVE RESEARCH

members of the bar had complained for years about the defects of the local courts: lack of uniformity of procedure and sentencing practices, gross disparity of caseloads among the judges, lack of liaison between the local courts and service agencies, and waste of court resources resulting from the provision for trials *de novo* of cases on appeal.²⁸

Although mere replacement of the old local courts by a new local court system need not have resulted by itself in greater efficiency and accountability, the 1961 statute establishing the statewide district court system had significant centralizing features. First, the statute made clear that the district court was one court, not a collection of independent courts, even though judges were to preside in many divisions. It was to have one chief judge, and all the judges of the court were to operate under one set of rules and one schedule of fees. The chief judge had authority to appoint all clerks and make necessary arrangements for courtroom facilities. All fines, bail forfeitures, and fees collected in any division were to go into one district court fund maintained by the state treasurer. Out of that fund the state treasurer was to pay the expenses of the court in accordance with a budget submitted by the chief judge. There was to be no pulling and hauling with municipal officials over the funding of the district court or appointment of its clerical staff.

The new court was not completely autonomous, of course. Its procedural rules were to be made by the Supreme Judicial Court.²⁹ Its chief judge, to be appointed from among the district court judges by the chief justice of the Supreme Judicial Court, was to serve at the chief justice's pleasure.³⁰ The original 1961 act did not provide, however, that the chief justice was to supervise the chief judge in operation of the district court, except for whatever inference might be drawn from a provision that the chief judge was to render an annual report to the chief justice on "the state of business in the District Court."³¹

Moreover, the Legislature itself retained control of the geographic boundaries of the divisions of the district court and the designation of the locations for holding court.³² The 1961 act grouped thirty-

COMM. PUBLICATION No. 100-4 [hereinafter 1961 IJA REPORT]. The legislation creating the district court was P.L. 1961, ch. 386, § 1 (current version at ME. REV. STAT. ANN. tit. 4, §§ 151-57, 162-64 (1989 and Supp. 1990)). The bill to create the district court was passed by overwhelming votes after a tussle with defenders of county and municipal autonomy. H. HENRY, *supra* note 13, at 5-9.

28. 1961 IJA REPORT, *supra* note 27. The deficiencies are summarized in H. HENRY, *supra* note 13, at 4.

29. P.L. 1961, ch. 386, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 156(2) (1989)).

30. *Id.* (current version at ME. REV. STAT. ANN. tit. 4, § 157(1) (1989)).

31. *Id.* (current version at ME. REV. STAT. ANN. tit. 4, § 164(9)(1989)).

32. P.L. 1961, ch. 386, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 153

three divisions into thirteen designated districts and required that at least one resident judge be appointed in each district.³³ That requirement was designed, of course, to gratify rural and small-town demands that some judge be reasonably close at hand to act promptly on local matters. Yet a statutory provision that pins a judge to one locality tends to create inefficiency in the deployment of judges in response to need throughout the system. However, the workloads in all districts became heavy enough that the resident judges have seldom been idle.³⁴ Since 1961, to handle the workload, the Legislature has authorized eight at-large judges in addition to the original one, and two resident judges in addition to the original fourteen.³⁵ Active retired district court judges are also available for assignment by the chief judge.

As an institution, the district court was certainly an improvement over the former collection of municipal courts and trial justices. The replacement of part-time by full-time judges was in itself a great advance. Despite the rising tide of cases and miserable working conditions at some early court locations, a good esprit de corps developed within the court and its staff,³⁶ fostered by a succession of vigorous and enthusiastic chief judges and promoted by the district court conferences required by the 1961 act.³⁷

Yet the considerable independence enjoyed by the new district court came at a price for the system as a whole. The budget for the district court was not integrated with that for the Supreme Judicial Court and superior courts. The 1961 act had no provisions requiring equity in compensation of administrative and clerical staff among the three courts.³⁸ Although the district court held its own conferences, there was no provision for continuing education of the judges of all the courts. No system-wide reporting existed to show the kinds and numbers of cases filed in Maine courts and their disposition. As a result, it was difficult to assess accurately the cost in judicial re-

(1989 & Supp. 1990)). There are now 30 divisions of the district court as a result of P.L. 1989, ch. 891, § A-2.

33. P.L. 1961, ch. 386, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 154 (1989 & Supp. 1990), reflecting frequent changes in composition of the districts).

34. Judge Henry reports 90,520 total filings in the district court in 1967. H. HENRY, *supra* note 13, at 86. By 1988-1989, district court filings had steadily risen to 325,560. They dropped to 315,123 in fiscal year 1990. STATE OF MAINE JUDICIAL DEP'T., ANNUAL REPORT FISCAL YEAR 1990, at 92 [hereinafter 1990 ANNUAL REPORT].

35. 1990 ANNUAL REPORT, *supra* note 34, at 38. Judges of the administrative court may now be assigned by the chief justice to sit in the district court, ME. REV. STAT. ANN. tit. 4, § 1158 (1989), as may also superior court justices. ME. REV. STAT. ANN. tit. 4, § 120 (1989 and Supp. 1990).

36. H. HENRY, *supra* note 13, at 19, 38.

37. P.L. 1961, ch. 386, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 164(11) (1989)).

38. See H. HENRY, *supra* note 13, at 38, referring to Chief Judge Browne's efforts to rationalize the pay scales of personnel within the district court system itself.

sources of particular procedures or of changes in the substantive law and, hence, hard to estimate the need for reallocation of resources or for new resources.

The 1961 act provided in section 7 that appeals from the district court should be heard *de novo* in the superior court. However, the same section empowered the Supreme Judicial Court to make and amend rules for appeals from the district court. Acting under that authorization, the Supreme Judicial Court lost little time in issuing district court rules doing away with *de novo* trials in civil cases.³⁹ Appeals in civil cases were thereafter to be on the record and on questions of law only. The persistent problem of developing a trial record in district court, where there was ordinarily no court stenographer, has been resolved over the years by increased use of supervised tape recordings.⁴⁰

In 1961, the Supreme Judicial Court did not yet have general statutory authority to make rules of criminal procedure; hence it confined the new District Court Rules to civil actions and made no move to abolish appellate *de novo* trials in criminal cases. Even after the court was authorized to promulgate rules of criminal procedure for the district court and did so, it preserved the *de novo* appeal to the superior court.⁴¹ The defendant's constitutional right to a jury trial appeared to be at stake, there being no jury in district court. *De novo* trials worked badly. Not only did they create an obvious waste of judicial time, but they damaged morale: The district court judges perceived their own labors in such cases to have been exercises in futility, and the superior court justices were frustrated at having to preside over duplicative trials of minor offenses that should have been finally disposed of in the court of first instance.⁴² The appeal by trial *de novo* was not finally abolished until 1982, after the Legislature had decriminalized most ordinary traffic offenses and authorized the Supreme Judicial Court to make a rule permitting defendants to waive their right to jury trial in criminal cases and be tried in district court for minor crimes coming within that court's jurisdiction.⁴³

39. The new District Court Civil Rules were promulgated on July 17, 1962. Foreword to Maine District Court Civil Rules, 158 Me. 537 (1962) (Williamson, C.J.).

40. See M.R. Civ. P. 76 H; M.R. Crim. P. 27(b), 36 (A)(d), 36 (C)(d); M.R.S.C.P. 6(a).

41. M.D.C. Crim. R. 39(b), 161 Me. 549, 655 (1965).

42. H. HENRY, *supra* note 13, at 33. The *de novo* trial was strongly criticized in the 1971 IJA REPORT, *supra* note 12, at 31-32.

43. P.L. 1981, ch. 487, § 1 (current version at ME. REV. STAT. ANN. tit. 15, § 2114 (Supp. 1990)). The rule now applicable is M.R. Crim. P. 22. An effort to limit to serious crimes the constitutional right to jury trial had failed in *State v. Sklar*, 317 A.2d 160 (Me. 1974). The legislative decriminalization of traffic infractions was held to have succeeded in *State v. Anton*, 463 A.2d 703 (Me. 1983), so that defendants in infraction cases no longer had a right to trial by jury.

General satisfaction with the rules of civil procedure led the Legislature in 1963 to authorize the Supreme Judicial Court to make rules of criminal procedure.⁴⁴ Following the methods successfully used for the civil rules in 1959, the court appointed an advisory committee and consultant—for this project Professor Harry P. Glassman of the University of Maine Law School—and after appropriate consideration promulgated, effective December 1, 1965, the Maine Rules of Criminal Procedure and the Maine District Court Criminal Rules.⁴⁵ As in 1959, conflicting statutes were simultaneously repealed.

Despite imperfections in the institutional arrangements for the district court, the bench and bar generally perceived it as a great improvement over the municipal courts and trial justices. The rationalization of procedure achieved by the civil and criminal rules was also generally applauded. By the mid-1960's, as the proponents of reform turned their attention to the probate courts and to the superior court itself, the momentum for reform seemed strong. Somewhat by chance, the effort to reconstitute the probate courts became caught up with an unsuccessful effort to remove one particular source of inefficiency in the operation of the superior court.

One glaring defect in the arrangements for the superior court arose from a long-standing provision that the clerk of the superior court in each county was to be the county clerk of that county.⁴⁶ Since 1842 the county clerks had been elected by popular vote in their counties, originally for terms of three years,⁴⁷ later for four. They were county officers, paid by the county, and they served as clerks of their boards of county commissioners. The anomaly of their being in effect imposed on the superior court regardless of qualifications or compatibility had been perpetuated to save money: most of the county clerks had time on their hands in the old days, especially in the rural counties where the clerks' duties for the county commissioners were far from onerous. From the point of view of the circuit-riding justices of the superior court, however, the obvious defect in control was a source of inefficiency and conflict.

In 1967 a bill was introduced in the 103d Legislature, apparently without any supporting institutional study, to empower the chief justice of the Supreme Judicial Court to appoint the clerks of court

44. P.L. 1963, ch. 226 (current version at ME. REV. STAT. ANN. tit. 4, § 9 (1989)).

45. Promulgation Orders, Maine Rules of Criminal Procedure and District Court Criminal Rules, 161 Me. iv (June 1, 1965, effective Dec. 1, 1965). For an account of the preparation of the rules, see Williamson, *Foreword* to 3 H. GLASSMAN, MAINE PRACTICE: RULES OF CRIMINAL PROCEDURE ANNOTATED (1967).

46. R.S. ch. 89, § 95 (1954). The county clerk was also clerk of the Supreme Judicial Court for the county. *Id.* As early as 1927, one of the recommendations of a legislative committee studying the Maine court system had been to have the clerks of court appointed by the court instead of elected. Silsby, *supra* note 13, at 170.

47. P.L. 1842, ch. 3, § 1.

for the superior court.⁴⁸ To placate local and anti-lawyer sentiments expressed in the Legislature, the bill in amended form provided that the clerk of courts in each county would be a resident of that county and would not be required to be a lawyer. The incumbent clerks were to serve out their elective terms. The bill eventually passed by comfortable margins in both houses of the 103d Legislature.⁴⁹

A bill was introduced in the 104th Legislature to repeal the 1967 act and reinstate the election of county clerks as county officers.⁵⁰ During the preceding two years, in appointing clerks of court as terms of the formerly elected clerks expired, Chief Justice Williamson had redesignated all but one of the elected incumbents who wanted to continue serving in their appointive status. However, he had not redesignated one incumbent who wanted to continue but had been the subject of complaints by superior court justices on grounds of inefficiency. The clerk in question was not of the same political party as the Chief Justice and was replaced by a clerk who was.

Legislators who had opposed the 1967 act making the clerks appointive supported the 1969 bill to repeal it. They argued that having the county clerk on the county ticket could strengthen county government;⁵¹ that an appointive county clerk was an elite, higher paid officer in the court house, disruptive of morale;⁵² that the fact that the Chief Justice had appointed all but one of the formerly elected clerks showed that there was nothing to the argument about qualification - that the electorate could pick qualified persons just as well as a chief justice.⁵³ One proponent of the repealer said he was sure the appointment of clerks was just a preamble to an eventual requirement that the clerks be lawyers.⁵⁴ One legislator hinted darkly that the bill was "politically motivated" but deemed that to be a good reason for supporting it.⁵⁵

It seems likely that some legislators who had supported the 1967 change had endured criticism for doing so from the local powers back home. Whatever the causes or motives, the 104th Legislature in 1969 repealed the 1967 act by a substantial margin.⁵⁶ The re-

48. L.D. 354 (103d Legis. 1967). After amendment the bill passed, to become P.L. 1967, ch. 419. The measure provided that the clerks were still to be paid by the counties even though appointed by the chief justice. P.L. 1967, ch. 419, § 1.

49. The bill passed 21-11 in the Senate, 3 Legis. Rec. 3679 (1967). The House, having originally defeated the bill without the amendment, voted 83-27 to recede and concur with the Senate after the bill was amended. 2 Legis. Rec. 3384 (1967).

50. L.D. 791 (104th Legis. 1969).

51. 1 Legis. Rec. 1240 (1969) (Statement of Sen. Wyman).

52. 1 Legis. Rec. 1463 (1969) (Statement of Rep. Kelley).

53. 1 Legis. Rec. 1462 (1969) (Statement of Rep. Carey).

54. 1 Legis. Rec. 1463-64 (1969) (Statement of Rep. Kelley).

55. 1 Legis. Rec. 1465 (1969) (Statement of Rep. Jutras).

56. P.L. 1969, ch. 229, § 1. The last votes were 90 to 44 in the House, 1 Legis. Rec.

pealer was not a model of draftsmanship, but its main purpose was clear enough: Clerks of court for the Supreme Judicial Court and superior courts were to be elected locally as before, not appointed by the chief justice.

This contretemps did not mean the end of structural reform in the Maine Legislature. That became apparent when in the same session a bill was passed putting an end to the statutory term system for the superior court.⁵⁷ The act authorized the chief justice of the Supreme Judicial Court to establish the times for holding terms of the superior court in each county and to specify the business to be conducted at such times. The effect of the measure was to enable the chief justice to deploy the superior court justices more efficiently to meet the demands of litigation. Although the change might have been perceived as threatening a reduction in the number of times the superior court would sit in the less populous counties, the legislative record does not reveal that any objection was raised on that ground.

Proponents of modernizing the Maine courts might have drawn two or three lessons from the lost battle over the county clerks. The principal lesson, of course, was that structural change directly and plainly reducing the power of local politicians would run into serious difficulties, especially if it meant transforming elective local offices into appointive state-level ones. It also appeared that where such a change seemed needed, it would be wise to make it part of a general plan of reform, supported by a thorough and convincing independent study that would clearly justify the reduction in local power by relating it to overall improvements in the operation of the system. Finally, great care would have to be exercised to repel any inference that proposed changes were prompted by partisan political motives.

It was in the context of the see-saw battle over the clerks that in 1967 the Legislature and the Judicial Council began to address the need for change in the probate courts. Those courts were then and still remain sixteen separate courts, not one court. There was and is no chief judge on whom responsibility can be placed for satisfactory performance of all the probate courts. The Maine Constitution itself provided in 1967 that judges and registers of probate be independently elected county officers.⁵⁸ The fees collected in each probate court went and still go to the county treasurer, not to the general fund of the state.⁵⁹

There were some obvious deficiencies in the structure of the probate courts. One was the absence of control by the probate judges over their registers. Separate election gave the register an indepen-

1699 (1969), and 22 to 8 in the Senate, 1 Legis. Rec. 1392 (1969).

57. P.L. 1969, ch. 57. *See supra* note 17.

58. ME. CONST. art. VI, § 6 (1964). *See infra* text at notes 72 and 73.

59. ME. REV. STAT. ANN. tit. 18-A, § 1-603 (Supp. 1990).

dence from the probate judge that was unwarranted by the nature of their working relationship. Though most of their duties are distinct, in some matters their cooperation is necessary. Separate election of the register as a county officer means that the judge has little authority to deal with incompetence or insubordination.

A second flaw in the probate system in 1967 lay in the arrangement for *de novo* review of probate court judgments by the superior court. The resulting waste of judicial resources was not as disturbing as it was in the case of criminal appeals from the district court with its high volume of minor criminal cases. However, *de novo* probate appeals created some additional burden for the superior court and manifested a legislative distrust of the probate courts.

The lack of any command structure within the probate system itself fostered a tendency for the probate court in each county to adopt idiosyncratic local procedures and forms, to the vexation of lawyers from outside the county who might be unaware of special requirements. An effort had been made many years before to control that phenomenon. Since 1895, a commission appointed by the governor, composed of probate judges and registers, had had responsibility for making rules and forms for the probate courts, subject to the approval of the Supreme Judicial Court.⁶⁰ That cumbersome device had not been wholly effective to keep peculiar local procedures and forms from proliferating.⁶¹

The most serious defect in the structure lay in the part-time nature of the probate judge's duties. Probate judges are required to be lawyers and are authorized to practice law when not performing judicial duties. They are not permitted to act judicially in any matter in which their clients have an interest.⁶² Yet the lawyer who is a part-time judge has a latent edge in negotiating with other lawyers who may someday have to appear on other matters before that lawyer in court. Moreover, the danger of a conflict of interest is constantly present.

The probate courts came under scrutiny in a report issued in 1967 by the Bureau of Public Administration of the University of Maine, commissioned by a legislative committee on probate court revision.⁶³ The Bureau was not given enough time to do a thorough study, and its tentative suggestions rested on rather impressionistic findings. In its summary, the report suggested that a district system for probate

60. ME. REV. STAT. ANN. tit. 4, § 351 (1964), repealed, as amended, by P.L. 1979, ch. 540, § 7-A, effective Jan. 1, 1981.

61. INSTITUTE OF JUDICIAL ADMIN., THE DESIRABILITY OF INTEGRATING ACTIVITIES OF THE PROBATE COURTS OF MAINE INTO THE SUPERIOR COURT 14 (Legislative Research Committee Pub. No. 104-21) (1969) [hereinafter 1969 IJA REPORT].

62. ME. REV. STAT. ANN. tit. 4, § 307 (1989).

63. BUREAU OF PUBLIC ADMIN., REPORT OF PRELIMINARY ANALYSIS OF THE FEASIBILITY OF A PROBATE DISTRICT COURT SYSTEM FOR MAINE (Univ. of Maine, Project Report No. 67-1) (1967).

courts was feasible, with full-time appointive judges.⁶⁴ The same summary stated that the opinion of judges and lawyers seemed to be that the probate function should not be attached to the superior court or district court.⁶⁵ The preference was for combining counties into a few districts and having one probate judge ride circuit within each district, with the registers, one per county, remaining at their existing county seats.⁶⁶ The probate district judges could constitute one statewide probate court, perhaps headed by a chief judge.⁶⁷ The impression created by the report was that the existing system, despite its theoretical defects, was not working too badly in practice and that the bar viewed with a tolerant eye the phenomenon of the judge's practicing law when off duty.⁶⁸

Although the 1967 report seemed mild in its findings and rather conservative in its suggestions, the Legislature in 1967 ordered its legislative research committee to study further the feasibility of establishing the recommended probate district court system with full-time judges to be appointed by the governor.⁶⁹ The study was to include a review of current workload as well as trends in the work of the sixteen extant probate judgeships; a translation of caseload into work time of the probate judges; consideration of travel time and other factors implicit in full-time judgeships; and the administration, staffing, structure, organization, and operation of the probate court system.

The legislative research committee retained the Institute of Judicial Administration to do the study. The findings of fact in the study contained no great surprises, but the ultimate recommendation surprised many: the probate courts should be abolished and their jurisdiction should be transferred to the superior court.⁷⁰ The Institute summarized its recommendations as follows:

1. That the present part-time probate judges be replaced (as vacancies occur) by full-time judges.
2. That the supreme court of probate be abolished.
3. That probate registeries be maintained in each county, conveniently close to the registry of deeds.
4. That the jurisdiction of the present probate courts be added to the jurisdiction of the superior court.
5. That the present part-time registers be replaced (as vacancies occur) by full-time registers appointed as clerks of court are now appointed.

64. *Id.* at III-IV.

65. *Id.* at IV.

66. *Id.* at IV.

67. *Id.* at 36.

68. *Id.* at III. *See also id.* at 31.

69. 1969 IJA REPORT, *supra* note 61, at 1.

70. *Id.* at 16-17.

6. That new superior court judges be appointed as needed.”⁷¹

The Institute’s recommendations, with the backing of Chief Justice Williamson and the Judicial Council, seemed headed for quick adoption. A legislative resolve in the summer of 1967 to amend the constitution by eliminating the provision for election of judges and registers of probate was favorably voted on by the people in November of 1967.⁷² However, since no other method of selection was yet in place, the Governor’s proclamation provided perforce that the amendment would be effective “at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges.”⁷³ That time has not yet arrived.

A bill introduced in 1969 to carry out the recommendations of the Institute’s 1967 study was withdrawn.⁷⁴ A bill in 1973 calling for appointment of probate judges was soundly defeated in the House.⁷⁵ Some legislators opposed to the bill declared that local election of probate judges and registers helped keep their constituents interested in exercising their electoral franchise; others expressed disapproval of any further attrition of county autonomy; still others foresaw increased costs to the state.⁷⁶ The fact that a majority of voters had approved the constitutional amendment of 1967 was simply disregarded.

Despite all the alterations in the Maine court system since 1973, the statutory provisions for election of part-time probate judges and registers have not been touched. Although some of the language of the act of 1975, describing the administrative powers of the chief justice of the Supreme Judicial Court, refers broadly to “all courts,” the context seems to limit the references to courts of the “Judicial Department.”⁷⁷ Chief Justices Dufresne and McKusick never treated their administrative authority as extending to the probate

71. *Id.* at 25-26.

72. Const. Res. 1967, ch. 77, passed in 1967. The vote in November, 1967, was 41,850 for the amendment and 34,301 opposed. 1969 Me. Laws 2141 (proclamation by the Governor).

73. 1969 Me. Laws 2141-42 (proclamation by the Governor).

74. 1 Legis. Rec. 1380 (1969).

75. 1 Legis. Rec. 1019 (statement of Rep. Jalbert), 1020 (statement of Rep. Cote), 1242 (statement of Rep. Ross) (1973).

76. L.D. 839 (106th Legis. 1973). The Senate passed the bill, but the House defeated it. 1 Legis. Rec. 1022-23, 1242-43 (1973).

77. ME. REV. STAT. ANN. tit. 4, § 1 (1989) provides in part:

The Chief Justice, as the head of the Judicial Department, shall, in accordance with the rules, regulations and orders of the Supreme Judicial Court, be responsible for the efficient operation of the Judicial Department and for the expeditious dispatch of litigation therein and for the proper conduct of business in all courts. The Chief Justice may require reports from all courts in the State and may issue orders and regulations necessary for the efficient operation of the Judicial Department and the prompt and proper administration of justice.

courts. Still funded by the counties pursuant to statute, they remain outside the "judicial department" of the state.

Yet the probate courts did not remain totally beyond the emerging central governance of the Maine judicial system. In 1977 the Legislature explicitly included the probate judges within the ambit of rules to be prescribed by the Supreme Judicial Court with regard to discipline, disability, retirement, or removal of judges.⁷⁸ The high court had adopted in 1974, with the force of a rule, a "Code of Judicial Conduct," containing seven canons or precepts for behavior of district, superior, and Supreme Judicial Court judges.⁷⁹ In response to the 1977 legislation, the court amended the Code in 1978 to include probate judges within the first three canons.⁸⁰

Two other improvements came from an unexpected quarter. In 1979, after years of study by a legislative commission, the Legislature enacted, effective January 1, 1981, the Maine Probate Code, modelled after the Uniform Probate Code adopted by the National Conference of Commissioners on Uniform State Laws.⁸¹ Though principally addressing problems of substantive law, the Code contained also provisions affecting procedure. Section 1-308 of the Code provided for direct appeal to the Supreme Judicial Court of final judgments and orders of the probate courts. There would be no more *de novo* trials in superior court as a method of review.

More important was section 1-304, which gave the Supreme Judicial Court power to prescribe by general rules the forms, practice and procedure, including rules of evidence, to be followed in all proceedings under the Probate Code and all appeals therefrom. At the moment the Code became effective, on January 1, 1981, the new

78. P.L. 1977, ch. 638 (current version at ME. REV. STAT. ANN. tit. 4, § 9-B (1989)).

79. The Code of Judicial Conduct had been "adopted, prescribed and given the force of a Rule pursuant to the inherent power of this Court" in April, 1974, by Order, Me. Rptr., 313-319 A.2d XXXVII. See *infra* text accompanying notes 116-118.

80. Order, Me. Rptr., 392-395 A.2d LVI, effective Dec. 15, 1978.

81. P.L. 1979, ch. 540, § 1 (current version at ME. REV. STAT. ANN. tit. 18-A (1981 & Supp. 1990)). The Commission on Revision of the Probate Laws had been established and funded by P. & S.L. 1973, ch. 126. The original composition of the Commission was interesting in view of the fact that it would be dealing with politically sensitive matters: The governor was to appoint two lawyers from a state bar association list, one representative of the Corporate Fiduciary Association, one chartered life underwriter, one representative of labor, and two public representatives; the president of the Senate was to appoint two senators, and the speaker of the House was to appoint three members of the House. Three probate judges were to serve as consultants.

On the effective date of the Maine Probate Code (January 1, 1981), the Maine Rules of Probate Procedure also went into effect, and the Advisory Committee on Probate Rules was permanently established. Order, Me. Rptr., 418-427 A.2d XXXI, XCI. Professor Merle Loper of the University of Maine School of Law and the author (the latter briefly) served as counsel to the Commission, and Professor L. Kinvin Wroth served as procedural consultant. Professors Wroth and Loper later served as counsel and reporters for the Advisory Committee.

rules of probate procedure and the official forms were ready and available. The old problem, of finding a suitable mechanism for achieving uniformity of forms and procedures among the sixteen probate courts, was finally resolved.

But the awkward matter of law practice by part-time probate judges remains, as does the independent election of part-time registers. The recommendation in 1969 by the Institute of Judicial Administration was well grounded. The probate courts should be part of the judicial department of the state.

Despite the rebuffs in the Legislature in 1969 in the matter of the clerks of court and in 1973 in the matter of the probate judges, the proponents of further structural change did not cease their efforts. We have seen that the Legislature of 1969 gave the chief justice the authority to designate the times for holding terms of court for the superior court, ending the old statutory term system.⁸² The same Legislature by resolution authorized and funded a study by the Judicial Council of "the operational aspects of the Supreme Judicial and Superior Courts, particularly in the area of finances, facilities and personnel."⁸³

Again the Judicial Council, still under the leadership of Chief Justice Williamson, engaged the Institute of Judicial Administration to make the study. The Institute's report, submitted in January, 1971, contained over 130 recommendations, including the following:

- (1) Provide for state rather than county funding of the operations of the Supreme Judicial Court and superior courts.
- (2) Abolish the term system for holding court. Although the statutory prescription of term times for the superior court in each county had been abolished in 1969, the chief justice still had to designate terms for holding court as the basis for assignment of justices to the several counties. Whenever the work to be done proved to exceed the predetermined duration of the term, delay resulted and a backlog formed.
- (3) Divide the state into regions for operation of the superior court and authorize the chief justice of the Supreme Judicial Court to designate a regional presiding justice in each region with authority to supervise all judicial activities within the region, including scheduling of terms and assignment of justices.
- (4) Give the court system authority to hire its own clerks of court.
- (5) Authorize the chief justice to assign temporarily a superior court justice to hear district court matters or a district court judge to hear superior court matters.
- (6) Set up a program for continuing education of judges of all the courts.

82. See *supra* text accompanying notes 19 and 57.

83. Resolves 1969, ch. 71. A continuing appropriation of \$20,000 was made for the study, which became the 1971 IJA REPORT, *supra* note 12.

(7) Eliminate *de novo* trials in superior court of district court criminal cases. As a means to eliminating trial *de novo* in many cases, the report suggested either (a) adoption of a constitutional amendment which would rescind the right to trial by jury for petty criminal offenses or (b) creation by legislation of a new category of offenses entitled "infractions." In routine traffic cases the superior court was being harassed by appeals from the district court, accompanied by demands for jury trials.

(8) Authorize the employment of law clerks to serve the justices of the Supreme Judicial Court and superior courts.

(9) Enlarge the responsibilities of the administrative assistant to the chief justice of the Supreme Judicial Court by having the administrative assistant take charge of all judicial support functions within the state and ensure compliance with the rules, policies, and directives of the Supreme Judicial Court and the chief justice relating to matters of administration.

(10) Require the chief justice to prepare each year a report on the state of the judiciary.⁸⁴

The Legislature did not respond to the recommendations of the 1971 report of the Institute with the alacrity it had shown in 1961 in carrying out the proposal for the district court. With respect to the *de novo* trial problem, it defeated proposals to amend the state constitution to limit the right to jury trial for minor offenses.⁸⁵ The Supreme Judicial Court itself, sitting as the Law Court, had to strike down on constitutional grounds a measure that would have denied jury trial for violation of the traffic laws: As long as traffic offenses were treated as criminal, the court held, defendants had a right to jury trial under the Maine Constitution.⁸⁶

The Institute's recommendation for dividing the state into regions for court administration went nowhere before 1975, as did also the major recommendations for state funding of the superior court's support structure and elimination of that court's dependence on the elected county clerks. The term system continued.

Some of the less important recommendations of the 1971 report were carried out within the court system as far as they could be without major enabling legislation. Chief Justice Dufresne began in 1971 to include a budget item for salaries of law clerks for the Supreme Judicial Court and superior courts. In the summer of 1971, law clerks began rendering badly needed assistance to the justices of the Law Court, who were facing a rising caseload of appeals containing new and difficult legal problems. Although a law enacted in 1969 had provided for an administrative assistant to the chief justice, the holder of that office was required to serve simultaneously as clerk of

84. 1971 IJA REPORT, *supra* note 12, at 66-72.

85. H. HENRY, *supra* note 13, at 33 n.12.

86. State v. Sklar, 317 A.2d 160 (Me. 1974). See *supra* note 43.

the Law Court and reporter of decisions.⁸⁷ It was impossible for one person holding all three positions even to begin carrying out the important oversight functions recommended in the 1971 report for the administrative assistant to the chief justice.

Although the 105th and 106th Legislatures did little to address directly the basic structural problems of the court system, the 106th Legislature did create, in July, 1973, a commission to "prepare legislation revising the trial court system."⁸⁸ That commission, known as the Trial Court Revision Commission, financed partly with a small appropriation and partly with a grant from the Law Enforcement Planning and Assistance Agency, was charged to address the structural impediments to greater efficiency of the trial courts. The Commission was created in response to growing dissatisfaction of the bench and bar with the existing archaic arrangements. In particular, Chief Justice Dufresne, in an influential essay in the *Maine Law Review*, had warned in 1972 that prolonged failure to carry out the 1971 recommendations of the Institute of Judicial Administration could lead to a breakdown in the rendition of justice in the state.⁸⁹

The Maine Trial Court Revision Commission retained the National Center for State Courts to do the study, which was designed to have a somewhat broader scope than the 1971 study by the Institute of Judicial Administration.⁹⁰ The new commission was to make recommendations regarding the district court as well as the superior court. The legislative charge to the Commission included no explicit reference to the probate courts, and there seems to have been a tacit understanding that the study would not cover them. The Commission's study made a few glancing references to the probate courts and advised that one probate judge be included among appointments to a "Maine Judicial Conference" which it recommended be established.

87. P.L. 1969, ch. 467, § 1, repealed P.L. 1979, ch. 13, § 1. The office of Administrative Assistant to the Chief Justice was abolished in 1979, when it appeared that the functions of the office were being performed by the Administrative Office of the Courts, established in 1975.

88. P. & S.L. 1973, ch. 139, § 1. Chair of the Commission was Joseph E. Brennan, then a state senator, and vice chair was Professor Judy Potter of the University of Maine Law School. Other members were Attorney General Jon Lund, Thomas Delahanty II (currently Chief Justice of the Superior Court), William E. McLaughlin, Gerald F. Petruccelli, Lewis Vafiades and John Walker. The Commission had the support of three judicial advisors, four consultants and a project staff of fifteen persons. NATIONAL CENTER FOR STATE COURTS, PUB. NO. R0020, ADMINISTRATIVE UNIFICATION OF THE MAINE STATE COURTS i-ii (1975) [hereinafter 1975 NATIONAL CENTER REPORT].

89. Dufresne, *Maine's Judicial Machinery at the Crossroads*, 24 MAINE L. REV. 35 (1972).

90. Compare P. & S.L. 1973, ch. 139, § 1 (proposing merger and reorganization of the trial courts) with Resolves 1969, ch. 71 (authorizing study of operational aspects of the Supreme Judicial Court and superior courts).

The report of the Commission,⁹¹ rendered to the 107th Legislature in 1975, closely tracked the Institute's 1971 study in its most important recommendations. One obvious defect in the organization of the Maine courts lay in the lack of integration of the district courts with the rest of the judicial system. One possible way of correcting the defect would have been, of course, to unite the district court with the superior court to form one trial court. By a slim majority, the Commission rejected that solution, most of the members believing that it would lead to strong opposition in the Legislature which might endanger other much needed reforms. Instead, the Commission report adopted the Institute recommendation that the state be divided into four regions, each with a regional presiding superior court justice, designated by the chief justice, located at a court center in each region, with administrative jurisdiction over all courts in that region.⁹²

The original idea was that the chief justice of the Supreme Judicial Court would assign superior court justices to each region and the chief judge of the district court would assign district court judges to each region; within each region the justices and judges would come under the assignment jurisdiction of the regional presiding justice. However, among the drafts of proposed statutes that accompanied the Commission's report, there was no reference to any inclusion of district judges within the administrative authority of a regional presiding justice. Needless to say, the chief judge of the district court was not pleased by the idea of losing control over district court judges once they had been assigned out to regions. In another twist, however, the report recommended that the statute defining the duties of the chief judge of the district court be amended to provide that the chief judge was to be not only "responsible to" but "under the supervision of" the chief justice.⁹³ The Commission perhaps thought that the chief justice could effectively order the chief judge to assign district judges to an administrative region as the recommended plan provided. In fact, however, they were never so assigned. The district court was never integrated with the superior court in the fashion contemplated by the Institute's 1971 recommendations.

One of the features of the 1975 report that may have helped to bring about its implementation by the Legislature was that it set forth in detail the proposed constitutional and statutory amendments and repealers that would be required to carry out the Commission's recommendations. The required legislative surgery was fully disclosed to legislators in the report itself. Furthermore, even when the effect of the proposed legislation would be to diminish

91. 1975 NATIONAL CENTER REPORT, *supra* note 88.

92. *Id.* at 2-3, 15-27.

93. *Id.* at 108.

county autonomy—as by giving the chief justice authority to appoint clerks of court—the diminution seemed relatively unimportant in the context of a major overhaul of the system. Finally, the whole package was sweetened for the counties by the prospect of some fiscal relief from having to support the superior court. With no visible opposition, the 107th Legislature responded favorably to the Commission's report, enacting chapter 408 of the public laws of 1975 and bringing about the most sweeping changes ever made in the judicial system of Maine.

The 1975 statute ended the dependency of the superior court and the Supreme Judicial Court on the counties for courtrooms, chambers and other office space and for office supplies and equipment,⁹⁴ and it ended the long reign of the elective county clerks as clerks of court—reversing the 1969 victory of the counties in the Legislature.⁹⁵ Clerks of the judicial courts were thenceforth to be appointed by the courts. The term system was abolished; the chief justice was by order to divide the state into judicial regions for administrative and venue purposes, designating within each region a regional court center and assigning a regional presiding justice of the superior court to be responsible for the administration of justice within the region. The duties of the regional presiding justices were to be determined by rule of the Supreme Judicial Court. The chief justice had the responsibility for assigning superior court justices to each of the judicial regions. Relief from that responsibility did not come until 1984 with the creation of the office of Chief Justice of the Superior Court.⁹⁶

Within the limits of appropriations, the chief justice of the Supreme Judicial Court was empowered to authorize expenditure of funds for necessary expenses and capital improvements for the supreme judicial and superior courts. The chief justice was given control over the budget of all the “judicial courts.”⁹⁷ The chief judge of the district court was thenceforth to submit the annual budget of that court to the chief justice. The district court budget was no longer to be rendered independently from the budget of the other judicial courts.

The worst of the ancient “impediments to the greater efficiency” of the superior court having been removed, the statute vested in the Supreme Judicial Court “general administrative and supervisory au-

94. P.L. 1975, ch. 408, § 12 (current version at ME. REV. STAT. ANN. tit. 4, § 115 (1989)) (quarters and furnishings), and P.L. 1975, ch. 408, §§ 2, 3 (current version at ME. REV. STAT. ANN. tit. 4, § 4 (3)(B)(1989)) (office supplies and telephone tolls).

95. P.L. 1975, ch. 408, § 21 (current version at ME. REV. STAT. ANN. tit. 4, § 551 (1989)).

96. P.L. 1983, ch. 269, § 7 (current version at ME. REV. STAT. ANN. tit. 4, § 101-A (1989)).

97. P.L. 1975, ch. 408, § 7 (current version at ME. REV. STAT. ANN. tit. 4, § 24 (1989)).

thority over the Judicial Department" and gave it authority to "make and promulgate rules, regulations and orders governing the administration of the Judicial Department."⁹⁸ The office of chief justiceship was about to become a powerful one. In accordance with rules, regulations, and orders of the Supreme Judicial Court, the chief justice was to be responsible for "the efficient operation of the Judicial Department and for the expeditious dispatch of litigation therein and for the proper conduct of business in all courts."⁹⁹

To carry out the heavy administrative responsibility about to be placed on the chief justice, the 1975 statute created the Administrative Office of the Courts, to be directed by the state court administrator, who would be appointed by and serve at the pleasure of the chief justice. The Supreme Judicial Court itself, as distinguished from the chief justice, was given little direct control over the state court administrator. The court may prescribe the qualifications of the administrator's employees, but authority to hire and fire those employees was reserved to the administrator with the approval of the chief justice.

The following provisions of the Act stated expressly the duties to be performed by the state court administrator:

The State Court Administrator under the supervision of the Chief Justice of the Supreme Judicial Court shall:

1. **Continuous survey and study.** Carry on a continuous survey and study of the organization, operation, condition of business, practice and procedure of the Judicial Department and make recommendations to the Chief Justice concerning the number of judges and other judicial personnel required for the efficient administration of justice. Assist in long and short range planning;
2. **Examine the status of dockets.** Examine the status of dockets of all courts so as to determine cases and other judicial business that have been unduly delayed. From such reports, the administrator shall indicate which courts are in need of additional judicial personnel and make recommendations to the Chief Justice concerning the assignment or reassignment of personnel to courts that are in need of such personnel. The administrator shall also carry out the directives of the Chief Justice as to the assignment of personnel in these instances;
3. **Investigate complaints.** Investigate complaints with respect to the operation of the courts;
4. **Examine statistical systems.** Examine the statistical systems of the courts and make recommendations for a uniform system of judicial statistics. The administrator

98. P.L. 1975, ch. 408, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 1 (1989)).

99. *Id.*

shall also collect and analyze statistical and other data relating to the business of the courts;

5. Prescribe uniform administrative and business methods, etc. Prescribe uniform administrative and business methods, systems, forms, docketing and records to be used in all state courts;

6. Implement standards and policies set by the Chief Justice. Implement standards and policies set by the Chief Justice regarding hours of court, the assignment of terms parts, judges and justices;

7. Act as fiscal officer. Act as fiscal officer of the courts and in so doing:

A. Maintain fiscal controls and accounts of funds appropriated for the Judicial Department;

B. Prepare all requisitions for the payment of state moneys appropriated for the maintenance and operation of the Judicial Department;

C. Prepare budget estimates of state appropriations necessary for the maintenance and operation of the Judicial Department and make recommendations with respect thereto;

D. Collect statistical and other data and make reports to the Chief Justice relating to the expenditures of public moneys for the maintenance and operation of the Judicial Department;

E. Develop a uniform set of accounting and budgetary accounts for all courts in the Judicial Department and serve as auditor of the Judicial Department;

8. Examine arrangements for use and maintenance of court facilities. Examine the arrangements for the use and maintenance of court facilities and supervise the purchase, distribution, exchange and transfer of judicial equipment and supplies thereof;

9. Act as secretary. Act as secretary to the Judicial Conference;

10. Submit an annual report. Submit an annual report to the Chief Justice, Legislature and Governor of the activities and accomplishments of the office for the preceding calendar year;

11. Maintain liaison. Maintain liaison with the executive and the legislative branches and other public and private agencies whose activities impact the Judicial Department;

12. Prepare and plan clerical offices. Prepare and plan for the organization and operation of clerical offices serving the Superior and District Courts within each county. Provide for a central clerk of court office at each county seat with satellite clerk in each court;

13. Implement preservice and inservice educational and training programs. Develop and imple-

ment preservice and inservice educational and training programs for judicial and nonjudicial personnel of the Judicial Department; and

14. **Perform duties and attend other matters.** Perform such other duties and attend to such other matters consistent with the powers delegated herein assigned to him by the Chief Justice and the Supreme Judicial Court.¹⁰⁰

The powers and duties thus described were extensive and demanding. Through their performance by the Administrative Office of the Courts, the chief justice could exercise powers and carry out duties created by other statutes as well as by provisions of the 1975 act. Moreover, certain statutory responsibilities of the state court administrator implied the existence of authority in the chief justice that might not be so readily inferred merely from the Act's general provision that the chief justice shall have responsibility "for the efficient operation of the Judicial Department and for the expeditious dispatch of litigation therein and for the proper conduct of business in all courts."¹⁰¹ It would not be entirely certain, for instance, that by itself this general prescription of responsibility authorized the chief justice to order a revision of the existing methods of the district court for docketing and managing its cases.

As we have seen, the district court had enjoyed considerable autonomy since its founding in 1961 and had handled its own heavy caseload since then with at least tolerable success. Without the fifth mandate of the 1975 statute to the state court administrator to prescribe uniform administrative and business methods, systems, forms, docketing, and records to be used in all state courts, there might have been room for some doubt whether it was the legislative intent to subject district court case management to control by the chief justice. But the direct legislative command to the administrator could leave no reasonable doubt: Since the administrator was ordered by statute to bring district court case management into line, the chief justice had the authority and duty to support the administrator's intrusion into that area of district court administration.

The first state court administrator, Elizabeth D. Belshaw, lost no time in setting about to fulfill her statutory mandate.¹⁰² Many judges of the district court were not happy with the prospective invasion of new methods and protested to the Chief Justice. With commendable firmness and fidelity to the purposes of the 1975 legislation, Chief Justice Dufresne, with the backing of the Supreme Ju-

100. P.L. 1975, ch. 408, § 5-A (current version at ME. REV. STAT. ANN. tit. 4, § 17 (1989 & Supp. 1990)).

101. P.L. 1975, ch. 408, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 1 (1989)).

102. H. HENRY, *supra* note 13, at 38.

dicial Court, fully supported the administrator.¹⁰³ By the end of his tenure in September, 1977, Chief Justice Dufresne had accomplished some difficult personnel actions to assure that the provisions of the 1975 law were effectively carried out.

A major purpose of the 1975 act was indeed to end the isolation of the district court and integrate it with the rest of the system. Besides the provisions directing the state court administrator to prescribe uniform administrative and business methods throughout the judicial department, the statute contained several provisions directly promoting integration of the district court with the rest of the system. As noted earlier in this essay, the chief judge was not only to be "responsible to" the chief justice but to serve "under the supervision of the Chief Justice or his delegate."¹⁰⁴ The statistics collected by the chief judge were to be compiled as requested by the chief justice or his delegate.¹⁰⁵ The district court annual budget was to be submitted to the chief justice, and the chief judge was to perform such additional duties as might be assigned by the chief justice. Powers of the chief judge not enumerated but necessary or desirable for proper administration of the courts were reserved to the Supreme Judicial Court.¹⁰⁶ Finally, the act created a Judicial Conference of Maine composed of both judges and justices, to advise and consult with the Supreme Judicial Court on matters affecting the administration of the judicial department.¹⁰⁷

After fourteen years of existence with virtually no administrative tie to the rest of the judicial department except for the appointive and dismissal power of the chief justice over the chief judge, the district court had been brought into one system with the Supreme Judicial Court and the superior courts. For the first time in history, Maine had a reasonably good structure for a coordinated system of trial and appellate courts, with responsibility placed squarely on the Supreme Judicial Court and its chief justice and with administrative machinery adequate to carry out that responsibility—subject always, of course, to the Legislature's willingness to fund the system adequately.

There were still some loose ends. The administrative court, which had been constituted a court of record in 1973,¹⁰⁸ remained outside

103. *Id.* at 39.

104. P.L. 1975, ch. 408, § 14 (current version at ME. REV. STAT. ANN. tit. 4, § 164 (1989 & Supp. 1990)).

105. P.L. 1975, ch. 408, § 15 (current version at ME. REV. STAT. ANN. tit. 4, § 164(7) (1989)).

106. P.L. 1975, ch. 408, § 19 (current version at ME. REV. STAT. ANN. tit. 4, § 164(14) (1989)).

107. P.L. 1975, ch. 408, § 19-A (current version at ME. REV. STAT. ANN. tit. 4, § 471 (1989)).

108. P.L. 1973, ch. 303. The administrative court, with two judges, has jurisdiction over certain types of cases relating to denial, suspension or revocation of licenses by

the system, as did the sixteen probate courts with their elected registrars and part-time judges, their special rule-making procedure and the odd arrangement for appeal of their decisions by *de novo* trials in the superior court "sitting as the Supreme Court of Probate." No provision had yet been made to coordinate the operations of the eighteen county law libraries, which had always been funded by the counties.¹⁰⁹ The 1975 act provided for funding of those libraries by the state rather than the counties, but it created no mechanism for establishing policies on acquisitions, staffing and management. A few of the county law libraries had been carefully managed by their law library associations, but most had been operated with part-time untrained staff and had deteriorated.¹¹⁰

When Vincent McKusick succeeded Armand Dufresne as chief justice in September of 1977, most of the principal institutions of the present court system were in place and working. During the last two years of his tenure, Chief Justice Dufresne and the Supreme Judicial Court had been carrying out the internal reforms directed by the 1975 act, initially over protests by some judges and clerks of the trial courts who disliked the intrusion of the Administrative Office of the Courts into their operations.¹¹¹ By the time Chief Justice McKusick entered on his duties, internal resistance to the new arrangements had died down. Even with the full cooperation of all concerned, however, the mass of administrative duties confronting the new chief justice and the court was formidable.

A hallmark of the new regime was to be the establishment by court orders of a network of committees to assist in formulating in-

licensing agencies of state government. The court was admitted to the judicial department in 1978 by P.L. 1977, ch. 551, § 1, effective July 1, 1978 (current version at ME. REV. STAT. ANN. tit. 4, §§ 1151-1158 (1989 & Supp. 1990)). Its decisions are reviewable for error of law by the superior court. M. Admin. C.R. 73.

109. ME. REV. STAT. ANN. tit. 27, ch. 7 (1964), *repealed* by P.L. 1981, ch. 510, § 2.

110. 1971 IJA REPORT, *supra* note 12, at 65. Not until 1981 was the deplorable situation of the county law libraries straightened out by P.L. 1981, ch. 510, § 1, which created a State Court Library Committee, to be appointed by the chief justice as a governing board for all the former county law libraries. The Act called for appointment of a trained state court library supervisor, to serve in the Administrative Office of the Courts and to plan for and coordinate the activities of the former county law libraries. The governing statutory provisions are ME. REV. STAT. ANN. tit. 4, ch. 6 (1989 & Supp. 1990)). The state and county law library system is an essential institution for proper functioning of the Maine courts.

111. H. HENRY, *supra* note 13, at 38-39. Silsby, *supra* note 13, at 178, col. 3. The opponents of the new regime attempted to repeal the legislation of 1975 or strangle the system by budgetary cuts but without much success. They did succeed, however, in getting the Legislature to enact P.L. 1977, ch. 544, which contained a number of provisions requiring approval or permission of the chief judge of the district court before the state court administrator could install uniform business methods, systems, forms and records, and uniform accounting in the district court. This strange piece of legislation (the chief judge still held office at the pleasure of the chief justice) was finally repealed, in effect, by P.L. 1983, ch. 269, § 3.

ternal policies and procedures for carrying out legislative mandates. When Chief Justice McKusick was appointed, there were only five advisory committees reporting to the Supreme Judicial Court: the advisory committees on civil rules, criminal rules, and rules of evidence, the committee on judicial records and an advisory committee on court administration, policies and procedures. Three committees then reported to the chief justice: a committee on court management and policy, a continuing judicial education committee, and a committee on the annual judicial conference. By the end of 1990, mostly as a result of legislation enlarging the responsibilities of the high court and the chief justice, the array of committees and boards reporting to them was as follows:¹¹²

Reporting to the Supreme Judicial Court

Board of Examiners for the Examination of Applicants for Admission to the Bar
 Board of Overseers of the Bar
 Advisory Committee on Civil Rules
 Committee on Judicial Responsibility and Disability
 Advisory Committee on Professional Responsibility
 Advisory Committee on Criminal Rules
 Advisory Committee on Rules of Evidence
 Advisory Committee on Judicial Records
 Advisory Committee on Probate Rules
 Advisory Committee on the Code of Judicial Conduct

Reporting to the Chief Justice

Committee on Continuing Judicial Education
 Committee on Court-Appointed Counsel
 Committee on the Judicial Conference
 Court Mediation Committee
 Judicial Department Legislation Committee
 Judicial Policy Committee
 State Court Library Committee

In the intervening years other committees had been created to deal ad hoc with problems as they emerged, and had been later discharged or reorganized as problems were brought under control. For example, the Advisory Committee on Court Administration, Policies and Procedures, established in March of 1977 to report to the Supreme Judicial Court, ceased to function in 1986. A committee on court reporters, established in 1978, disappeared in 1983. An advisory committee on court-bar association relations came and went, as did a committee on court facilities, whose functions became absorbed into the operations of the Administrative Office of the Courts. The Committee on Collective Bargaining for Judicial Department Employees lasted as long as necessary to provide policy guidance to the state court administrator in instituting collective

112. 1990 ANNUAL REPORT, *supra* note 34, at 29-35.

bargaining pursuant to a statute and order in 1983.¹¹³

The titles of the committees themselves reflect the major responsibilities placed on or assumed by the Supreme Judicial Court and the chief justice. The rules of evidence had gone into effect during the last eighteen months of Chief Justice Dufresne's tenure, having been prepared by the Advisory Committee on Rules of Evidence pursuant to an enabling statute in 1973.¹¹⁴ Except in certain types of proceedings,¹¹⁵ those rules are applicable to all the courts of the state, including the probate courts.

The Supreme Judicial Court formed the Committee on Judicial Responsibility and Disability in 1977 under the direction of a statute requiring that such a committee be set up.¹¹⁶ Its function was not just to recommend rules, but to make investigations and recommendations to the court in regard to discipline, disability, retirement or removal of judges of all the courts, including the probate courts. Accordingly, that committee has been an operating committee, not an advisory one. Its procedures were established in 1978 by rules which, as amended from time to time, set forth the composition of the Committee and the investigative procedures to be followed when a complaint is lodged against a Maine judge.¹¹⁷ Although the Committee may dismiss complaints after investigation, it has no power to impose discipline. If the Committee believes that discipline may be warranted, it reports its findings of fact and conclusions of law to the Supreme Judicial Court for appropriate action.¹¹⁸

On its own initiative, asserting an inherent supervisory power, the

113. See *infra* text accompanying notes 122-25.

114. Promulgation Order, Me. Rptr., 336-343 A.2d XL, effective February 2, 1976. The initial Advisory Committee for Rules of Evidence had been chaired by Robert B. Williamson after his retirement as Chief Justice. Other members included Franklin G. Hinckley, Lynwood E. Hand, David A. Nichols (later a justice of the Supreme Judicial Court), Frank E. Hancock, Ralph I. Lancaster, and Jack H. Simmons. The original consultants had been Richard H. Field, of the Harvard Law School faculty, and Peter L. Murray, of Portland. Order, Me. Rptr., 293-299 A.2d XLV-VI.

115. M.R.Evid. 1101. The administrative court is not specified in subsection (a) as a court to which the Rules of Evidence are applicable, but M. Admin. C.R. 43 provides that Rule 43 of the Maine Rules of Civil Procedure governs procedure in the administrative court "so far as applicable." Subsection (a) of M.R. Civ. P. 43 in turn provides: "All evidence shall be admitted which is admissible under the statutes of this state, or under the rules of evidence applied in the courts of this state." M.R. Civ. P. 43(a).

Excepted proceedings include, among others, grand jury proceedings and small claims proceedings before rendition of judgment. M.R.Evid. 1101(b).

116. The Committee was established by order of the Supreme Judicial Court, effective July 5, 1978, Me. Rptr., 385-388 A.2d LX, and pursuant to P.L. 1977, ch. 638 (current version at ME. REV. STAT. ANN. tit. 4, § 9-B (1989)).

117. The original order establishing the Committee on Judicial Responsibility and Disability was promulgated on June 26, 1978, effective July 5, 1978.

118. See RULES OF THE COMMITTEE ON JUDICIAL RESPONSIBILITY AND DISABILITY 3.

court adopted the Maine Bar Rules, effective November 1, 1978, to govern the professional conduct of Maine attorneys. Rule 3 was a code of professional responsibility, modeled after the American Bar Association 1969 Model Code of Professional Responsibility and Disciplinary Rules.¹¹⁹ Other rules established the Board of Overseers of the Bar and several subsidiary institutions deemed necessary for the Board's operation: a grievance commission, a bar counsel (with a role comparable to that of a prosecutor), a professional ethics commission, and a fee arbitration commission. Every Maine lawyer must register each year with the Board and pay an annual fee, established by the Supreme Judicial Court, to meet the expenses of administration of the system.¹²⁰ The constitutionality of the arrangement was challenged by a dissident member of the bar but was upheld by the Supreme Judicial Court, sitting as the Law Court, on appeal.¹²¹

Other duties and activities besides those reflected in the titles of the various boards and committees have occupied the thought and effort of Chief Justice McKusick and the Supreme Judicial Court during his tenure. To list a few at random: the construction and improvement of court facilities; a thorough revision of small claims procedures; revisions of the bail system and the grand jury system; training sessions for law clerks and court clerks; computerization of the whole court system except the probate courts; liaison with the Maine Criminal Justice Planning and Assistance Agency while it was in existence; liaison with the Maine Criminal Justice Sentencing Institute; general supervision of a project in 1980-1981 to improve the selection and management of jurors; liaison with the Maine Commission on Domestic Abuse; liaison with the Supreme Judicial Court Plan and Design Commission, a legislative commission studying possibilities for a new Supreme Judicial Court building in Augusta.

An important development in 1984 was the enactment of the Judicial Employees Labor Relations Act, giving employees of the judicial department the rights to engage in collective bargaining, join labor organizations of their own choosing, and be represented by

119. The Supreme Judicial Court first promulgated the Maine Bar Rules reserving Rule 3 (to be the Code of Professional Responsibility). Order Adopting Rules 1-2 and 4-10 of the Maine Bar Rules, Me. Rptr., 392-395 A.2d XXII. An order amending Rules 1 and 2 and 4-10 was promulgated with the new Rule 3 the following year, effective May 15, 1979. Order, Me. Rptr., 396-400 A.2d LVII. The Code of Professional Responsibility was initially prepared by the fifteen-person Select Commission on Professional Responsibility, headed by President Robert Strider of Colby College. Dean Bert S. Prunty, of the University of Maine School of Law, served as counsel and reporter. Order, Jan. 17, 1978, Me. Rptr., 381-384 A.2d LXIX.

120. M. Bar R. 6.

121. Board of Overseers v. Lee, 422 A.2d 998 (Me. 1980). The gravamen of Lee's complaint was that the registration fee constituted a tax, which only the Legislature has power to exact. *Id.* at 1003-1004.

those organizations in their employment relations with the judicial department.¹²² To allay any doubts about the constitutionality of that statute—doubts grounded in the separation-of-powers clause of the Maine Constitution—the Supreme Judicial Court itself issued an order also authorizing collective bargaining for judicial employees.¹²³ The Administrative Office of the Courts had done much since 1975 to rationalize the personnel system of the judicial department, and by 1984 it had also had the benefit of an independent personnel study completed in 1981 by Arthur Young & Company.¹²⁴ The adjustments necessary to carry on collective bargaining without undue disruption were not exceptionally difficult. The Maine Labor Relations Board now exercises almost the same functions and authority with respect to judicial employees' collective bargaining as it exercises with respect to other state employees.¹²⁵

The domestic relations law of Maine went through many elaborate revisions during the 1980's. Several new sections are devoted to protection of the interests of minor children of failed or failing marriages; a common feature of those sections is a provision calling for the court to refer the battling couples to mediation.¹²⁶ In 1985 the Legislature established the Court Mediation Service to provide mediation in both the superior and district courts throughout the state.¹²⁷ The statute directed the Administrative Office of the Courts to contract with qualified individuals to serve as mediators, and it directed the chief justice to appoint a court mediation committee to set policy for and monitor the Service. Mediation is required in all contested domestic relations cases when minor children are involved, and it may be required for parties in small-claims cases. The Service may mediate only cases pending in the courts. In fiscal year 1989-1990, a total of 5,596 cases were sent to mediation, of which

122. ME. REV. STAT. ANN. tit. 26, §§ 1281-1294 (1988 & Supp. 1990).

123. Administrative Order in Regard to Judicial Employees Labor Relations, effective July 25, 1984, Me. Rptr., 467-478 A.2d LXXXIX-XCIV. The Supreme Judicial Court had cooperated with legislative leaders through an advisory committee on collective bargaining for judicial department employees.

124. ARTHUR YOUNG & CO., MAINE JUDICIAL EMPLOYEES LABOR RELATIONS (1981). That report to the state court administrator had evaluated the existing personnel classification and compensation system and had documented current market salaries for court positions.

125. Compare ME. REV. STAT. ANN. tit. 26, ch. 14 (1988 & Supp. 1990) (judicial employees) with ME. REV. STAT. ANN. tit. 26, ch. 9-B (state employees). There are minor differences. For example, ME. REV. STAT. ANN. tit. 26, § 1285(5)(1988), permits the parties to agree in advance to a mediation-arbitration procedure in the case of judicial employees, whereas the cognate provisions for bargaining procedure in the case of state employees, 26 M.R.S.A. tit. 26, § 979-D (1988), contains no such authorization.

126. *E.g.*, ME. REV. STAT. ANN. tit. 19, §§ 214, 581, 636, 665, 752 (Supp. 1990).

127. P.L. 1985, ch. 396, § 1 (current version at ME. REV. STAT. ANN. tit. 4, § 18 (1989 & Supp. 1990)).

slightly more than half were resolved without trial.¹²⁸

That further restructuring of the courts of Maine may take place was signified in 1990 by legislation creating a large commission, known as the Commission to Study the Future of Maine's Courts, to study the court system and "make recommendations as necessary to ensure that the judicial needs of citizens will be met in the 21st century".¹²⁹ To be re-examined, among other things, are some of the proposals made during earlier studies that have not yet been adopted, such as unification of the trial courts, establishment of an intermediate appellate court, and resolution of the conflict-of-interest problem of the probate judges.

Some interesting minor changes in court structure during the past few years have had a decentralizing effect. As noted above, legislation in 1983 permitted the chief justice to designate a chief justice of the superior court from among the justices of that court.¹³⁰ Serving at the pleasure and under the supervision of the chief justice of the Supreme Judicial Court, the chief justice of the superior court is now responsible for the operation of that court. One consequence has been that the chief justice of the Supreme Judicial Court is no longer directly responsible for deployment of superior court justices throughout the former judicial regions of the state. The superior court and district court now have their own committees on civil and criminal forms.¹³¹

In recent years the Legislature has occasionally assigned functions and responsibilities directly to the Administrative Office of the Courts and to the chief justice of the superior court or the chief judge of the district court. The statute of 1985 setting up the Court Mediation Service directly designated the Administrative Office of the Courts as the contracting agency for engaging mediators.¹³² In 1985 also, the state court administrator, under supervision of the chief justice, was directly instructed to "plan and implement arrangements for safe and secure court premises" and given authority to contract for services of qualified security personnel.¹³³ Again in 1985, the Legislature placed the Court Appointed Special Advocate Program directly under control of the chief judge of the district court.¹³⁴ The program is designed to provide volunteer lay persons

128. 1990 ANNUAL REPORT, *supra* note 34, at 121.

129. P.L. 1989, ch. 891, § B-5.

130. See *supra* note 96.

131. 1990 ANNUAL REPORT, *supra* note 34, at 36.

132. P.L. 1985, ch. 396, § 1 (current version at ME. REV. STAT ANN tit. 4, § 18 (1989)).

133. P.L. 1987, ch. 137, § 3 (current version at ME. REV. STAT ANN tit. 4, § 17 (15) (1989 & Supp. 1990)).

134. P.L. 1985, ch. 581, § 1 (current version at ME. REV. STAT ANN tit. 4, § 1502 (1989 & Supp. 1990)). A description of the Court Appointed Special Advocate (CASA) Program appears in 1990 ANNUAL REPORT, *supra* note 34, at 125.

to serve as appointed special advocates or guardians ad litem in child abuse and neglect cases. The only direct link to central administration appears in a provision that one member of the advisory panel for the Program shall be the state court administrator or the administrator's designee.¹³⁵

The statute establishing the Commission to Study the Future of Maine's Courts contains a provision directly authorizing the chief justice of the superior court and the chief judges of the district and administrative courts to establish a pilot project for handling of cases arising under the domestic relations law, child protective proceedings under the child welfare laws, and "any other matters the Chief Justice [of the Superior Court] and Chief Judges determine appropriate."¹³⁶ The three chiefs are to report on the project to the Commission to Study the Future of Maine's Courts.¹³⁷ The provision seems studiously to avoid any direct involvement of the Supreme Judicial Court, the chief justice, or the Administrative Office of the Courts.

One could speculate that the Legislature may be coming to recognize that the administrative load that the high court, the chief justice and the Administrative Office of the Courts are bearing is extremely heavy and perhaps to think that allocating responsibilities directly to the administrative head of the trial courts will alleviate the burden at the top. However, any idea that the Legislature worries about overburdening the administration of the court system is probably untenable. In the summer of 1989, an emergency measure was enacted directing the Department of Human Services to establish a child support table by October 12, 1989, and directing the Supreme Judicial Court to adopt by the same date rules establishing criteria for application of the child support table for use in judicial proceedings.¹³⁸ In the fall of 1989, the Supreme Judicial Court divided, four votes to three, on whether to comply with the directive.¹³⁹ Though the court complied, three justices declined to concur, on the ground that the provision amounted to an unconstitutional delegation of legislative power to the court. Writing for Justices

135. ME. REV. STAT. ANN. tit. 4, § 1505 (1989).

136. P.L. 1989, ch. 891, § A-12.

137. *Id.*

138. P.L. 1989, ch. 365, § 1, repealing and replacing ME. REV. STAT. ANN. tit. 19, § 303-A, relating to guidelines for child support awards. Subsection 3 of the new section 303-A directs the Supreme Judicial Court to "adopt rules establishing criteria for application of the child support table for use in judicial proceedings to establish child support by October 12, 1989, which rules shall provide that consideration shall be given to the relative periods of time which a child spends with each parent and the relative consequential financial burden this places upon each parent." Section 303-A was repealed by P.L. 1989, ch. 834, § B-7 (effective April 17, 1990).

139. Supreme Judicial Court Administrative Order Adopting Child Support Guidelines, No. SJC-13 (Oct. 5, 1989, effective Oct. 12, 1989).

Roberts and Glassman also, Justice Hornby stated:

At the Legislature's direction, the Court has set out upon a path it has never previously taken. Today the Court writes law in a context divorced from the decision of any particular case and in an area not involving the customary workaday rules of court like procedure, evidence and lawyer/judge discipline. The Child Support Guidelines involve difficult and abstract questions of policy that the people's elected representatives, not this Court, should decide. At the very least, an executive agency should promulgate such rules according to standards set by the Legislature. They would then have the benefit of prior notice and a public hearing and be subject to the public scrutiny inherent in executive decision making. If we recognize today's legislative assignment as proper, what will be tomorrow's? Devising criteria for damages in workers' compensation or medical malpractice cases? Writing detailed rules for liability in cases involving hazardous substances? There are many such areas where a busy legislature could shunt aside tedious or politically difficult cases to courts; but the result would be a major alteration of our system of state government.¹⁴⁰

The majority of the court, issuing the order, observed:

Although mindful of the concerns expressed by our colleagues in nonconcurrence, we issue this Administrative Order in response to 19 M.R.S.A. § 303-A(3). We are required to assume that the statute is constitutional and we leave it to the Law Court to rule upon the constitutionality of the statute if it is challenged in litigation. The Legislature may choose to remove any uncertainty by enacting the substance of the Administrative Order.¹⁴¹

It may be symptomatic of a change in attitude toward the separation of powers over the past thirty-five years that the Legislature, which was once so cautious about giving the Supreme Judicial Court rulemaking authority, seems in this case to have regarded a rules-enabling statute as a proper device for resolving a complex question of social policy having little to do with court procedure or organization. The statute was soon repealed and replaced by one containing its own child support guidelines,¹⁴² whereupon the court vacated its order.¹⁴³ The incident should not be regarded as precedent for using the high court as a kind of ad hoc administrative agency.

This brief account barely summarizes the development over thirty-five years of the Maine court system. In 1956 it was hardly a system at all—a mere agglomeration of courts, largely uncoordinated in their procedures, erratic in performance, with great inequities in personnel management and pay, lacking in any institutional encour-

140. *Id.* at 8-9 (statement of nonconcurrence).

141. *Id.* at 1.

142. ME. REV. STAT. ANN. tit. 19, § 311 (Supp. 1990).

143. Administrative Order, July 20, 1990, effective August 19, 1990, Me. Rptr., 576-_____ A.2d CXLIII.

agement of continuing education, and weak in mechanisms for supervision and control. Except for the probate courts, it is now one fully administered system with lines of administrative authority clearly drawn, with sanctions in place for professional misbehavior by judges or lawyers, and with an effective instrument for management in the form of the Administrative Office of the Courts.

In reviewing those dramatic administrative improvements, one should not lose sight of the fortunate fact that the actual performance of individual judges in their daily work remains highly independent and largely beyond the reach of any administrative power. Good court structure and administration make judges more productive and efficient than they might otherwise be and probably attract abler persons to the bench, but the quality of the decisions they render from day to day depends far more on their own ability, learning and character than on the administrative system in which they do their work. The quality of justice in Maine will always depend most heavily on the quality of appointments to the bench. Among judicial appointments, however, the designation of Chief Justice of the Supreme Judicial Court now stands in a class by itself. The holder of that office must be not only a good judge but a person with the concern, vision, energy, diplomatic skill, and courage to manage the court system of Maine effectively and lead it wisely through changes yet to come. It will not be easy to equal or surpass the performances of Chief Justices Williamson, Dufresne, and McKusick.