The State of the Judiciary
Chief Justice Norman F. Arterburn, Supreme Court of Indiana
Message to the Legislature
February 7, 1973

Lieutenant Governor Orr, Speaker Burrous, Senator Gutman and Members of the 98th Indiana General Assembly, Ladies and Gentlemen:

It is with a feeling of great pride and gratitude that I stand here before this joint session of the House of Representatives and the Senate of the Indiana General Assembly. This is an historic occasion. It is the first time in the 157 years since Statehood was granted Indiana that a representative of the Third Branch of State Government, the Judiciary, has been afforded an opportunity to speak to the members of the Legislative Branch on "The State of the Judiciary."

The framers of our Constitution acted most wisely when they prescribed careful guidelines for checks and balances in our State government by establishing three separate departments – the Legislative, the Executive and the Judicial. With that declaration of the separation of powers, the writers of the Constitution also directed: " . . . and no person, charged with official duties under one of these departments, shall exercise any of the functions of the other, except as in this Constitution expressly provided." However, these departments can not exist and adequately perform their Constitutional functions without communication among them. Therefore, I am most grateful for the invitation as Chief Justice of Indiana, to occupy this platform and to speak on the Judiciary, or, as it is expressed in the Constitution's new Judicial Article which took effect on January 1, 1972: "The Chief Justice shall have prepared and submit to the General Assembly regular reports on the condition of the courts and such other reports as may be requested."

Indiana is one of the leaders of the practice of greater communication among the branches of government. To our knowledge, it is the fourth State in the Union to afford its Chief Justice the opportunity to address a joint session of a State Legislature. In fact, the first such occasion in the Nation occurred in 1971. Thus, you will appreciate my enthusiasm and yet, I have feelings of inadequacy as I seek to set out what I believe would be of interest to you, and of interest to the general public at this juncture in the evolution of Indiana's judicial system. I say "inadequacy" because resources are not available for a sufficient accounting on the condition of the courts, especially at the trial or local court level. No central clearing house exists or are statistics available pertaining to the business of the courts throughout the 92 counties at present.

The research and studies of the Indiana Judicial Study Commission, which was created in 1965, have developed useful information about the Indiana courts. However, that research has evolved because of specific project assignments, and the State of Indiana currently lacks an on- going program which brings to one central source the great variety of information about the courts on a regular, continuous basis. There is a new emphasis throughout the Nation toward modernizing the business and administrative practices of the courts so that thorough evaluations may be made about judicial manpower, caseloads and procedural innovations. Your attention is commended to legislation which would create the Office of State Court Administration for the accountability of record to the Chief Justice.

That proposal would also authorize the Supreme Court to temporarily transfer a judge from a trial court to another jurisdiction to assist in the disposition of the business of another court. Should this authority be granted by the General Assembly, it is contemplated that the Supreme Court will create a bank or group of trial judges who would be willing, on request to help clear congested dockets elsewhere on a limited assignment basis. In other words, the plan would be conducted on a voluntary and cooperative basis so that such extraordinary judicial duties would not be arbitrarily directed.

**The Court System of Indiana**

For those of you who are not lawyers it may be of help to give a bird's eye view of the judicial system in Indiana. At the base, as most of you know, are the small courts such as the justice of the peace, city courts, municipal courts and local magistrates, each of which has limited jurisdiction and from which in most cases there is a right to appeal to a court of general jurisdiction such as the Circuit or Superior Court. Next, above these small courts are the trial courts of the state of Indiana which are known as Circuit, Superior and Criminal Courts, Probate Courts, Juvenile Courts, etc. Interesting to say, in this State we once only had Circuit Courts. The name was derived from the fact that such Court had no site in one county, but the Judge rode a circuit of two or more counties holding court at certain times or terms. It was in such a setting that Abraham Lincoln rode the circuit with other attorneys who followed the judges from county to county. In the evening Lincoln would sit at the fireside and tell his stories. Calvin Fletcher and Ovid Butler, later president of Butler University were among those early circuit riders when Indianapolis was a small town of two or three thousand. As population increased circuits were cut down until today there are about a half dozen courts left that are truly circuit courts. With the increase in population, additional courts of the same jurisdiction as a circuit court were required to take care of business and they were denominated Superior Courts. Some counties have more than one Superior Court. As the business and complexity of the laws increased, in the larger counties, it was found that courts could work efficiently if they became specialized courts such as Criminal Courts, Probate Courts or Juvenile Courts. Above this tier of such courts is the Court of Appeals consisting of nine Judges and three Divisions, and above that is the Supreme Court.

As you know, there was significant reorganization of Indiana's appellate-level Judiciary following ratification of the Judicial Amendment to the Constitution, with the terms of that amendment taking effect January 1, 1972. There is no need to go into the details of that Constitutional restructuring. But, it was by that Constitutional directive that the Office of the Chief Justice of Indiana was established for the accomplishment of greater administrative duties, the former statutory Appellate Court was replaced by the Court of Appeals, and there was created the Judicial Nominating Commission to provide recommendations for the filling of vacancies as they occur on the Supreme Court and on the Court of Appeals. The latter Commission also serves as the Judicial Qualifications Commission which reviews and passes upon the performances of the appellate judges of this state.

**The Court of Appeals**

Under the new Judicial Amendment, one Judge was added to the eight-member Court and the Court of Appeals was divided into three Districts of three Judges each. For the first time, this tier of the state's appellate-level Judiciary, the Court of Appeals, was given criminal jurisdiction

under the rule-making authority of the Supreme Court. This jurisdiction of the Court of Appeals relates to all criminal case appeals except when the penalty is imprisonment for 10 years or more, or life or death. When a trial court has adjudged a law unconstitutional, that action may be appealed directly to the Supreme Court.

Chief Judge George B. Hoffman of the Court of Appeals has provided information about the work of that Court. During the first year of their operation ending on January 1, 1973, that Court received approximately 400 (398) cases fully briefed which were distributed to the three panels of Judges on the Court. In 1972, 136 more cases were disposed of than in 1971. A total of 335 cases were disposed of in 1972, leaving 106 cases as a backlog for the three panels. Chief Judge Hoffman informs me that of these 106 cases, 74 are pending less than three months; 22 less than 6 months; 9 less than 9 months, and only one appeal is over 9 months old and that is 9 months and three days. I wish to commend that Court for its energetic work and the disposition of its cases. It appears that the new Judicial Amendment which gave the Legislature the power to increase the number of divisions on the Court of Appeals was a wise and farsighted provision. As the caseloads increase, additional divisions may be necessary.

**The Supreme Court**

Over all the divisions of the Court of Appeals is the Supreme Court which must review those opinions, especially if the decision of one division is contrary to another division's causing confusion and conflict as to what the law is. We also must have the burden of dealing ultimately with important constitutional questions.

The present Supreme Court consists of four Justices and a Chief Justice. The Chief Justice is compelled to devote a portion of his time to administrative duties and attempting to keep the Court operating efficiently.

Cases are distributed to each Justice in rotation as the briefing is completed in our Court. There is no picking and choosing of cases by a Justice. Every third round the Chief Justice is omitted to partially compensate for the time he has to devote as the chief officer of the Court.

During the year ending January 1, 1973, approximately 200 appeals were filed in the Supreme Court. In addition, approximately 150 petitions to transfer to review the action of the Court of Appeals were filed in the Supreme Court, 35 original actions requiring a hearing before the Court and requesting mandate or prohibition, primarily against trial courts were filed in the Supreme Court. In addition, there are other miscellaneous type actions including disciplinary matters and appeals from the Board of Law Examiners decisions requiring review before this Court, that approximate 25 in number. Thus we have before the Supreme Court in one year approximately a total of 400 reviews, appeals and other matters for five Justices to consider.

I know you are concerned about the output of the Court in the face of this inflow of cases. I have the following figures of cases disposed of by the five Justices during the past three years.

**Total Cases Decided**

| Appeals- | Petitions For | Original | Per Year |
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| | Opinions | Transfer | Actions, etc. | Total | Per Judge |
|---|---|---|---|---|---|
| 1972 | 217 | 95 | 25 | 337 | 67 |
| 1971 | 235 | 85 | 25* | 345 | 69 |
| 1970 | 208 | 71 | 25* | 304 | 60 |

*Estimated

**Backlog of Cases**
(February 1, 1973)

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|---|---|
| Appeals | 93 |
| Petitions to Transfer | 47 |
| Pro Se Appeals | 75 |
| Motions to Dismiss Appeals | 20 |
| Misc. Original Actions, etc. | 26 |
| TOTAL | 261 |

With an inflow of about 400 cases a year and a total disposition of 330 to 340 cases by the Court, you may see the present backlog of 265 cases increase at a rate of 60-70 cases more a year. Although more appeals go to the Court of Appeals than previously under the new rules, nevertheless, we get them back in the Supreme Court on Petitions to Transfer, which have materially increased under the new Rules. The total output on our Court per Judge is far above the average. Most courts in other states run 30 to 40 opinions per judge a year. A Justice must not only draft his own opinions, but also consider and study the opinions and memorandum of all the other Justices before final disposition of a case. In addition to the decision making cases, the time of the Justices is taken in conferences, considering and adopting rules and codes of procedure, disciplinary cases, admissions to the bar and oral arguments, and participating in activities of the law schools and the bench and bar.

When I first went on the Court about 18 years ago we granted oral argument in every appeal. Regrettably, we have had to eliminate all oral argument except in the most important and grievous cases, since the argument and the conference following the argument take up the major portion of the day and keep us out of our offices and from working on other opinions. I personally regret such necessary action since I think in fairness to the litigants and the lawyers, oral argument plays a very important part in presenting the merits of the case to the Court. I, as a practicing lawyer, always wanted oral argument and would feel deprived if it was denied. I am sure most attorneys feel the same way. I am not complaining personally, but the litigants and the people of the state have justifiable complaint with the backlog of cases.

The demands on our time actually cannot be satisfied under the present conditions. This creates an unconscionable burden and I am sure results in a lack of quality in our opinions and decisions.

There is a proposal before you to increase the membership of the Supreme Court from five members to seven members. I feel our present overburdened Court can be materially relieved with two more members added. I trust you will give this matter serious consideration.

Whether we like it or not, state government is growing all over the nation. During the last session of the Legislature a law was enacted providing for the construction of a judicial building. I am not naïve enough to think that this was done because we on the court needed the room, but rather because the Legislature needed our rooms. Seriously, however, I wish to commend the Legislature for this act. Regrettably, nothing has been done in activating and initiating this program provided by this law, although at the time approximately 50% of the cost could have been provided from federal funds. An amendment to this act has been introduced to eliminate from its provision a time-consuming process of holding a contest for architectural submissions of designs for the building. I trust the Legislature will give this matter attention.

**Retirement**

I find as Chairman of the Judicial Nominating Commission that in securing qualified nominees for vacancies for judges, that many highly qualified persons refuse to allow their names to be considered for such vacancies because they realize that when retirement arrives, retirement benefits are not sufficient and are not comparable in any fashion to situations that they would find themselves in if they would continue the practice of law as attorneys. Under the present retirement plan a ceiling of $10,000 is fixed as the total benefits any judge may receive. The Judges Association of Indiana is sponsoring legislation to bring Indiana up to par with other states regarding retirement benefits. Indiana ranks third from the bottom with reference to comparable benefits upon retirement in other states. We need the experienced, the successful and mature attorneys as judges in this state. Your considered attention and study of this retirement legislation is strongly urged.

On June 23, 1971, the Supreme Court adopted a code of discipline for the attorneys of this State which was substantially that of the ABA. Along with it, the Court adopted a code of procedure, to enforce ethical standards. Under this arrangement a Disciplinary Commission was created with a full-time Executive Secretary who is an attorney, a full-time investigator, and with sufficient office and secretarial personnel. Prior thereto this function was performed by a committee of lawyers in their spare time and was necessarily delayed and inefficient in its effectiveness. Under the present arrangement grievances against attorneys are promptly and effectively investigated, and where good cause is found, a complaint is filed and a hearing is held to determine the facts, with a recommendation to this Court for such discipline as it sees fit to enforce. I speak for the Court when I say that we feel this arrangement is working effectively and efficiently. On behalf of the practicing Bar of the State, I wish to note that they are paying an assessment and creating a fund which defrays the expenses of the operation of the state Disciplinary Commission. In other words, the attorneys of this State are paying their own expenses in policing and enforcing discipline against the members of their own profession. We, as members of the Bar take pride in initiating and supporting such a program.

**Crime**

I do not feel I can finish this message to you and overlook the number one problem, not only of Indiana, but of this nation, namely the increasing rate of crime and the public concern and fear resulting therefrom. A Gallup poll shows that the concern about crime is by far the greatest concern of citizens, particularly in urban areas. I must point out, however, this is not a problem solely of the judicial department. The solution of the problem devolves upon the Legislature as

well as the Executive department in the enforcement of the public policy promulgated through law by the Legislature. We must have reasonable and sound legislation along with effective and efficient enforcement of legislation by the Executive department. Coupled with this must be a speedy and efficient court system which makes those guilty of crime feel the quick punishment of the law. We in the Judiciary recognize our weaknesses in this respect particularly the delay in our judicial system, in many cases because it is overtaxed and in some cases, I must be honest, with too many pure technicalities having no merit. However, I am not willing to place all the blame for the breakdown in the criminal procedure upon the courts of this state or the legislature or the law enforcement officers. Much of the blame must fall upon the United States Supreme Court and its soft-on-criminals attitude. It has laid down a peculiar doctrine known in other countries, namely, that if a police officer improperly or illegally arrests or searches a suspect, any incriminating evidence found may not be used in a trial to convict such individual. The theory being that it is better to punish the police officer who has erred than the criminal. The exclusion of evidence of guilt is frustrating to all trial courts whose objective is to find the truth and to find whether or not a defendant is guilty or innocent. Under this unique principle evolved by the United States Supreme Court in many cases a guilty person must be turned free. This doctrine, regardless of all of its defenders, has a very real and devastating effect upon the ability of courts to convict guilty persons. There are ways to punish erring law enforcement officers aside from turning a guilty person loose on society again. The observance of this rule creates delays and hearings within hearings in the trial courts in determining in each instance if the official correctly followed all the niceties and technicalities of an arrest or search and whether or not probable cause existed in order to get evidence of guilt thrown out. However, we in the courts have to deal as best we can with this frustrating principle. Although we in government, the Executive, the Legislative and the Judicial must accept our responsibility in reducing crime, our task is made much more difficult and in some instances totally frustrated by this deplorable doctrine evolved in the United States Supreme Court. In my opinion, only by public knowledge and discussion can this erroneous doctrine be eliminated.

**Judicial Conference**

Upon my initiative a few years ago the General Assembly of this state created an organization known as the Judicial Conference. It consists of all the judges of the State who meet annually to study their problems. I wish to commend the Legislature for its action. The Judicial Conference has proved to be a fine forum in which the trial judges as well as the appellate judges seek means and methods and exchange ideas to simplify our procedure in both the criminal and civil sides of the Judiciary. Out of these studies have come many improvements and suggestions for changes in the law.

Although in this brief survey of the State of the Judiciary I have stated our weaknesses, deficiencies and needs, in conclusion I wish to emphasize that we have much to be proud of in Indiana's judicial system. My observation is that Indiana is not a laggard in this respect among the states of the Union. As I previously have stated, Indiana is the fourth State to provide for the head of the Judicial Department to address a joint session of the Legislature on the State of the Judiciary.

Other recent improvements include the updating of our Civil Procedure. We are working on a new Code of Juvenile Procedure. We are one of the states to set up the new type of Disciplinary

Code and Procedure for the Bench and the Bar. Our recent Judiciary Amendment, as I previously stated, has put Indiana's judicial system in the forefront of the States of this nation.

I became especially conscious of this new status of the Indiana Judiciary when I attended the last Chief Justice Conference which is composed of all of the Chief Justices of the United States. Previously, with Indiana's office of Chief Justice on a rotating basis of the members from year to year, there was little opportunity for a Chief Justice from Indiana to be effective in a national organization. At the last conference following my election to a five-year term as Chief Justice of Indiana, under the new Judicial Article, I was elected to the Executive Council of the Conference of Chief Justices. I feel this came, not because of any special merit on my part, but because of the new respect and recognition which the Chief Justices of the other states now give our State Judiciary. You, Members of the General Assembly, have helped to bring about much of this progress by your cooperation.

With your continued cooperation and help, we shall continue to strive to increase the confidence in and the good standing of the Judicial system of this great State of Indiana.