State of the Judiciary Message
Chief Justice Norman M. Krivosha, Nebraska Supreme Court
Message to the Legislature
February 17, 1983

Before beginning to present to you the state of the Nebraska Judiciary, may I take a moment to once again, on behalf of the entire judiciary, thank you for your very kind invitation to appear before this body and present to you a report on the State of the Judiciary. The opportunity to do so has become what we hope is an important tradition within our State. We should, however, emphasize that we view the presentation as much more than mere tradition. Those of us in the judicial branch of government view this as an important and vital part of government, both for us and for you, for it is an opportunity to share with each of you the condition of the judicial branch of government and what, if any, changes need to be made. We are hopeful, therefore, that this invitation will be more than just a tradition for you as well. By sharing with you these matters, we are hopeful that both branches of government can better fulfill their constitutional responsibility. For, as the late President Kennedy observed: "The task of government is not to fix the blame for the past, but to fix the course for the future." That is undoubtedly what our founders had in mind when adopting Article V, Section 25, of our State Constitution.

Were I to share with you all of the details concerning the State Judiciary, I would quickly overstay my welcome. For that reason I have selected particular aspects which I believe should be of particular interest to you. Keep in mind, however, we are talking about a branch of state government given the direct responsibility for 120 judges and some 500 employees in 96 offices throughout the State, as well as the indirect effect on hundreds of other persons involved in some manner in the justice system in Nebraska.

One matter of national concern is the problem of docket control in the courts. In a number of states, intermediate courts of appeal have been created in an effort to try and handle the docket problem at the appellate court level. Chief Justice Warren Burger, in his recent State of the Judiciary Message presented at the mid-year meeting of the American Bar Association, suggested the creation of a new national court of appeal to assist the United States Supreme Court. While all of those devices may ultimately be required here in Nebraska, for the moment, with your help, we at the Court have looked in another direction. Rather than attempting to solve the problem by creating more costly procedures, we have attempted to turn the tide by having the present system work even harder than it has in the past. There are some early signs which are extremely encouraging and, if continued, may indeed prove to be a better solution to the extremely difficult problem than those tried by other states.

With your assistance and by reason of your amending several statutes at our request, the Court has been able to expand its court schedule. The Court is now sitting 30% more than it was two years ago. While that expanded program has imposed greater burdens upon an already burdened court and staff, the results have been rewarding. For the 12-month period ending August 30, 1982, the Supreme Court disposed of 940 cases as opposed to 786 disposed of during the previous 12-month period. Of that number, 459 were decided by full opinion. This constituted an increase of 109 more full opinions for the 12-month period.

By any standards known throughout the country those numbers indicate the efforts of a court working far beyond its ideal numbers and perhaps even beyond numbers which are realistic. I believe that I can say that it is not possible for the Court to realistically handle any greater volume than it is now handling without making some significant changes, including sacrificing some of the quality of its opinions. I might even suggest that attempting to handle the volume we are presently handling strains the Court in its desire to produce carefully considered and well written opinions. We have, in my view, reached the maximum level of production and perhaps have even exceeded it. If we are to continue addressing the problems of an ever expanding docket we cannot hope to solve the problems by hearing more arguments or writing more opinions but, instead, must seek other solutions.

One of those solutions we have turned to has been the Preargument Settlement Conference. This is a procedure, as you know, where retired judges of the court are employed by the Supreme Court. Their function is to meet with lawyers and, in some cases, their clients, and review cases which are on appeal to this Court. This procedure was first instituted in 1981 and has continued to prove successful.

Figures maintained by the Settlement Conference Officers disclose that for the period from July 1, 1981, to June 30, 1982, conferences were held in 407 cases resulting in 267 of those cases settling without any further action required by the Court. This amounts to a success rate in excess of 65%. That number becomes even more significant when you recognize that one of the parties to that conference has already obtained a successful verdict. Even with regard to those cases which do not settle, something is to be gained. In a number of the cases the issues are narrowed, thereby reducing the cost of the appeal and assisting the Court in addressing the unanswered questions. Prior to January 1, 1983, only a limited number of cases were required to be submitted to Settlement Conference while a host of others came only on a voluntary basis. Because of the success of the program, the Court determined that beginning January 1, 1983, all cases appealed to the Supreme Court would first be reviewed through the Settlement Conference. While we are hopeful that this procedure will continue to assist the Court and therefore the State in addressing the workload of the Court, we must solicit your support in permitting us to continue using retired judges to carry out this very important and worthwhile project. The cost is minimal when compared to the benefits realized. While there are similar programs throughout the United States, few, if any, seem to have enjoyed the success of our program. For that reason we continue to monitor the program closely to be certain that the maximum benefit of the program can be realized.

The matter of workload at the appellate court level is only one of many issues facing an ever expanding court system. The proper utilization of court personnel, including judges, is another important issue. For that reason, we have proposed to you the adoption of expanded in-chambers jurisdiction for judges. This is found in the current L.B. 272, heard on Tuesday by the Judiciary Committee. We ask your support for that bill. Outside of Lincoln and Omaha, our judges are principally circuit-riders, often times required to drive long distances for relatively brief hearings. By adopting L.B. 272 greater utilization of the telephone would come about, thereby permitting matters to be handled by conference call, even though the judge may be in one county and the lawyers in two others. We believe that this will be significant in helping hold down both the cost of litigation and the waste of a judge's time, needlessly driving all over the State, when

the matter could just as well be handled by telephone. It is the use of such systems that offer to us the greatest hope for success.

There are, of course, those who suggest that too many things are litigated today. While it may be desirable to encourage people to get along better; if, indeed, disputes do arise, there appears to be no better way to resolve them than through the peaceful process of the courtroom. Consider, if you can, what a society without an independent legal system would be like. Experience has taught that when individuals cannot bring their disputes to the courtroom and resolve them in calm, they are inclined to take their disputes to the streets and seek to resolve them in anger. For that reason, if for no other reason, we must continue to make the courts available to all. It was on that basis that the framers of our State Constitution included Article I, Section 13, which provides that: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Our desire to improve the administration of justice is not motivated alone by personal views but as well due to our mutual constitutional obligation to bring it about.

It is for that reason that the Court has continued to concern itself with preventing court delay at all levels even before a problem develops. We are extremely fortunate in this State that delay at the trial level has not generally been a serious problem nor has it posed the difficulties which many states now face. In an effort, however, to insure that we keep on top of that situation, a special committee appointed by the Court and headed by Justice William Hastings during the past year, drafted rules concerning the operation of courts. These rules were submitted to the Supreme Court and by the Court adopted. Under these rules, all judges at every level must file a certificate with the Supreme Court each month advising the Court of any case which that judge has had under advisement for more than 90 days since the taking of evidence. The purpose of the rule is obviously to prevent cases from being held under advisement for inordinate periods of time. The rule seems to be accomplishing its purpose in that few cases are now held under advisement for more than 90 days. In addition, guidelines have further been developed for the courts which provide that cases must be heard on the merits within prescribed periods of time, varying depending upon the nature of the case, but in no event more than 18 months after the date of filing. The obvious purpose of this rule is to prevent long delays between the filing of a case and the trial of the case as is so common in other states. While the rules do provide that longer intervals may be approved when deemed necessary because of extraordinary eventualities, such as exceptionally complicated discovery, stabilization of injury in a personal injury case or settlement of financial affairs, nevertheless, the guidelines are intended to generally be followed. The Court is firm in its belief that justice delayed is justice denied and steps must be taken to avoid that situation whenever possible.

I should further report to you that we have carried out the mandate given to us by you during the last session of the Legislature. You may recall that the discovery rules in Nebraska provided by statute were repealed and in its place authority was given to the Supreme Court to promulgate rules for discovery. Appropriate rules were developed and distributed to interested groups. Thereafter a public hearing was held and comments were received. Following all of that, the rules were adopted effective January l, 1983, and are now in place.

Turning then to another subject, the Court, in its continuing effort to provide the general public with a better understanding of the judicial branch of government, has amended its previous Canon 35 so as to permit cameras and recording devices in the Supreme Court. Beginning October 1, 1982, cameras and recording devices, in a limited manner and pursuant to rules promulgated by the Court, have been permitted during oral argument in the Supreme Court. This modification and waiver applies only to the Supreme Court and does not, at this time, apply to any other courts in Nebraska. It is yet too early to determine whether the experiment has been successful except to say that the use of the devices to date appears to have caused no significant disruption in either the operation of the Court or the administration of justice. Whether the public has gained sufficiently by reason of the press being permitted to bring cameras and recording devices into the courtroom is yet unknown. We will continue to monitor that procedure in our effort to find further ways of permitting the public to be aware of what transpires at the Court.

Another matter which may be of particular interest to you concerns the retention of judges under the merit selection system. Because we firmly believe that the public should be given every opportunity to participate in this process in a knowledgeable and meaningful way, we have requested the State Bar Association to develop a meaningful system of evaluating judges who are subject to retention. By that we do not mean simply a polling system which reflects whether an individual lawyer has had a successful experience or an unsuccessful experience with a judge but, rather, whether a judge displays the characteristics important for a judge, such as whether the judge displays judicial temperament, is industrious, knows the law, is impartial, and is punctual. In my view, the public is deserving of such assistance from the Bar and I am pleased that the Bar has agreed to undertake such a project. I believe that when that program is completed and in place, the merit selection system will be greatly enhanced and will continue to fulfill the purposes for which it was intended.

Having now shared with you some of the results of the past, let me now share with you some of the concerns of the future. For, indeed, if government, regardless of the branch, is to thoughtfully serve the public, not only must it look back to see where it has been, but it must likewise look forward to see where it must go. It was Abraham Lincoln who observed that the legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all in their separate and individual capacities. And Edmund Burke who noted that government is a contrivance of human wisdom to provide for human wants.

The first matter which I wish to discuss with you concerns what I shall describe as the need for the preparation of a legal impact statement in connection with proposed legislation. After many years of being able to disregard the fiscal impact that proposed legislation might have upon the public, this body, a number of years ago, carefully and thoughtfully instituted a procedure which now produces a fiscal impact statement in connection with proposed legislation. As you know, all legislation is required to be examined by various governmental agencies who must advise you as to their best estimate of the fiscal impact the adoption of legislation will have. That fiscal impact is generally directed to the immediate or near immediate time. There is, of course, another effect brought about by the passage of legislation which, though it may not be as immediate, is as important. This is what I refer to as the legal impact. Passing a statute may not require you to appropriate funds immediately. Nevertheless, the passage of that statute may result in so significantly increasing the workload of the courts, or the law enforcement agencies,

or the probation department so as to either effect the agency's ability to carry out the mandate of the specific legislation or, in any event, divert its attention from fulfilling other previously imposed duties. I believe we need to begin giving such matters more careful consideration. We must start looking a little further down the road to see just where we are going and what it will really cost, not only in money but in time and effort as well. I am not prepared this morning to suggest to you how that should be done but only that we should begin, at the earliest possible moment, to consider that fact and begin to develop appropriate procedures for providing the necessary information. In order to do so we must determine, among other questions, what should be the proper scope of the statement, who should prepare the statement, what unit of government should be responsible for preparing the statement, and when should a statement be prepared.

As but a brief example of the importance of a legal impact statement, let me share with you for a moment a California experience. Beginning January 1, 1976, California reduced the penalty for simple possession of not more than 1 ounce of marijuana from a felony to a misdemeanor, punishable by not more than a $100 fine. Everyone assumed the passage of the bill would reduce the criminal workload in California because the processing of misdemeanors was less difficult and less time-consuming than felonies. What California did not know was that local law enforcement personnel in one of the communities had not been actively pursuing cases involving less that 1 ounce of marijuana. The officers and those with whom they coordinated their activities believed that the chances of obtaining a conviction under the former felony statute did not justify the required amount of justice system resources, including time. As a result, law enforcement officials simply used their authority to confiscate the drugs and then screened the cases from the justice system. Once, however, the crime was reduced from a felony to a misdemeanor, law enforcement officials more vigorously enforced the law. Instead of reducing the workload as had been previously anticipated, the workload was significantly increased resulting in greater filings in the municipal court, a fact which no one had considered possible when considering the legislation. There are many other examples such as this, both outside our State and even within our State. I firmly believe that some of the disappointment experienced by this body initially and by the public subsequently in connection with legislation adopted by this body could be minimized if a meaningful system for preparing a legal impact statements could be devised. In this way you could know whether the bill is likely to produce the result desired or was only cosmetic.

And as I share with you my thoughts concerning the development of a legal impact system, I am again reminded of what I see as the development of an unfortunate practice. I refer to the practice of introducing legislation directly affecting the operation of the court system without first seeking suggestions from the judicial branch of government. I do not, for a moment, mean to diminish the authority of the Legislature to initiate any bill it desires nor to dim the constitutionally created separation of powers. I mean to only suggest that you are missing the availability of a valuable resource when you fail to use the office of the Court Administrator. I regret that we have failed, over the years, to develop some system whereby the three branches of government might have an exchange of ideas on a regular basis. I remain firmly convinced that, just as this has been done between the legislative and executive branches of government without sacrificing any authority, so too could it be done between the three branches of government. I again offer to participate in such a program if one can be developed. I believe the people of Nebraska will better be served by reason of our undertaking such an endeavor. It was Samuel

Johnson who once said, "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it." In an ever expanding and complex society, we must expand our knowledge by expanding our sources of knowledge.

As I conclude my report to you this morning let me touch on one other general subject of great concern to all of us. I speak, of course, of the matter of crime generally and the role which the courts must play in addressing that issue. Contrary to public slogan, the courts are not to blame for today's incidents of crime any more than firemen are to blame for fires or raincoats for rain. It is not the firemen who create the fires nor the raincoats that cause the rain and it is not the courts that create crime. In order for that to be true, one must assume that those who ascend to the bench do not come from the general population nor do they have family or property requiring protection. Moreover, for the slogan to be true, it must be assumed that, for reasons no one seems able to explain, the judges have taken up with the criminal element rather than with the public generally. The difficulty with that belief is not only that it treats the judiciary unfairly, but it likewise blinds us so that we are unable to find real solutions to these difficult problems. We must first of all recognize that courts are not unlimited in either their authority or their ability to deal with crime. Courts are not at liberty to disregard constitutional prohibitions nor statutory requirements. Simply suggesting that such matters can be interpreted away is simply to fail to understand the American legal system. It was Woodrow Wilson who said: "Unless justice be done to others, it will not be done to us." And Gladstone who observed that national injustice is the surest road to national downfall. Nor should we disregard Alexander Hamilton's admonition that the first duty of society is justice. Doing away with justice will not do away with crime.

I believe the problem may be caused more by two other beliefs firmly held by the public but which time and experience have proven untrue. They are that irrational behavior present during the commission of a crime can be deterred by the threat of punishment and that punishment itself, absent anything else, will subsequently produce a law-abiding citizen. Neither of those notions are supported in fact. Yet, to a large extent, the actions we take in addressing crime today are based upon the truth of those beliefs. I believe that it is because of our failure to recognize the fallacy in those beliefs that we have thus far been unsuccessful in our fight against crime. It is true that some people are deterred in committing some crimes in face of some punishment; but no one must believe that the majority of those who commit crimes are deterred by the threat of punishment. One need only look at the rate of recidivism among previously convicted felons to recognize that even after an individual has experienced prison, he or she may be inclined to commit another felony. Therefore, to simply adopt more laws prescribing longer sentences will not reduce crime and those who believe that are destined to be disappointed. Such laws may produce longer jail sentences but those sentences can be imposed only after a crime has been committed. The judicial system has no way of directing its forces toward individuals unless and until a crime has been committed. Therefore, the adoption of longer sentences, without anything else, will only produce larger prisons that may satisfy our desire for revenge, but it will not result in significantly reducing the incidents of crime.

It therefore occurs to me, as I hope to you, that we could better use our time and our resources working with those whom we have identified as criminals in an effort to change their ways as opposed to simply continuing to declare more acts criminal, imposing longer sentences, and walking away.

Unless we are prepared to impose life sentences for all crimes (a fact I take we are not prepared to do), we must recognize that at some point everyone we send to prison is likely to be released; and, unless we are prepared to use the time we have them imprisoned and spend the money necessary to change their attitudes before we release them back into society, we cannot expect much by way of an improved population. If, for 8 or 9 years, we teach an individual not to be responsible, not to work, not to make decisions, and not to follow the same rules by which the outside world lives, we should not be surprised if upon return to society he or she fails to live up either to our rules or our expectations.

Preliminary studies indicate that as much as 30% of the Nebraska prison population is illiterate, in a country in which the illiteracy rate is minimal. Should that not tell us something about the basic characteristics of the criminal and what one of the serious problems with crime is? And should it not further encourage us to try and remove that illiteracy while we have them incarcerated so that the individual, upon returning to society, may have at least the same minimal tools to work with which the rest of us have? The question is no longer whether we can afford to change to such programs but, only whether we can afford not to change to such programs. Unless and until the criminal element is exposed to appropriate role models who can convince the criminal about the joy of lawfulness, nothing we do in building larger facilities nor imposing longer sentences is likely to prove effective.

I recognize that programs such as education, vocational training, and psychological counseling will not eradicate crime. But we should not be looking for a Salk-like vaccine for crime. These problems have taken years to develop and will, likewise, take years to resolve. But we must start somewhere.

Probation poses the same type problem. While, on the one hand, we are encouraged to extend to the first-time offender another chance and place him on probation, we are, at the same time, unable to provide that individual with either meaningful supervision or appropriate direction. At the present time, those in charge of probation are both too few in number and too poorly paid to perform the full functions they need to perform. Yet, every individual who is saved through probation is one less individual whom we must later provide for in the penitentiary. We must give more thought to what we can do with the first-time offender placed on probation. The necessary programs now available are simply too few. We must begin to look at the real causes of crime and criminal behavior and enlist not only government but all of society in combating this difficult and never-ending problem. We will not, of course, eliminate crime. It has been with us since the very beginning. That should not be our goal. But if, in fact, we can establish clear and concise objectives which are designed to change the criminal behavior, we may be able to yet turn the tide. We will not be successful in every case and, to be sure, we will fail with some. But if we can develop an understanding program brought about through the joint efforts of all three branches of government and the public generally, we may yet be able to save this great country.

The one general consensus growing out of the Court's recent symposium on crime held last fall was the need for better communication, understanding, and cooperation between the various branches of government and their many agencies involved in the criminal justice system. And

yet, while the suggestion seems so simple and so obvious, little if anything has been done toward bringing it about. I again invite and urge this body to join with us in addressing this very important issue.

One need only examine events in various parts of the world to realize the value and importance of a free and independent legal system such as that which exists in America. In order for that system to continue to fulfill its function it must adjust with the times. Those adjustments cannot be made without your help and cooperation though, to be sure, those adjustments should not be made in such manner as to cause erratic and constant changes of course. The change will cause some pain, that is natural. Yet, we must not be afraid of either the pain or the change. As E. B. White noted: "The only sense that is common in the long run is the sense of change-and we all instinctively avoid it." We must no longer instinctively avoid change with regard to our fight against crime. We must not insist on retaining the status quo simply because it provides us with comfort, but must be willing to adjust as times and needs require while recognizing that merely making adjustments may not bring about change but may only make waves. For a nation which can, at will, move people and equipment in and out of space, who can design machines to nearly think like a human, and who can replace nearly every vital organ of the human body, one must believe that the solutions to crime are available. We of the Judiciary wish to join with you in that endeavor and we solicit your invitation to permit us to join with you.

In conclusion, let me therefore report that the Judiciary of Nebraska is alive and well and anxiously looking forward to the challenges ahead.

Thank you very much.