The State of the Judiciary
Chief Justice Frank R. Kenison, New Hampshire Supreme Court
Message to the Legislature
February 28, 1973

Mr. Speaker, Mr. President, and Honorable Members of the Senate and House of Representatives:

On behalf of the Judiciary of this State, it is an honor and a privilege to speak to you today in response to the cordial invitation of the Speaker of the House and the President of the Senate, pursuant to a statute that this General Court passed in 1971. RSA 490-A:3 (c) (Supp.); Laws 1971 ch. 459. You will understand nevertheless that the speaker views this happy occasion with some mild apprehension. Historically, when a member of the Judiciary is hailed before a legislative body it customarily is to face charges of misconduct and possible removal from office. In the central part of ancient Greece they adopted a procedure whereby any legislator who proposed a new law was required to appear with a noose around his neck. If the proposal was rejected the penalty was death and it is said that no laws were introduced for 200 years. If this ancient procedure is resurrected in New Hampshire, it is hoped that you will not make it retroactive and it will become effective only after tomorrow.

In a more serious vein, your invitation constitutes an historic first in this State in the excellent relationship that has existed over the years between the legislative branch and the judicial branch of government. We welcome this opportunity to discuss some aspects of that relationship, with particular reference to recent developments initiated by the Judiciary. On January 31, 1973, the Supreme Court by Rule 25 adopted, with some minor amendments, the American Bar Association's Code of Judicial Conduct which regulates the judicial conduct of all judges in the State, both on and off the bench. This Code was studied and considered by the Court for four months, during which time all members of the bench and bar were given an opportunity to present their views. As an indication that the Court is aware of recent developments in this field it may be noted that New Hampshire is one of four states that have adopted such a Code of Judicial Conduct. Almost a century ago it was firmly established that the appearance of a fair and impartial trial of litigants was next in importance to a fair and impartial trial itself. "Next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial; and anything that tends to impair their belief in this respect must seriously diminish their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects." Beattie v. Hilliard, 55 N.H. 428, 435-36 (1875). The Judicial Code should be an effective tool to implement this cherished objective in judicial administration.

With your cooperation the New Hampshire Court Accreditation Commission was initiated by members of the bench and bar and authorized by you in 1971. RSA 490:5-a to 5-e (Supp.); Laws 1971 ch. 382. In brief, the Commission prescribes minimum standards for courthouses, courtrooms and other court facilities. The Commission has no punitive powers and is an advisory commission which assists cities, towns and counties in upgrading and improving their courthouses and court facilities. The Commission may rate a court as "accredited-excellent, or accredited-satisfactory or not accredited." It may be noted that former Governor John King was

the originator of this Court Accreditation Commission and it is fitting that he was appointed chairman of the Commission, which includes one legislator whom you refer to as Mr. Speaker. The Commission has moved carefully, has rendered substantial assistance to those considering improvement of their court facilities and will be issuing a report later this year of the work that it has accomplished. So far as is known, New Hampshire is the first State in the United States to have such a Court Accreditation Commission authorized and established by legislative act.

The Administrative Committee of District and Municipal Courts, appointed by the Supreme Court, obtained a federal grant to have a recognized authority make a study and analysis of the District and Municipal Courts in New Hampshire. The report was made by the Institute of Judicial Administration of New York University Law School and is highly rated in this field of judicial administration. The report recommends sixteen full-time judges with twelve base locations and court sessions held in other locations as the need requires. The courts will be State administered with two-thirds of the revenues being allocated to a special fund to pay for basic court expenses and one-third of the balance to be distributed as determined by the legislature. The report recommends a full-time administrator for the courts.

The major objectives of the report are supported in concept and principle. The report is deserving of serious consideration by the legislature. The legislation to accomplish this that was appended to the report was incomplete and needs revision, which I understand is being done at the present time. In recent years there has been increasing criticism of our present system where a large number of small courts are retained and even increased in number because they generate a "profit" to the local municipalities. This is an insubstantial reason for the continuation of the present system.

As a result of the study and recommendations of the Governor's Commission on Court System Improvement in recent years and the cooperation of the Legislature various improvements have been made in the machinery of court administration and the judicial process, and the number of Superior Court Justices is based on population. RSA 491:1 (Supp.); Laws of 1971, 456:7. The Legislature has also provided the initial framework for a unified court system in the State. RSA 490-A (Supp.); Laws 1971 ch. 459.

One of the most important provisions of our State Constitution is found in Pt. 1, Art. 37. Opinion of the Justices, 102 N.H. 195, 152 A.2d 878 (1959). That Article reads as follows: " [Art.] 37th. [Separation of Powers.] In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." It establishes the legislative, executive, and judicial branches of the government as equal, independent, each having distinct powers and duties which are to be exercised in the interest of the State as a whole. While the three branches are separate from each other the State can function only as a unit when each performs its assigned tasks. It is this doctrine of separation of powers that has prompted the Supreme Court to consistently adhere to the proposition that we consider only the constitutionality of statutes and do not compete with the Legislature in determining their wisdom, expediency, or desirability. Opinion of the Justices, 110 N.H. 359, 266 A.2d 823

(1970). Our respect for the legislative powers is such that we presume that a legislative enactment is regular and constitutional until the contrary is shown.

It is an historical fact that the Judiciary, having neither the power of the sword of the executive nor the power of the purse of the Legislature, is the weakest of the three departments. As early as 1788, Alexander Hamilton, in The Federalist No. 78 stated the matter as follows: "It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." No court in this State, including the Supreme Court, is or should be immune from constructive criticism. No court in this State has attained absolute perfection in the administration of justice and it may be that it never will. But it is important that we have the concern and advice and assistance of laymen and legislators in our attempt to improve the administration of justice from day to day and month to month. Our objective has been well stated by the Chief Justice of the United States, Warren E. Burger, in his State of the Judiciary address, 1972, as follows: "Our constant purpose must be to keep in mind that the duty of lawyers and the function of the judges is to deliver the best quality of justice at the least cost in the shortest time."

It is rare for any public official or department to publicly concede that it has authority which could be taken away if the Legislature or the people believed it wise and desirable. Part 2, Article 74 of our Constitution provides that the court may give advisory opinions in the following language: "[Art.] 74. [Judges to Give Opinions, When.] Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions." From time to time in recent years we have heard criticism of this power and practice which exists in only a few of the states in the United States. The criticism has been that sometimes the questions are submitted for purposes of delay in enacting legislation and that the generality of the questions and the necessary generality of the advisory opinion is of questionable value in deciding specific constitutional questions. As long as this power to give advisory opinions is in the Constitution the court will continue to follow both its spirit and letter. If the critics of the practice wish to see it abolished, we have no objection. Since 190 l the Legislature has seen fit to place the power of appointment of the Tax Commissioners in the Supreme Court rather than the Executive. This is an authority which the court never sought and does not seek to retain if the Legislature wishes to place the power of appointment elsewhere. This is a position the court has taken consistently for the last seventy-two years because the power of appointment to the Tax Commission is not an inherent judicial function. The Traffic Safety Commission, under the chairmanship of James R. Bucknam, has made studies in New Hampshire relating to traffic safety and in particular a program designed to keep the operators of motor vehicles under the influence of liquor off the highway. Their recommendations are well reasoned, logical, and appear to be grounded upon common sense. The problem is an acute one which is increasing in intensity and demands some positive legislative remedy such as they have recommended.

While there are no proposals before the Legislature relating to the revision of criminal sentences it is submitted that some machinery of that nature would do much to make criminal sentences in the State more coordinated and uniform. A plan of this nature has existed for several years in Massachusetts and Maryland and other jurisdictions. It is not proposed that there should be

appellate review of sentences by the Supreme Court. What is proposed is that three judges of the Superior Court would constitute a commission with the power to review criminal sentences. Under the Massachusetts system such a criminal sentence upon review and revision can be increased or decreased to bring it in line with similar sentences for crimes committed under similar circumstances. Such a commission would not involve a large expense. The fact that this system has worked well in other states would be sufficient reason for the Legislature to at least look into the problem if they believe it has merit and would accomplish a proper public purpose. It is a pleasure to report to you that the judges of the courts in this State at all levels, District and Municipal, Probate, Superior and Supreme, have taken an active interest and participated in many programs of continuing judicial education which have been held both within and without the State. These judicial education programs have been work sessions and have enabled the judges to keep abreast of the rapid changes in both State and Federal law. It is encouraging to see judges who are determined to increase their efficiency and education in order that they will be able to deliver justice on the basis of current understandings and developments. Several of the judges in New Hampshire have been active in organizing and teaching at these various judicial seminars and programs.

An encouraging feature to report to you is that all courts at all levels have displayed an acute awareness of the advisability and necessity of keeping their rules of practice and procedure updated and current to meet new and changing situations. The Superior Court completed a general revision of its rules as of April 4, 1972 and made two additional changes in January 1973. The District and Municipal Courts, through its Administrative Committee, have made several revisions in its rules this year. The Supreme Court made some changes and revisions during the last two years. The Probate Courts are seeking a modest appropriation in this session to make necessary changes in the Probate forms, and this is a proposal we support.

The familiar warning of the Spanish poet and philosopher, Santayana, that those who cannot remember the past are condemned to repeat it was a potential danger to the Judiciary in this State prior to 1966. On several occasions between 1813 and 1915 a political party gaining control of the General Court and the governorship addressed out of office on a wholesale basis public officials and judges and replaced them with appointees of their own particular political persuasion. That theoretical threat was eliminated by constitutional amendments in 1966 (N. H. Constitution Pt. 2, Arts. 4, 72-a and 73) providing for an independent Judiciary which were adopted by the people by a substantial majority vote of 144,828 in favor to 26,162 against. A return to the old possibilities is an unlikely step that an enlightened electorate would take in the l970's or anytime in the 20th century.

The cost to the State for the financial support of the Judiciary is a small drop in the large bucket of the net appropriation for the biennium. Thus the cost of the Supreme Court for the fiscal year 1973 is one-quarter of one percent of the net general fund appropriation, while the cost to the State for the whole Judiciary is less than one percent of that appropriation. The courts have never been demanding in presenting their budgets to the Legislature and this session is no exception. However we hope that the Legislature will continue the existing appropriations for staff, whether federally funded or not, which includes the administrative assistant to the Chief Justice of the Superior Court and the secretaries and law clerks which are now provided for the Superior and

Supreme Courts. The need will be greater and not less in the future because of the substantial increase in cases in all courts of the State.

This brief bird's-eye view of some of the judicial developments should be sufficient to make some assessment of the State of the Judiciary in New Hampshire. The Judiciary in this State may be fairly described today as alive, well and awake. We are not in a state of crisis. We are aware that new and modern techniques and business practices may have to be applied to assist in overcoming delay, to manage crowded dockets and to strengthen judicial procedures. Courts and police do not cause crime even though they may be convenient targets to blame for it. The courts in this State have been free of scandal. The State has proud tradition in noting that its Chief Justice Charles Doe has been considered one of ten of the most distinguished judges in the United States. We have never been afraid of innovations or of new legal doctrines or the introduction of innovative methods. If, to paraphrase the words of Robert Frost, we have promises to keep and miles to go before we sleep, we will keep the promises and travel the full distance to accomplish it.

In conclusion, we are proud that we are making this report on the Judiciary to a fully independent Legislature that is not controlled or dominated by any group, any lobby, any organization, or any newspaper. We are proud that this report is being made to a Legislature that over the years has been the author of many progressive and several innovative chapters of legislation. We are proud of the substantial contribution made by the Judicial Council to modern legislation and the excellent working relationship it has had and continues to enjoy with both Houses of the General Court. We are proud that you gave us our day in court in this legislative hall with lasting tradition. Whatever your verdict, we will accept it with respect.