Massachusetts can no longer afford to tolerate the state of its antiquated judicial system. With delays reaching as much as six years for civil litigants in some counties and the inability to process criminal matters promptly, the entire structure of our trial courts should be recognized as unequal to the task of keeping up with its business. Failure of the system is no longer a prediction—it is a reality. Because the legal community—the bench and bar—have primary responsibility for monitoring the system, we should legitimately ask ourselves why we began the third century of our nation's history with the judicial branch of state government unable to perform its essential functions.

The present multi-tier system is primarily of eighteenth century construction. It was molded to fit the needs of a rural community, with district courts dotting the landscape at points convenient enough for the horse and buggy to arrive at court and return to the home within the space of one day. Thus, the local court was able, conveniently, to resolve small disputes and dispose of routine criminal matters, all at a place close to home and with a local judge who "knew the territory." More complex or weighty civil disputes, and lesser offenses unsatisfactorily handled (at least in the eyes of the accused) by the local court could be adjudicated in the Superior Court. That tribunal was staffed by circuit judges sitting on a rotating schedule at various county seats throughout the Commonwealth. At this level the proceedings were carried on in a court of record with more formality. Jurisdiction of the Superior Court was drawn around existing county lines with the county seat located in major population centers. Probate courts, their original jurisdiction paralleling the old British ecclesiastical courts, were also anchored in county government handling business involving estates, trusts, guardians and domestic relations. Added to this system was a Land Court to handle special problems relating to real estate. The traditional method of solving
special problems by adding more courts instead of more judges to existing courts persists to the present. The legislature, with the approval of the legal community, recently established two Housing Courts.

The efficiency of our system began to erode as a result of the pressure put upon it. It was not the fact that it was ill-conceived, nor could its increasing inefficiency be blamed on the dedicated judicial personnel who served the courts. Time simply bypassed the system. The population exploded and shifted; the automobile solved some problems and created others. The criminal justice system took on new dimensions, including pre-trial and post-trial considerations. Urbanization created new and alarming social problems. Where the criminal justice system once involved only a trial and sentence for the guilty, it now must concern itself with more counseling, reliance upon modern psychiatric techniques, a deeper understanding of the causes of crime, and diversion programs. In the area of civil litigation, advances in technology have resulted in a multiplication of disputes. Persons injured by motor vehicles, product defects, construction related activities, and other occurrences rely upon the courts as a means of implementing the reparations system. Urban renewal and other public projects require speedy adjudication of eminent domain matters. In short, the more knowledge we attained, the more complex our community became and the more stress placed upon our courts.

The district courts give the appearance of functioning well, but in perspective their relationship to the system makes them part of the problem. The distribution of work among the district and superior courts is uneven. In addition, some district courts are able to handle their volume of business without problems, and others are not. District Court jurisdiction is limited in some matters and in some instances overlaps with other courts. Each district court has its own budget and some measure of autonomy. The several court systems compete for legislative and county attention. Thus, our judicial system is faced with over 400 separate budgets, overlapping jurisdiction, and an uneven distribution of work load and facilities.

Past attempts at solution, such as wholesale referral of cases to masters or remanding of cases from one court to another, serve only to delay ultimate resolution of the problem. Our judicial system requires centralized budget control, including state assumption of the costs, and the flexibility attainable only in a single tier trial court. By merging all trial courts we could solve the current crisis. Judges could be assigned to wherever the work load demanded at the time they were needed. The court could conduct the same business but with more efficiency, including the consolidation of physical facilities. Judges' time could also be more efficiently used in the pre-trial process, where it is critically needed.

We should advocate nothing short of total restructuring of the judicial system. However, it is the obligation of the legal community to develop the guidelines for this restructuring. We cannot rely upon the legislature to generate the basic structure for reform without our first doing the spade work. That work is being done. The pages of the issue of the Quarterly contain the results of a comprehensive study conducted by the Massachusetts Bar Association and recommendations for basic reform of our judicial system. Briefly, that study recommends unifying the Superior, Probate, Land, Housing, and District Courts, together with state assumption of all court costs, limited terms for chief justices, and the drawing of jurisdictional lines around judicial districts instead of county boundaries. Governor Dukakis has also appointed a special committee, headed by Professor Archibald Cox, to recommend desired changes to the system.

We must act with dispatch but not in haste. Recent legislation proposed by Chief Justice Hennessey will permit assignment of a number of district court judges to handle superior court business, allow certain matters to be transferred between Suffolk and Middlesex Counties to take better advantage of physical facilities and permit the district court facilities for superior court business. Those measures are recognized as being a temporary not a long term solution. However, their implementation should ease the problem enough to avoid solving the long term problem in an atmosphere where a patchwork approach would be attractive. We must also realize that total reform in the form advocated by the Massachusetts Bar Association collides with existing institutions. Old allegiances are not easy to change.

There are those who believe that certain business must be removed from the judicial system because the system has been overburdened with society's problems. Others say that we must change substantive rights because the judicial process is unequal to the task of fairly and speedily handling the problems. With some minor exceptions, I do not favor these approaches. I believe that the judicial system can be made to operate effectively but only if it is modernized. If we do not bring the system completely up to date we will have no alternative but to remove some of its business—a solution which, I submit, would result in a step backward and not a move toward better justice.

Paul R. Sugarman
President
RES GESTAE

Recommendations and Final Report of MBA Committee on Court Reform

As disclosed by the findings of this report, the archaic structure of our present trial court system is more consistent with the era of Dickens' Bleak House than the present day. The committee's proposals are far-reaching. It advocates unification of the district, superior, probate, land and housing courts into a single-tiered trial court.

Establishment and Goals of the Committee

The MBA's Committee on Court Reform was established by President Charles Y. Wadsworth of this Association, with a mandate to define the problems within the administration of justice system and to make specific recommendations on needed long-range reforms to make it more responsive to the ends of justice.

As stated by the President, the function of this Committee is not to draft specific legislation implementing its recommendations, but rather, to study objectively the present multi-tier court system which tends to establish different classifications of judges, different classes of courts with overlapping jurisdictions, widespread inefficiency, in that there is no central authority effectively to allocate available resources within the judicial system, and to make general recommendations to the Board of Delegates on specific long-range reforms. The recommendations in this report will be made available to those concerned with a more efficient court system, including the Governor's Select Committee on Judicial Needs, chaired by Professor Archibald Cox, the General Court and interested citizens of the Commonwealth.

Composition of the Committee

The members of the Committee on Court Reform are:

Chairperson:
Paul R. Sugarman, Esq.

Members:
George J. Basbanes, Esq.
William E. Bernstein, Esq.
Robert M. Bonin, Esq.
Matthew Brown, Esq.
Thomas E. Cargill, Esq.
Prof. Roland Christensen, Harvard Business School
Marguerite M. Dolan, Esq.
Richard K. Donahue, Esq.
Willis A. Downs, Esq.
Prof. Thomas W. Dunn, Boston College
Harry M. Durning, Jr., WBZ Editorial Board
James N. Esdaile, Jr., Esq.
Paula W. Gold, Esq.
Prof. Robert E. Keeton, Esq.
Raymond J. Kenney, Jr., Esq.
Robert B. Kent, Esq.
Gael Mahony, Esq.
James F. Meehan, Esq.
David J. Sargent, Esq., Dean, Suffolk Law School
Wallace W. Sherwood, Esq.
Morton J. Sweeney, Esq.
Warren E. Wood, Esq.
William G. Young, Esq.
Lyman H. Ziegler, Mass. Taxpayers Foundation
George N. Keches, Esq., Leg. Counsel, MBA

Areas of Discussion by the Committee

During the four meetings held by the Committee a wide range of subject matters were discussed which enabled the membership to explore analytically the present system. Agendas for each meeting were prepared and submitted to the members in advance by the Chairman with topics being assigned to individuals within the Committee for their presentation. A very high percentage of the Committee was present at all meetings. Topics of discussion for each meeting were as follows:

Fall 1976/Res Gestae/129
January 6 - A financial and administrative analysis of the structure of the court system
Limited terms for chief justices of the various courts of the commonwealth
The legislative approach to judicial reform, past and prospective

January 28 - Restructuring in other jurisdictions
Unification, specialization and judicial boundaries within the court system
The Governor's Select Committee on Judicial Needs

February 10 - Chief Justice Hennessy's recommendations to the Governor's Select Committee on Judicial Needs
Options available to the Committee as to what recommendations will be promulgated by this Committee

February 26 - Proposal as to the structure of a unified trial court system

RECOMMENDATIONS OF THE COMMITTEE

Analysis of the Present Structure of the Court System

The present system of financing and administering the court system is, the Committee believes, both illogical and unproductive, the end result being the inability of the Commonwealth to resolve the many problems facing the courts. For example, Rep. Charles F. Flaherty, House Chairman of the Joint Committee on Counties, in a statement to the Judiciary Committee on March 3, 1975, relative to H-1930 (An Act Providing for the State Assumption of the Costs of the Supreme Judicial Court, the Appeals Court and the Land Court) filed on behalf of the MBA, said:

No less than 16 governmental units deal with the courts. These are the Commonwealth, the City of Boston and 13 counties outside Boston, and the Suffolk County Court House Commission charged with the operation of the Pemberton Square Court House. These 16 entities keep 16 sets of books, purchase supplies, hire help and pay them . . .

Indeed, various budgetary analysts assert that over 400 different budgets are prepared and submitted relative to the financing of said system.

Other examples of the inequities of the system can be found in the financing and administration of the Probate, Superior and Supreme Judicial Courts. While the Probate courts are strictly geographical in jurisdiction, i.e., one for each county, their judges and registers of probate are paid by the state. However, the salaries of the clerks of court who serve the Supreme Judicial and Superior Courts, courts of general and statewide jurisdiction, are paid by the county.

Many of the problems facing the court system, i.e., prohibitive delay in criminal and civil cases and inadequate court facilities are in part attributable to the lack of a unified budgetary process which would encourage efficient management and allocation of judicial resources. One solution to this fragmented budgetary system advocated in a study, Financing Massachusetts Courts, by the American Judicature Society (see Appendix A) would be the creation of a truly unified judicial budget whereby all judicial costs would be funded by the state to a single budget administered by the judicial branch. Such a comprehensive budget would permit maximizing the allocation of available judicial resources with the ultimate goal of improving the system. Unfortunately, because of the fiscal crises in which the Commonwealth finds itself, H-1930, a measure filed by this Association (whose title was previously alluded to), was put into a study by the Judiciary Committee during the last session and the prospects of passage are very dim indeed. As stated previously, the American Judicature Society in conjunction with this Association and Charles F. Flaherty, Jr., Chairman of the Committee on Counties, conducted a comprehensive statewide study. These recommendations are appended to this report. (See Appendix A.)

Legislative Approach to Judicial Reform

Despite the delay on H-1930, this past legislative session was a fruitful one relative to judicial reform from the standpoint of this Association. Three measures endorsed for a number of years were enacted into law: (1) phaseout of special justices of the probate and district courts; (2) making justices of the part-time courts full-time, and (3) providing for recall of retired probate and superior court judges (separate bills).

Legislation filed in the 1976 session relative to judicial reform includes the certification of district court judges for use in the superior court, providing for recordation in the district courts and making mandatory the taking of de novo appeals to juries of six within the district courts. (For a summary of these measures, see Appendix C.)

Unification of the Trial Court System

In exploring the options concerning long-range reforms within the administration of justice system, the membership felt it useful to examine practices in other jurisdictions. Subsequent to this examination, the Committee found that virtually every recent major study of court reorganization or restructuring has recommended unification of the trial court system. Among these were the Advisory Commission to the Joint Committee on the Structure of the Judiciary (California legislature) which stated that "The Superior, Municipal and justice courts of the state should be merged into a single trial court," the American Bar Association which recommended "A court system that is unified in structure and administration," and the National Conference on the Judiciary which said, "State courts should be organized into a unified judicial system."

A subcommittee in its report on the wisdom and flexibility of unification of our system considered why our system lends itself to it.

Roscoe Pound observed in 1936 that our system of courts was archaic. A chart diagramming the Massachusetts courts today would show nine different trial courts, a maze of jurisdictional mysteries, fractionalization among the courts, overlapping and concurrent jurisdiction, and tremendous duplication through trial de novo and remand procedures, while responsibility for administrative and personnel policies, as the late Chief Justice Flaschner noted, is seriously fragmented. All of this leads to the inevitable conflicts which result between these courts when they are competing for the limited finances within the Commonwealth.

Twelve states have adopted fully unified systems, while eighteen others have adopted elements of unification. The latter statement can be misleading in that unification may mean several different things. It may refer to structural unification which may or may not have a single-tiered trial system, or to administrative unification; that is, some sort of centralized supervisory authority. Also the term is often used to refer to the assumption of court costs by the state and also, but not necessarily, to unitary budgeting.

Structural Unification

Structural unification of the Massachusetts trial courts is recommended on a number of grounds. The first of these is the principle that a controversy should be capable of being disposed of in one court. The second ground noted by the ABA Commission on Standards of Judicial Administration is that maintaining a two-tiered trial system reduces flexibility in assigning judges and other court personnel in response to shifts in workload. At present there are about ninety (90) separate district courts. Third, trial de novo necessitates duplication by compelling the double trial. Another disadvantage of the two-tiered trial system is the lack of accountability of the inferior court: the district courts are largely insulated from review and correcting of errors. These transfers of cases involve both expense and delay. Moreover, there are arbitrary limits on the type of business a district court judge may handle.

The scarcest resource in our judicial system is judicial manpower. Consequently, the extent to which congested dockets may be relieved largely depends on the degree of flexibility in assigning judges to courts and calendars. In addition to the principal of flexibility, there is the important principle of economy.

To implement these principles, it is suggested that Massachusetts unify its district, superior, probate, land and housing courts into a single-tiered trial court. This step has now been taken by many jurisdictions and is currently under serious study in others, including California, Connecticut, Oregon and Washington.

Immediately two questions come to mind: what should be the status of the new judges? There are several alternatives. One is to elevate all district court judges to the status of the full superior or circuit court judges. This is in accord with the ABA recommendation that there be only a single class of judges in courts of original proceeding. The second alternative contemplates a transitional stage by giving them the status of associate justices, freezing the number of associate judgeships. The latter has been proposed in several plans studied in California, including the Hayes Plan and the California United Feasibility Plan. Currently under study in California is the Illinois system, which unifies its trial courts into a single court of original proceeding. Illinois recently completed the transition by giving the associates the status of full circuit court judges.

If Massachusetts were to adopt a unified trial court system, various judges versed in certain specialties of the law could be assigned cases within their areas of expertise. Legal scholars, including former Supreme Court Associate Justice Tom Clark, advocate that a unified court could have specialized divisions, as for example, juvenile proceedings and domestic relations. Clark, Judicial Reform in Connecticut, 5 Conn. L. Div. at 5 (1972).

In creating specialized divisions within the proposed court system the Committee explored the idea that lesser jurisdictional offenses, as small claims matters, minor motor vehicle offenses and supplementary process might be disposed of in an administrative proceeding rather than in this proposed system.

How might a unified court system work? One approach would be to assign each trial court judge to a particular circuit and to institute a filing system by which the complainant's attorney uses a checkoff list to indicate the general nature of the case, as is done in the federal district courts. The presiding judge or justice of each circuit would be in a position to assign cases to the various circuit judges based on preferences and the specialized experience of individual judges. Although indubitably there are a variety of approaches, this has been recommended by the ABA Commission on Trial Court Standards (Tent. Draft 1975).

By unifying the district, superior and specialized courts into a single court of original proceeding, it is possible to end some of the compartmentalization, make better use of facilities and most significantly of all, achieve greater flexibility in allocating scarce judicial resources. Under the present system, transfer of judges becomes a major problem. The burdened court has to identify and call attention to its need. A judge in another court must be found who can essentially leave his own work, and the visiting judge, for all practical purposes, loses control of his own calendar. By contrast, the flexibility of a unified system makes it substantially easier to transfer judges and other personnel temporarily within the system. Moreover, a unified court system can create a unified calendar which permits the coordination of scheduling appearances of law enforcement officers and of attorneys.

Unification would end fragmentation, minimize the possibility of jurisdictional conflicts and permit adjudication of cases in accord with the entire controversy principle. Unification would eliminate the duplication, delay

4. See Pound, 20 J. Am. Jud. Soc. 178 (1936) when he stated court system archaic: "1) in its multiplicity of courts, 2) in preserving concurrent jurisdiction, and 3) in the waste of judicial power it involves."
and expense of trials de novo. This is also a problem in civil cases. In 1973 there were more than 5,000 cases removed from the district courts (including the Boston Municipal Court) to the superior court and in that same year about 7,000 law cases shuttled from the superior court to the district courts and back to the superior court. A system of specialized divisions as opposed to specialized courts has the salient advantage of eliminating duplication of staff and budget. A unified court structure also has greater ability to draw on the court system as a whole when special facilities or support services are needed.

Tenure of Chief Justices

The issue of whether there should be a limit placed on the tenure of the Chief Justice of the Supreme Judicial Court as well as the chief justices of the lower courts was discussed in the context of making the court system more responsive to the changing values in society. A subcommittee was assigned this topic for discussion. (See Appendix B.) The choices posed were that of the existing system where the Chief Justice once appointed has tenure until age 70, assuming good behavior, or, alternatively, having a limit of years placed on the term of office.

It was pointed out that both alternatives had possible shortcomings; on the one hand, tenure until age 70 is felt by many to result in an aloof judiciary whose ideas may become stale or remote from those of the mainstream of the society they serve. On the other hand, if the tenure of the Chief Justice is too short, he may be constantly pressured to conform his decisions in actions to immediate political realities.

For guidance, the Committee felt it would be fruitful to examine other jurisdictions.

Massachusetts is among the very small number of states which continue tenure until age 70 for their Chief Justice. We share this distinction with New Hampshire, Rhode Island and Puerto Rico. New Jersey has a modified system under which the Chief Justice is appointed for an initial period of seven years and then is subject to reappointment for life. All other states in the union have tenure limited to a fixed period of years. Vermont has the shortest tenure, two years. The District of Columbia and Maryland each have the longest tenure, 15 years. The average for the states and territories of the United States having a tenure system is 8.27 years. The majority of states are clustered between 6-8 years.

Reference was made to legislation now before the legislature filed by John J. Conte, Senate Chairman of the Joint Committee on the Judiciary. This would, in effect, place a limitation on the term of office of the Chief Justice of the Supreme Judicial Court. The measure provides that the Governor appoint an Associate Justice of the highest court as Chief Justice for a term of ten years with such person ineligible for reappointment to successive terms as Chief Justice. Moreover, contained within the bill are other provisions which would allow the Chief Justice of the Supreme Judicial Court to appoint all chief justices of the inferior courts for a period of four years. To avoid injustices and any constitutional pitfalls, a grandfather clause was inserted which excludes the present chief justices.

While cognizant of the legislation pending before the legislature, it was the recommendation of committee members, on the basis of the experience in other states, that a tenure period of eight years be fixed for the Chief Justice of the Supreme Judicial Court. It was their further recommendation that the office of Chief Justice not be renewable, thus avoiding any undue political pressures upon the Chief Justice from the political forces which might affect his reappointment. After the non-renewable 8-year term, the Chief Justice would continue as Associate Justice of the Supreme Judicial Court. It is also believed that a period of eight years is sufficiently long to allow a Chief Justice to impress upon the Supreme Judicial Court his special, unique views, ideas and insights. Thus, a limitation of tenure avoids the problem of a creative and dynamic officeholder becoming stale.

Administrative Unification

Another facet of a unified court system is administrative unification. This entails some form of central administration.

Many states, including Massachusetts, have a state court administrator who, subject to the direction of the Chief Justice, has the initial responsibility for defining long-range goals, preparing the budget and keeping track of the trends of judicial business.

Other states have an administrative judge. This is in accord with the ABA's 1971 Handbook on the Improvement of the Administration of Justice and the recommendations of the Dominick Commission which undertook a study of court reform in New York.

New York currently places administrative authority in the Administrative Board of Judicial Conference. The Dominick Commission advocated the appointment for four years by the Chief Justice of a Chief Administrative Judge to be responsible for the administration of the state court system.

The process of choosing a chief justice is already difficult. To require, in addition to having all the qualities of scholarship and wisdom required of a chief justice that the individual also be an outstanding administrator is to make the already weighty responsibilities of the office much more onerous.

Some have suggested it would be dangerous to vest more authority in a single individual and propose the state either have a chief administrative judge or alternatively, each judicial district have either its own chief judge or its own administrative judge.

There is broad consensus concerning the need for more centralized supervision of judicial and non-judicial administration, but there has been little critical evaluation of the supervisory process. In most states, the Chief Justice serves as the chief administrative officer, and this system was endorsed by the 1971 National Conference on the Judiciary.

At present the judicial system in the Commonwealth is characterized by the nearly absolute autonomy of each court, a consequence resulting from separate purchasing and the unavailability of judicial manpower due to the imbalance between the workloads of different judges. Another consequence is economic and human waste resulting in the denial of equal justice to all. Long-range
planning for the system is practically nonexistent. Administrative unification can help to alleviate these weaknesses.

Financial Unification

As stated earlier, each year some 400 separate court budgets are prepared. At public expense, dozens of budget officers, registers of probate, district attorneys, judges and clerks of court spend days drawing up fragmented budgets. For example, in the district courts, the judge, the chief probation officer and the clerk each formulate a separate budget, often without consulting each other. The custodian of the building submits still another budget. Responsibility for funding is divided between the state and the counties with outmoded, Byzantine complexity.

The state budget currently absorbs less than 20% of the approximate total cost of operating the entire system. The remaining 80% is paid by the counties by means of the property tax. It takes a much higher proportion of the incomes of lower income people than of wealthier individuals, especially in the cities where property tax rates are the highest as there is increasing pressure toward full valuation. In some counties, Suffolk for example, the burden is even more unjust. While approximately 80% of the space in the Suffolk County Court House is occupied by courts with statewide jurisdiction, the Commonwealth pays for only 30% of the costs of maintaining facilities for the courts located there. Suffolk County, therefore, pays 70% of this cost. By statute, Boston pays all court costs for Suffolk County although the county also includes the cities of Chelsea, Revere and Winthrop. This Association has sponsored legislation calling for the state to assume the costs of the Suffolk County Court House, but this measure failed to pass the legislature.

The above facts have persuaded the Committee that the state ought to assume the full cost of operating the court system, that the state institute unitary budgeting and the courts be financed by means of a state-based tax. These were also the conclusions reached by the American Judicature Society as stated earlier, the ABA Commission on Court Standards and by the National Conference on the Judiciary (1971).

The reasons for enacting a system of full state financing are numerous. The present system thrusts the courts into local politics. State financing would relieve the courts of having to go hat-in-hand to the county commissioners and enable the judiciary more closely to achieve independence as a co-equal branch of government. In addition, full state financing can relieve those who pay property tax and offer the opportunity to more equitably distribute the costs. It will increase the likelihood that need rather than political factors will determine the allocation of resources. Full state financing will enhance the opportunity to eliminate duplication and waste through unitary budgeting, centralized purchasing and coordination of efforts to tap available outside funds such as LEAA. It will enable the state to obtain the comprehensive fiscal data necessary for long-range planning and to establish more equitable taxing for court support.

With state assumption of all court operating costs a system of unitary budgeting should be instituted. Unitary budgeting makes an annual audit of costs more feasible and consequently enhances the control of costs.

Reforms in the control of costs are overdue, and the legal profession and concerned citizens should take an active role to accomplish immediate reform.

Geographical Structure of the Unified Trial Court System

An integral part of the unified trial court system would be its geographical structure. There seem to be two possible choices. One is to organize on a county or regional basis where every trial judge would be assigned to a particular judicial district. A second alternative would be the system now used in the assignment of superior court justices.

The latter, which might be characterized as a rotation system based on substantive need, involves the transfer of judges where needed as often as needed. A rotation system may entail somewhat more time spent in travel, but its appeal lies in the fact that no judicial district, no matter how remote from urban centers, no matter how sparsely populated, would be deprived of the benefits of specialized judges adjudicating cases arising in the district, calling for particular kinds of expertise within the limitations of total resources.

A county or regional district on the other hand also has merit, and if there is to be a transition period between full state assumption of court financing, a county or regional court system might be easier to effect. Districts could be drawn by taking into account such factors as population, geography and court facilities. It was suggested that we use a district system already in existence.

Under such a system, unlike that of Illinois where the system is divided into circuits and there are no provisions for judges to be assigned to different circuits, a chief administrative judge could be given the authority to assign judges to different districts.

In assessing the geographical impact of unification and in determining whether a district system or a rotation system is preferable, the essential point is that either system contemplates assigning judges to achieve more evenly balanced workloads and reducing the congestion of court calendars. This is noteworthy because Illinois has created a rigid county district system precluding transfer of judges. This is not a desired result. One of the primary reasons for creating a unified system is to permit flexible assignments of personnel.

Select Committee on Judicial Needs

Governor Michael Dukakis recently created a 20-member Select Committee on Judicial Needs, chaired by Professor Archibald Cox, with a mandate to make recommendations to relieve the congestion of cases in the superior court. The composition of the Committee is broadly based and includes the former Chief Justice of the Supreme Judicial Court, the Attorney General, members of the General Court, practicing lawyers and laypersons.

Although the Select Committee will take up subjects which include jurisdictions of various courts, de novo appeals, court facilities and judicial manpower, thereby paralleling the work of our Committee in many respects, there is no conflict between the two committees. The importance of the work and the recommendation of this
Committee is to permit the MBA to formulate a unified position on judicial reform, to make it available to interested parties, including the Select Committee on Judicial Needs and the legislature, and subsequently to work toward long-range reforms of the court system.

Committee Recommendations

Subsequent to digesting the extensive background material submitted to it, the Committee

VOTED: that it adopt in principle the concept of a unified single trial court and a system of central administration and funding.*

In reaching its conclusions the Committee rejected a piecemeal approach to restructuring the system as it exists today. While it endorsed Chief Justice Hennessey’s recommendations, it did so with the proviso that they would be effective for only a two-year period. Thus, the Committee has taken the approach that a long-term solution must be found for the problems the court faces today and in doing so has reached the conclusion that only a total restructuring of our system, given its present workload, will suffice to make the system responsive to the needs of the public. The Committee believes:

1. There should be a restructuring of the present system into a unified trial court system with general jurisdiction having only one class of judges headed by a chief justice with a chief administrative judge under his direction and a chief judge for each of the judicial districts, but numbering no more than seven.

2. All judges within a particular district should be available for assignment to other districts.

3. The Commonwealth would assume the total cost of financing the judicial system.

4. The Supreme Judicial Court should retain its present general supervisory powers and would be given sole responsibility for the annual proposed budget for the entire judicial system.

5. The Chief Justice of the Unified Trial Court should be appointed by the Governor for an eight-year term and would be ineligible for reappointment. The Chief Administrative Judge is to be appointed by the Chief Justice of the Unified Trial Court System and to serve at the pleasure of the Chief Justice. The Chief Administrative judge’s term shall not exceed that of the Chief Justice. In addition, the Chief Justice would appoint the Chief Judge of the judicial districts (circuit) whose terms of appointment would be for two years with the power of reappointment for one additional two-year period.

6. The prosecutors within the judicial districts created, whatever their geographical distribution and however constituted, would be elected and not appointed. Their functions would be analogous to those of the district attorney system as it is presently administered.

7. Trial de novo should be abolished.

8. The Committee recognizes the need for citizen input to the process of administering the Unified Trial Court System but makes no recommendation regarding its implementation.

APPENDIX A

Recommendations of the “Court Financing Report”

Assumption of Court Costs

1. The Commonwealth of Massachusetts should assume full responsibility for financing all of its courts and auxiliary court services.

2. All revenues from fees, fines, penalties and forfeitures levied by a court should be transferred to the Commonwealth’s general fund.

3. The Commonwealth’s assumption of all court costs should occur over a reasonable period of time, with specific time-frames established for the assumption of each court’s costs.

Court Budgeting

4. Within the framework of the existing court system, budget and accounting responsibilities should be consolidated so that single unified budgets are prepared for the Supreme Judicial Court, Appeals Court, Superior Court, Probate Courts, District Courts, Land Court, Juvenile

*During the course of the Committee’s deliberations, the Committee and the Board of Delegates

VOTED: that the Massachusetts legislature should act with expediency on Chief Justice Hennessey’s recommendations which would be effective for a two-year period. (See Appendix D.)

All of these recommendations would be so-called “emergency measures” effective for two years commencing September 1, 1976. They are not meant to be long-range solutions to problems within the administration of justice system. The five measures are:

(1) the granting to the Chief Justice of the Supreme Judicial Court the authority to assign up to 15 district court judges to sit in the superior court with unlimited civil jurisdiction;

(2) the granting to the Chief Justice of the Supreme Judicial Court the authority to order the transfer of Suffolk County Superior Court civil cases for trial in Middlesex County;

(3) the transfer of jurisdiction over the de novo trial of criminal cases from the superior courts to the district courts;

(4) the transfer of jurisdiction over the de novo trial of juvenile cases from the superior courts to the district courts, or in some locations to juvenile courts;

(5) the transfer of jurisdiction over the de novo trial after remand of motor vehicle tort cases from the superior courts to the district courts.

All of these recommendations in some form are contained within legislation filed by John J. Conte, Senate Chairman, Joint Committee on the Judiciary. In fact, the Judiciary Committee on February 18 reported favorably on H-392 (S-636), An Act Providing for the Use of District Court Judges to Relieve Superior Court Congestion. This bill, essentially the same as that recommended by Chief Justice Hennessey, provides that the Chief Justice may authorize not more than twenty district court judges to sit in the superior court with unlimited jurisdiction in both civil and criminal matters. In addition, said justice would be authorized to order the transfer of Suffolk County Superior Court civil cases for trial in Middlesex County. There are likely to be further changes in this measure before final passage is ensured.
Courts, and Housing Court.

5. Pursuant to Recommendation #4, the Chief Justice of the Supreme Judicial Court should consolidate each of the unified court budgets into one comprehensive state court budget for transmittal to the Governor.

6. The Governor should be empowered to make only lump-sum recommendations with respect to the state court budget and the Legislature only lump-sum appropriations. In no case should line-item recommendations and appropriations be made.

7. All funds appropriated for the judiciary should be placed in a judicial account and be subject to prompt and regular independent audit at the end of each fiscal year.

8. The executive secretary of the Supreme Judicial Court should retain a full-time fiscal officer whose primary responsibilities would be to dispense funds appropriated for the judiciary and to implement recognized accounting practices to assure regularity, punctuality and honesty in the expenditure of funds placed in the judicial account.

APPENDIX B
MEMORANDUM

To: Massachusetts Bar Association
   Committee on Court Reform

From: James N. Esdaile, Jr., Esquire

Subject: Tenure of the Chief Justice of the Supreme Judicial Court

I. Background

Any inquiry into placing a limitation upon the term of the Chief Justice of the Supreme Judicial Court of the Commonwealth forces one to reflect upon the various philosophical models of judicial behavior. In the 18th Century, it was widely believed that the conscientious Judge exercised a quasi-religious function. He was thought to make his judgments on the basis of Natural Law. The Judge was thought to base his judgment upon universal verities which remained fixed at all times. In the 19th Century, Oliver Wendell Holmes revolutionized our concept of Judicial conduct in his great book The Common Law. Holmes argued that the Common Law was not based upon static universal principles, but rather mirrored the collective values and ethical principles of society. In Holmes' view, there was no legal principle which was necessarily right for all ages. Rather the law constantly changes and evolves as social attitudes change and evolve. More recently, the social critics have suggested that the judicial personality represents the values of the dominant social and political group from which he has emerged.

If one believes that a judge should be part of a process which is responsive to the changing values of society, then one must be concerned about creating a structure within which a close relationship between the Chief Justice of the Supreme Judicial Court and the society which he serves will be reinforced.

Unfortunately, any consideration of a tenure less than the lifetime of the Chief Justice of the Supreme Judicial Court raises the ancient concern that the office of the Chief Justice will be politicized. Indeed, the Judicial engineer is tossed between the horns of a difficult dilemma. On the one hand, tenure for life is felt by many to result in an aloof judiciary whose values may become remote from the values of the mainstream of the society which they serve and whose ideas and creative force may become stale with the years; on the other hand, if the tenure of the Chief Justice is too short the Chief Justice will be constantly pressured to conform his decisions and actions to immediate political realities. There is widespread agreement that a constant worry about present political realities would destroy the necessary detachment and independence of mind which the Chief Justice must have. I believe that it would be fruitful for us to examine the experience of other states.

II. Treatment of Judicial Tenure in the United States

Massachusetts is among the very small number of States which continue to have a tenure for life. We share this distinction with New Hampshire, Puerto Rico and Rhode Island. New Jersey has a modified system under which the Chief Justice is appointed for an initial period of seven years and then subject to re-appointment for life. The rest of the States of the Union have a tenure limited to a fixed period of years. Vermont has the shortest tenure, set at two years. The District of Columbia and Maryland are tied with the longest tenure, that of fifteen years. The average for the States and Territories of the United States having a tenure system, is 8.27 years. The majority of the States are clustered between tenure period of 6 and 8 years.

III. Recommendations

On the basis of the experience in the other States, it is my recommendation that a tenure period of 8 years be fixed for the Chief Justice of the Supreme Judicial Court. It is my further recommendation that the Office of Chief Justice of the Supreme Judicial Court should not be renewable. This would avoid the creation of any undue political pressures upon the Chief Justice to conduct himself according to the desires of the political forces which would potentially oversee his reappointment. After the non-renewable 8 year term, it is my recommendation that the Chief Justice join the other Justices of the Supreme Judicial Court.

I would respectfully suggest that the 8-year, non-renewable term for Chief Justice would encourage the Governor as the representative of the political process, to appoint somewhat younger Chief Justices than we have historically experienced. This would serve to create a structural support for the notion that the Chief Justice should be a man at the height of his intellectual and physical powers and moreover that he should have a meaningful grasp of the values and desires of the society which he represents. It is moreover considered that the period of 8 years is sufficiently long to allow the officeholder to impart to the Supreme Judicial Court whatever views or ideas are unique to him and the limitation of the period avoids the problem of a creative and dynamic officeholder becoming stale after an extended tenure.

Respectfully submitted,

James N. Esdaile, Jr.
APPENDIX C

Ch. 862—An Act Phasing Out the Office of Special Justices
This measure provides that all 81 special justices of the District Court must certify in writing to the Chief Justice of said court no later than July 1, 1979 of their intention to go full-time. If such justice does not file such certification, he is thereafter precluded from engaging in the practice of law but does not receive any of the incidents of a full-time justice, i.e., compensation, vacation, sick leave and travel expenses. While the Chief Justice has the authority to fix the effective dates of the certification of such applicants, the legislative intent clearly reflects that he does so by chronological order. The Chief Justice is given the authority to assign these justices; however, it is clear from the language inserted that only in exigent circumstances is such justice to be assigned outside the court to which appointed or the county of residence.

Ch. 864—An Act Making Full-Time Justices of the Part-Time Courts
This measure provides that by July 1, 1977 all remaining part-time judges, now totaling 16, will be precluded from practicing law and will be given the opportunity of becoming full-time judges. A staggered schedule relative to the implementation of this act is provided therein. Such a judge will receive the same incidents as those of a full-time justice.

Ch. 861—An Act Providing for the Recall of Superior Court Judges
This legislation allows the Governor to place on an eligible recall list any retired Superior Court judge for a period of not more than two years. The Chief Justice of the Superior Court may assign any justice eligible to be recalled, but in any event, no assignment shall be longer than 90 days. There are approximately 16 retired judges eligible to be placed on the list by the Governor with the advice and consent of the Executive Council. However, due to such factors as their health and the compensation which they will receive, it is expected that a far fewer number will actually be recalled.

Ch. 820—An Act Providing for the Recall of Probate Court Judges
This measure, similar to the above, provides that only probate judges retired after January 1, 1975 will be eligible to be placed on the recall list. At this time Jeremiah Sullivan has been placed on such list by the Governor with the advice and consent of the Executive Council.

While each of the above proposals is important in and of itself, i.e., the elimination of the part-time judge and part-time lawyer concept, collectively they insure the availability of additional judicial manpower within the court system. The coming legislative session takes on new significance as to what tools the legislature will give the judiciary as means of allocating these new sources of judicial manpower. What the legislature does will determine the success of the court's attempt to deal with the burdensome backlog of civil and criminal cases in the Superior Court.

Prospective:

S-636 (H-4393)—An Act Providing for the Certification of District Court Judges and Facilities for Use in the Superior Court
This measure, as redrafted by the Judiciary Committee, authorizes the Chief Justice of the Superior Court to certify not more than 20 justices of the district courts, including special justices, to sit in the Superior Court with unlimited jurisdiction in both civil and criminal cases. In addition, such Chief Justice may certify District Court facilities for use in the Superior Court.

Elimination of Trial De Novo
This legislation which died in the House last session provides for an election in the initial instance of a jury trial or jury-waived trial with all subsequent appeals on questions of law only being taken to the Appeals or Supreme Judicial Court.

Mandatory Appeals to Juries of Six Within the District Courts
This measure would retain the trial de novo system but would authorize district courts and juvenile courts to hold jury of six sessions with the mandate that all de novo appeals be heard by such juries. The proponents argue that the district courts have better available facilities, that district court judges sit in the Superior Court on motor vehicle, tort, and all criminal matters within the jurisdiction of the district court, and that it would eliminate a delay in trying criminal cases. This bill died in House Ways & Means last session.

Recordation in the District Court
This measure would authorize the District Court to install all recordings within their courts and thus become courts of record. If either the elimination of trial de novo or mandatory appeals to the jury of six in the district court measures are enacted, this measure becomes imperative in order for there to be a transcript available on appeal to the Appellate Courts.

The above measures appear to have one thing in common, i.e., to increase the jurisdiction of the district courts by both the establishment of juries of six and recordation, thereby reducing the backlog in the Superior Court with the additional assistance of district court judges sitting in the Superior Court. If there is any discernable approach to judicial reform by the legislature, this appears to be it.

APPENDIX D

To: The Select Committee on Judicial Needs

From: Chief Justice Hennessy

The following proposals are offered as emergency measures designed to make the most flexible and effective use, on a temporary basis, of available court resources — judges, supporting personnel and facilities — in Suffolk and Middlesex Counties in order to relieve the unconscionable backlog of criminal and civil cases in the Superior Court for those counties.

I address my recommendations immediately and directly to these adjacent counties because the situation is
especially acute in them. Thirty-six percent of the citizens of the Commonwealth live in them. Thirty-nine percent of the Superior Court’s criminal business is entered annually in them according to the most recently published report of this Court’s Executive Secretary. Fifty-five percent of the Superior Court’s civil backlog exists in these two counties. Civil delay has reached scandalous proportions in them—five years in Middlesex County and four years in Suffolk County. Efforts to cope with their criminal caseloads under existing circumstances will only further aggravate the problems of civil delay.

The assignment to the Superior Court of up to fifteen district court justices at a time to preside in available facilities in Middlesex County over civil cases arising in either Middlesex or Suffolk County would permit a massive attack on the civil backlog and congestion of these two counties.

Relief, however, would not be limited to these two counties alone. The assignment of selected district court justices to try Suffolk and Middlesex County civil cases in available Middlesex County facilities, the judicious use elsewhere in the Commonwealth of retired Superior Court justices available for recall and the resulting flexibility in the assignment of the Superior Court justices would have a beneficial effect throughout the Commonwealth.

The “emergency” measures which I propose (all to be effective for two years commencing September 1, 1976) are:

1. The granting to the Chief Justice of the Supreme Judicial Court the authority to assign up to 15 district court judges to sit in the Superior Court with unlimited civil jurisdiction.

2. The granting to the Chief Justice of the Supreme Judicial Court the authority to order the transfer of Suffolk County Superior Court civil cases for trial in Middlesex County.

3. The transfer of jurisdiction over the de novo trial of criminal cases from the Superior Court to the district courts.

4. The transfer of jurisdiction over the de novo trial of juvenile cases from the Superior Court to the district courts or, in some locations, to juvenile courts.

5. The transfer of jurisdiction over the de novo trial, after remand, of motor vehicle tort cases from the Superior Court to the district courts.

I have discussed these matters with Chief Justices McLaughlin, Flaschner and Lewiton and they join me in support of them.

1. Assignment of district court justices to civil sessions of the Superior Court.

N.B. There is presently available in the district courts sufficient judicial man-power to permit such assignments without disrupting the activities of the district courts. There are district judges presently capable of conducting civil jury trials in the Superior Court. Some already do so on a regular basis by assignment to motor vehicle tort and criminal sessions. Other district court judges have considerable experience gained in the existing jury trial sessions of those courts. In any event, I intend to establish a training and orientation program for any judges so selected for service in the Superior Court prior to any such assignment.

2. Transfer of Suffolk County Cases for trial in Middlesex County.

N.B. The Suffolk and Middlesex County courthouses are only four street car stops from one another. The transfer of such cases from Boston to Cambridge for trial would work no hardship on lawyers, litigants, witnesses, jurors or court personnel. It would make full use of existing and under-utilized facilities in Middlesex County. It would permit the greater use of Suffolk County facilities for the trial of pending criminal cases.

The concentration of the civil business of both counties in one building would expedite the scheduling and calendaring activities of both counties since, by and large, the same members of the civil trial bar tend to practice in both counties.

3. Transfer of de novo criminal cases.

N.B. District court judges already staff the de novo criminal sessions of the Superior Court. Transfer of exclusive jurisdiction over de novo criminal trials to the district courts would not, therefore, add to the burdens of district court judges. However, it would free Superior

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Court facilities and personnel for other Superior Court sessions. Essentially then, it amounts to a transfer of the location of such trials.

Chief Justice Flaschner informs me that the district courts are presently equipped to absorb this additional caseload. However, it would be advisable to delegate to him, for the public convenience, administrative responsibility for establishing such sessions in each county.

4. Transfer of de novo juvenile cases.
N.B. This provision would transfer to the district courts or, in some areas, existing juvenile courts, exclusive jurisdiction over de novo juvenile appeals. This could be done with no substantial hardship to those courts and would allow the assignment to such sessions of judges with specialized expertise and interest in juvenile justice. At the same time, it would free Superior Court justices, supporting personnel and facilities for other purposes.

5. Transfer of de novo trial of motor vehicle tort cases.
N.B. At present, district court judges staff the motor vehicle tort sessions of the Superior Court. As in the case of the transfer of de novo criminal cases, this would essentially transfer the location of such trials and free Superior Court facilities and personnel for other purposes. Remanded motor vehicle tort cases, few of which ever proceed to a de novo trial, would remain in the district court system. Motor vehicle tort cases not subject to remand would remain in the Superior Court.

These proposals will likely lead to net savings to the taxpayers. However, if practices similar to past procedures for re-allocating court costs are followed, there may be some redistribution of costs between the Commonwealth and the counties. Nevertheless, the increased use of available facilities and personnel will result in greater economies and efficiency, thus making them more cost-effective. For example, courtrooms must be maintained even if not used.

The availability of additional judges for assignment to Superior Court civil sessions will reduce or even eliminate the costs presently incurred in referring cases to masters. In 1974-75, the average monthly costs of such referrals in Suffolk and Middlesex Counties exceeded $41,000—a figure substantially larger than the annual salary of a Superior Court justice.

The prospect of the speedier disposition of civil cases will also result in indirect savings both to the litigants and the public. The frequency of expensive and time-consuming continuances will be reduced as will the economic pressures to accept less than fair settlements. Interest on judgments (8 per cent per year), an expense often passed on to the public in the form of increased insurance premiums or tax rates, will also be reduced.

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