

**HOUSE AND SENATE
JOINT JOURNAL SUPPLEMENT**

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Wednesday

No. 3

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State of the Judiciary Address

by

The Honorable Daniel E. Winfree

Chief Justice

Alaska Supreme Court

Before a Joint Session

of the

First Session of the

Thirty-Third Alaska State Legislature

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February 1, 2023

Juneau, Alaska

The following was submitted for publication:

President Stevens, Speaker Tilton, Honorable Members of the 33rd Alaska Legislature, guests, and all those otherwise joining to hear about Alaska's judiciary, good morning. Thank you for allowing me here for my final State of the Judiciary Address, which I like to refer to as the last stop on the Chief Justice Winfree farewell speaking tour. As required by the Alaska Constitution, I must retire by my 70th birthday on February 12, and my last day in office will be next Monday, February 6. A friend recently commented on the irony that I'm about to be too old to remain an active justice on our court, while based on the last two presidential elections, I may not be old enough to run for president.

As I mentioned last year, Chief Justice George Boney, Alaska's second Chief Justice, appeared here in January 1972 for the first State of the Judiciary Address. I am the 13th person — and the first Alaska-born — to address you as Chief Justice; I am delighted, and deeply honored, to be here as I close out my time on the Alaska Supreme Court. Because there are so many new legislators this year, I'd like to first quickly introduce you to some people, then talk about some of the judiciary's successes and challenges, and finish by expanding on my remarks from last year about our different roles in Alaska's contemporary democracy.

The next Chief Justice will be Justice Peter Maassen, who was appointed by Governor Sean Parnell in 2012 and sits in Anchorage. I will swear in Justice Maassen as Chief Justice as late in the day as possible, perhaps just before midnight, on February 6.

Justice Susan Carney was appointed in 2016 by Governor Bill Walker and sits in Fairbanks. Justice Carney came to Fairbanks in 1987 for a one-year clerkship with Justice Jay Rabinowitz; as she often says, it's been a very long year.

Justice Dario Borghesan was appointed in 2020 by Governor Mike Dunleavy after a decade with the Attorney General's Office. Justice Borghesan came to Alaska in 2008 to clerk for me; he now sits in Anchorage.

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Justice Jennifer Henderson was appointed in 2021 by Governor Dunleavy and also sits in Anchorage. Justice Henderson came to Alaska in 2001 to clerk for Justice Warren Matthews, and she joined us after serving on both the district and superior courts for a total of eight years.

Finally, I'd like to introduce my successor and soon-to-be newest justice on the court, just recently appointed by Governor Dunleavy. Superior Court Judge Jude Pate came to Alaska some 30 years ago and has been a mainstay in Sitka all these years. He will maintain his chambers here in Juneau, and he will bring a wealth of experience to the court. My colleagues hope he joins the court as soon as possible to share the workload.

I also want to introduce our Administrative Director, Stacey Marz, who has over 20 years with the court system and became Director in November 2019. Stacey worked incredibly hard to help us navigate the pandemic and then a cyberattack, and she speaks nationally to other court administrators on a variety of issues. She is inspirational.

General Counsel Nancy Meade came to Alaska in 1987 to clerk for Justice Ed Burke. She joined the court system in 2004 as our court rules attorney and moved to her current position in 2011. Her goal is to help you understand court system operations and how proposed legislation might impact the judicial system. I hold her in very high regard and thank her for her nearly 20 years with us.

As you may know, the bad news for us last year was former Deputy Director Doug Wooliver's retirement after nearly 30 years with the court system. The good news is that we were able to find someone willing to work in a temporary role to fill at least part of the void created by his departure. Let me introduce Doug Wooliver, our new Acting Deputy Director. I think this is his 27th appearance in Juneau for the court system; I understand some of you aren't even that old yet!

I'd also like to acknowledge Susanne DiPietro, Executive Director of the Alaska Judicial Council for about the last decade. The Council plays an important constitutional role in the judicial selection process and is a key reason our judiciary is so highly regarded across the

country. Susanne has been a public sector attorney for over 30 years, and she has volunteered internationally to help establish judicial systems in emerging democracies.

I'll now highlight a few of the court system's successes and challenges. Most notably, I'm pleased to report that we are, and have been for nearly the entire past year, operating with all engines firing. We are at virtually the same levels of activity, and productivity, with all the same services (and actually a number of expanded services!) that we had before pandemic disruptions.

What do I mean by "productivity"? That seems an odd word to describe a court system's work. A court system's success in its mission, serving the public fairly and efficiently and handling every matter that comes in the door, obviously can't be measured the same way as for-profit businesses, but we might roughly apply that notion by looking at trial court output. And statistics show that our judges and staff have been delivering. Let me highlight just a couple of those statistics, because boring numbers sometimes really do tell a story:

- First, we track the total number of court hearings. In calendar year 2022 we had about 333,000 hearings, almost exactly the same as we had in 2019, before pandemic interruptions.
- Breaking that down a little, about a third of those hearings were in felony cases; that's about 6- or 7,000 more felony hearings than we had in 2019.
- Looking at criminal change of plea hearings, when the court is asked to accept a negotiated plea agreement to end the entire case or at least most of the issues, we held over 16,000 of them. Again, this is more than we had in 2018, before the pandemic, and the number of those in felony cases was higher than in any of the last five years.

Although numbers reflect a recovery from pandemic limitations, I must acknowledge one data set much less satisfactory than we would like. The number of pending criminal cases remains higher than normal as a result of pandemic disruptions and subsequent unexpected events. This is especially frustrating given all the efforts and incremental progress made during pre-pandemic years to shorten the time between opening and resolving a criminal case.

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Part of our mission is to bring every case to final resolution as fairly and as quickly as is reasonable. Resolving criminal cases in particular provides some closure for victims, settles a defendant's status, and provides an ending of sorts for everyone involved. To further that, we have a strong policy and practice of making judges and courtrooms available when prosecutors and defense attorneys are ready to proceed with a plea agreement or a trial in any criminal case.

So, why this "backlog" of open criminal cases? If you were here last year, you learned that historically 96 to 97% of criminal cases are resolved without a trial. Criminal cases generally are dismissed or settled with plea agreements, only rarely is there a trial. But cases that should have been resolved without trial did not get resolved during the pandemic, reportedly because prosecutors, defense lawyers, and defendants wanted or needed real trial dates to prompt real action on their cases. Last year, after authorizing all criminal jury trials to resume, I expressed confidence that agency lawyers would get back to resolving cases without trial and whittle away the backlog. That whittling has been much slower than we would like. Some agencies have ongoing staffing problems in various locations, and trial scheduling and logistics can be a tremendous challenge. We know the agencies are working hard to stabilize their staffing and clear cases, and we know your help with agency lawyer pay increases will play an important role. That's encouraging, and I remain optimistic about this.

Just like those agencies, and all of state government, we, too, have been facing recruitment and retention challenges. Many of our staff, and even our judges, are somewhat new to their jobs; yet, as a whole, the pace is quick, filings are promptly processed, proceedings are taking place in person and remotely, and expectations are high. We are hopeful that we'll continue to retain a professional, helpful, and motivated staff and that the public will see our branch of government as responsive to their needs.

Beyond recovering from the pandemic, we've focused on enhancing and expanding ways to provide service to all Alaskans. First, remember that budget crisis back in fiscal year 2016? The court system took the proactive step of closing our courthouses to the public on Friday afternoons, resulting in fewer work hours and a

corresponding salary decrease for many of our front-line people. That saved the state over two million dollars in FY 2017 and every year thereafter. I'm pleased that, with your help in our current budget, all the large courts have reopened on Friday afternoons and remaining courts will open incrementally as we move forward. Alaskans again can access the court system on Friday afternoons; thank you for your help in making this happen.

Since arriving in Juneau, I've heard that some of you are wondering whether the Friday afternoon closures contributed to the criminal case backlog. The answer is no. The Friday afternoon closures, which began July 1, 2016, had no effect on case settlement rates. And the closures were well received by judges and agency lawyers because it freed up case preparation time. We had no abnormal backlog prior to the pandemic; the current backlog is a direct result of pandemic-related failures to resolve cases without trial in the normal course.

Second, we have greatly expanded courtroom video technology as a direct result of previous pandemic health and safety concerns. Our IT employees are travelling to jails and other detention facilities to install necessary equipment so more arraignments, status conferences, other criminal case hearings, and civil commitment proceedings can take place remotely. This cuts down on security and safety risks inherent in transporting prisoners or vulnerable Alaskans on roads and inside courthouses, and it should result in significant cost savings for the Department of Public Safety as well. We also are working on creating a list of civil and criminal hearings that presumptively should be held remotely with audio or video technology. We intend that any new process be convenient, cost-effective for everyone involved, fair to litigants, and less burdensome for all participants. I'm hopeful that by this time next year we will have substantially more use of this technology in a variety of hearings.

Our increased use of video technology also will help the public observe and participate in court proceedings. Through our court system website, we now are live streaming key hearings and trials in cases with high public interest, and I know some of you have taken a look at this. A recent trial had over a hundred people watching or listening online; I suspect the vast majority of them wouldn't have

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ventured to the courthouse, found a parking spot, cleared security, and sat on those wooden benches in the courtroom gallery to watch the trial. Indeed, this will allow people all across the state to watch matters of great public interest that may be happening, say, in Anchorage, Fairbanks, Palmer, or Juneau. We're proud to showcase our work and make it easier to see firsthand what we do.

Finally, last year I spoke about our nationally recognized Access to Justice Services department, focusing on helping those who are self-represented in court matters. We've launched a brand-new program for landlords and tenants dealing with evictions. With grant funding from the National Center for State Courts — and we are one of only twelve court systems nationwide to receive this funding — we now have a designated staff member creating a pathway for landlords and tenants to resolve housing disputes before entering the courthouse doors. We'll provide information on rental assistance, financial counseling services, mediation, and legal assistance to help parties avoid the cost and time involved in traditional eviction litigation. We think this program will mitigate the collateral damage of evictions, improve housing stability across the state, and allow judges to dedicate more time to other matters needing attention.

Now to finish up, I'd like to return to last year's theme: our differing roles in maintaining a contemporary democracy. Since last year, we've had a post-redistricting election for pretty much everyone in this brand-new, 33rd Legislature, and we've had another election for governor. In two years, there will be the 34th Legislature, and in four years, there will be a new governor. Alaska's legislatures and individual legislators come and they go. Alaska's governors come and they go. Alaska's supreme court justices, like me, come and they go. Yet as Alaska approaches 70 years old, 6 years behind me, it remains vibrant and alive despite myriad political pendulum swings. Democracy is alive and well in Alaska.

You may be surprised to hear that I admire you, and every other Alaskan who has thrown a hat in the ring for elected public office. I couldn't do what you do — fighting political policy battles, entering the public square and debating, civilly or otherwise, heated political disputes of the moment, asking donors for money for campaigns, and

engaging with the public every day to discern the political winds and act accordingly. I do sometimes enjoy watching you from a distance, although often I shake my head and wonder about politics of the day. But I believe that each of you has a sense of duty and that each of you acts in what you believe are in Alaska's best interests.

I would hope that you have a similar regard for us. But as I did last year, I want to contrast how you go about your business with how we go about ours.

The political branches control and conduct the State's day-to-day business. Generally speaking, political parties and politicians seek to influence government conduct through public policy debates and calls to action, electing particular politicians to positions of power, and governing in a manner promoting particular public policy and related goals. To be successful, you must express your personal and political views and, perhaps more importantly, listen to your constituents' views. You seek information from many sources, get advice from your closest political confidants, look at opinion polls, and then you decide which public policy is best, or at least which public policy is consistent with your constituents' wishes and your future re-election plans. But to get things done, you make temporary political arrangements: Who will be in the next coalition, and why? Who will vote yea or nay on a bill, and why? Who will vote for a budget, and what will their constituents get in return? You do all this in the public eye — well, some of it anyway — but your considerations are ever-changing political transactions.

We all generally like the concept of majority rule — how many times do we hear that elections matter? But unconstrained transactional politics and majority rule have dangers that may place minority rights and privileges at risk. So, what constrains political-transaction, majority rule? Well, there is that pesky Alaska Constitution. One of my few recollections of law school classwork is a professor's description of the law as riverbanks — in this context, the political branches generally can do what they want as long as they stay in the flow between the riverbanks. But they can't jump over or unilaterally change those riverbanks. Then, of course, the question arises: who guards those riverbanks?

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Enter stage left, or stage right, depending on your viewpoint, the judicial branch. Our most basic constitutional duty is deciding disputes brought through the courthouse doors. We don't go looking for things to decide. All Alaskans have the right to bring a dispute to the courts, and we don't get to pick and choose which ones to consider. We are always mindful that our work involves some of the most important matters in people's lives, like divorces, child custody disputes, criminal charges, civil commitments, guardianships, parental rights terminations, personal injuries, contract disputes — you name it, we decide it. And, of course, there are those few occasions when we are asked, and tasked, to decide political disputes — perhaps election or redistricting challenges, turf wars between the legislature and the governor, citizen challenges to legislatively enacted statutes, or challenges to citizen rights of initiative and referendum.

How do we go about that? It's completely unlike how you go about your business. A central feature of being an Alaskan judge is making the conscious effort to put aside personal views and public opinion when deciding cases. We don't go asking friends and confidants how we should rule, and we don't conduct opinion polls to see how people think we should rule or what their reaction to a decision might be. We don't check with personal friends in the legislature or executive branch to see how they feel about it. We consider only the evidence presented in court and the relevant law, and we disregard everything else that could inappropriately influence the outcome, whether the decision affects one person, a family, a community, or everyone in Alaska. If we instead simply rule according to the swirl of public opinion or to what some in the legislative or executive branches want, then the judiciary means nothing.

And unlike in your world, there is no room for a transactional analysis. A trial court judge works alone. In the supreme court, what I bring to the table in every case is my hard work to understand the case, my analysis of the legal issues, and my ultimate conclusion about the correct legal resolution. We do not talk with each other about the merits of a case unless all of us are present, and our memos about a case go to all the justices at the same time. We meet together in the conference room to discuss our individual views of a case, and we discuss those views until there is a majority consensus on its

resolution. We then spell it all out in a written decision; everyone has access to our decisions to see exactly why we decided what we decided.

This all comes in to play as the rule of law, and democracy relies on the rule of law. Some of you are thinking, what a crock, of course politics are at play in our decisions and we're just a bunch of activist judges. But that's because you see everything through a political transaction lens. You see a political dispute and conclude that any decision we might make to resolve that dispute therefore must be political. I see the political dispute as just another legal dispute, one of the hundreds and hundreds and hundreds of disputes I've seen in my time as a justice. I look to the facts, I look to the law to determine the correct analysis, and I reach a legally based resolution of the dispute just like I do in a divorce dispute, a contract dispute, or a citizen's claim against the State. That's my judicial lens. And that's why, when I watch you through my judicial lens, I don't always understand what you're doing and why you do it. But then I remind myself that you see things through a different lens than I do. So, when you're wondering about one of our decisions, please make an effort to see things through our judicial lenses.

I do want to make a couple of comments about that activist judge label. The practical definition of an activist judge has been clear to me for years: it's the judge who rules against you. The losing side is certain that the judge must be an activist because the losing side is always, always, certain that it couldn't possibly be wrong about its version of the facts or its interpretation of the law. And with respect to our decisions on important political disputes of the day, it seems that many people base their judgments solely on how their internet sources characterize the result, without ever reading or caring about our written explanation of the relevant facts and the law and why we came to our conclusion. If they don't like the result, we're corrupt, incompetent, or, even worse, radical activist liberals or radical activist conservatives. When they like the result, we're incredibly smart and wonderful, or at least the blind pig who found a truffle. And this view is easily encouraged and amplified by those who should know better.

Democracy and the rule of law depend upon an independent judiciary willing to make the hard calls without favor or bias. I recognize that

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some here don't believe in an independent judiciary, but rather believe Alaska's judges should be hand-picked and controlled by politicians so the judges will render decisions the politicians want. Our Constitutional Convention Delegates were aware of that view, and they expressly rejected it — along with rejecting the notion of elections for judges — in favor of the merit selection process. The Delegates wanted politics out of the judicial selection process all the way up to the governor's constitutionally authorized appointment of a judge from the list of the most qualified applicants provided by the Alaska Judicial Council. With apologies to Led Zeppelin's Stairway to Heaven — and those too young to get the reference — the judiciary was intended to be a rock, and not get rolled.

Not long ago I saw something attributed to U.S. Supreme Court Justice Clarence Thomas that resonated with me, and it goes something like this: "We should be careful about destroying our institutions simply because they don't give us what we want when we want it." I couldn't agree more. Our three branches of government have separate duties and separate ways of fulfilling them. But we have important common ground. We strive for fair and predictable government, equitable law enforcement, and respectful resolution of disputes. Alaska has had these linchpins of a functional government and democracy for nearly 70 years, and I remain confident it will continue to do so.

The Delegates signed the Alaska Constitution just before my third birthday, and just a couple of miles from my house. I again note the little-known resolution the Delegates directed to Alaska's children, which I have hanging on a wall outside my office:

"We bequeath to you a state that will be glorious in her achievements, a homeland filled with opportunities for living, a land where you can worship and pray, a country where ambitions will be bright and real, an Alaska that will grow with you as you grow. We trust you; you are our future. We ask you to take tomorrow and dream; we know that you will see visions we do not see. We are certain that in capturing today for you, you can plan and build. Take our constitution and study it, work with it in your classrooms, understand its meaning and the facts within it. Help others to love and appreciate it. You are Alaska's children. . ."

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I am one of those children, a kid from Fairbanks with the teenage dream of someday helping make important decisions for Alaska. And 15 years ago, I suddenly found myself one of five people heading the judicial branch of Alaska's government. I have given it everything I have to give, and loved every minute of every day. To all you other children of Alaska out there, young and old, live your dreams and make Alaska an even better place for all of us.

It's been an honor and privilege to speak to you, and to all Alaskans, on behalf of the nearly 800 Alaska Court System employees around the state. Farewell.

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