Massachusetts Bar Association

Annual Address

Margaret H. Marshall
Chief Justice
Supreme Judicial Court

November 30, 2006

Thank you, President Mason, for the honor, and great pleasure, of addressing this meeting. Today promises to be an exciting event.

I want to recognize and welcome the new Chief Justice of the Appeals Court, Phillip Rapoza. Chief Justice Rapoza, the Justices and I look forward to working closely with you and your colleagues on the Appeals Court as we continue to make progress toward excellence in our appellate process.

I extend a particular welcome to Justice Elena Yurievna Valyavina, First Vice President of the Supreme Arbitration Court of the Russian Federation, Russia's highest commercial court. Welcome to Massachusetts. It is our privilege to confer with you, as we have done with many of your Russian judicial colleagues who have also visited this courthouse.

I am always delighted to address this Bar Association, and I am particularly pleased to do so this year at the John Adams Courthouse. This is a first in another respect: today is Thursday, not Saturday. I hope that all of you will enjoy relaxing on a sunny Saturday next March, when your program guide to the Massachusetts Bar Association Annual Meeting states that the Chief Justice's annual address, scheduled for that time slot for many years, has already been given!

I look forward to the panel discussion that will follow my address. There is nothing more fundamental to our constitutional democracy than our system of fair,

judicial independence, the focus of the panel. Freedom and economic prosperity[1] flourish only in a society with a deep and abiding commitment to the rule of law.

Former Chief Justice William H. Rehnquist memorably explained why:

> The importance of judicial independence is illustrated very well by looking at our experience with the Bill of Rights and the French experience with the Declaration of the Rights of Man. The Bill of Rights was ratified in 1791; the French Declaration of Rights two years earlier in 1789. In comparing the language of the French Declaration of the Rights of Man with the Bill of Rights of the United States Constitution one would have said that while there were certainly some differences, the basic guarantees provided by each were pretty much the same.
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> [But] within only a few years of the adoption of the Declaration of the Rights of Man, a regime known as the "Reign of Terror" began. During this period of time three hundred thousand persons were imprisoned, about twenty thousand people went to their deaths on the

[1] See generally The World Bank, Law and Justice Institutions Homepage *at* http:/www1.worldbank.org/publicsector/legal/index.cfm (containing working papers, studies, and other documents on the relationship of the Judicial Branch to economic development).

guillotine, and another twenty thousand died in the prisons or were executed without any trial. . . . The chief legislative body was the National Convention; . . . . Judges and jurors on the tribunal were appointed and removed by the Convention.

It seems to me that the reason this happened was that during the Reign of Terror there was no independent institution that could actually uphold the rights contained in the Declaration -- the legislature was supreme; it promulgated the laws, it authorized the prosecutions, and it controlled the courts.

In contrast to the French experience, the American scheme included an independent Judiciary, separate from the Legislature and the Executive, and with the power of judicial review.[2]

An independent judiciary, with the power of judicial review, has indeed been "one of the touchstones of our constitutional system of government."[3] But judges do not act alone. An effective judiciary requires clerks, administrators and

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[2] Remarks of former Chief Justice William H. Rehnquist, Symposium of Judicial Independence, University of Richmond T.C. Williams School of Law, March 21, 2003, at pp. 1-2.

[3] *Id*. at p. 1.

staff who are devoted to excellence. It requires the active support of attorneys dedicated to sustaining, improving, and protecting our courts. Since I became Chief Justice seven years ago, excellence, sustained by collaboration, has been my stated objective. This afternoon I want to touch on a few recent developments directed toward that objective.

An important event in signaling the goals I would pursue was the establishment of the Visiting Committee on Management in the Courts, chaired by J. Donald Monan, S.J., Chancellor, Boston College. In its 2003 Report, the Committee commended the Massachusetts court system for the high quality of its substantive justice and the dedication of its employees. It concluded, however, that "[t]he impact of high-quality judicial decisions is undermined by high cost, slow action, and poor service to the community."[4] The Report of the Visiting Committee laid out a roadmap, a comprehensive roadmap, for administrative and managerial reforms. After broad consultation, the recommendations were adopted by the Justices, and have informed almost all of our administrative decisions of the past three years.

Where are we on the roadmap? We have, in fact, traveled a remarkable distance. We have done so as, day-in and day-out, superb substantive justice

[4] Report of The Visiting Committee on Management in the Courts, March 2003, at p. 2.

continues to be delivered in the Commonwealth. How do I know this? From regular visits to courts across the Commonwealth; from conversations with attorneys and jurors and members of our communities; from the Supreme Judicial Court's appellate review of the decisions of our trial judges. We can continue to be proud of the "high quality" judicial decisions that the Visiting Committee remarked upon.

Our excellence in substantive justice proceeds apace, even as administrative and managerial reforms are implemented at a rate that would have seemed all but impossible a few years ago. It is difficult to recall that when we embarked upon a comprehensive program of transforming the delivery of justice in Massachusetts, we faced a system where some court departments lacked even rudimentary technology, where administrative goals were all but non-existent, and where data was not uniformly collected or analyzed. That has now changed. Under the extraordinary leadership of Chief Justice for Administration and Management Robert A. Mulligan and the Chief Justices of each of the seven Trial Court Departments, and with the hard, hard work of clerks, administrators, and staff throughout the judiciary, we are making progress, demonstrable progress. I want to pay particular tribute to the contributions of the members of the Court Management Advisory Board established by the Legislature in the wake of the

Visiting Committee Report. Led by Chairman Michael B. Keating of Foley Hoag, LLP., Board members advise the Justices of the Supreme Judicial Court and the Chief Justice for Administration and Management on all operational aspects of the courts. We benefit enormously from their wise counsel.

At this Bar Association's Annual Meeting last March, I highlighted some of the progress we have made since the Visiting Committee issued its report in 2003: the establishment for the first time of time standards in all seven departments of the trial court, in civil and criminal matters; the adoption of staffing models to guide our scarce resources to where they are most needed. Since that time we have implemented national models for measuring and improving the expeditious processing of all cases. From every courthouse, every session, civil and criminal, data is now systematically collected, reviewed, and analyzed on four metrics: clearance rates, time to disposition, age of pending cases, and trial date certainty. Massachusetts is in the vanguard of a growing national movement to bring modern systems of management and accountability to our court system. We are one of only two states in the nation that has made a commitment to using *CourTools* developed by the National Center for State Courts in all of our courts, for all cases. We have set goals - ambitious goals - to improve the timely and expeditious disposition of cases, and to measure progress on these goals objectively using

CourTools metrics. I look forward to publishing our first report of systemwide court performance in 2007.

The appellate courts, too, are committed to the timely disposition of all cases. One major impediment to this objective concerned the long delays in preparing trial court transcripts. Continuing the excellent work of a committee headed by Appeals Court Justice Mark V. Green, a working group of judges, court officials, court reporters, and appellate attorneys has now developed a program to eliminate the transcript preparation backlog. Next year we will implement, for the first time, time standards for the preparation of all transcripts in all of our courts.

All of these efforts share a common purpose: to collect accurate data regarding every case from the moment of entry until final disposition; to use the data to identify and address any delays that occur; and to ensure that all cases flow quickly and smoothly to final disposition. Combined with the new staffing models, this will assure the people of Massachusetts and their elected representatives that every dollar allocated to the court system is spent efficiently and effectively.

Children deserve special mention in any conversation about timely disposition of cases. Children caught up in lengthy court proceedings do not emerge unharmed. We are fortunate to have skilled and compassionate judges,

court staff, and attorneys working in our juvenile courts and in our probate and family courts. They are making every effort to ensure that we implement best practices wherever possible. Drawing on a comprehensive evaluation of care and protection cases in Massachusetts performed by the Muskie School of Public Service at the University of Southern Maine, we are focused on achieving specific administrative reforms, again in collaboration with important partners. Federal funds secured through the Court Improvement Program have underwritten a new handbook for parents in child welfare cases, helping parents to understand the judicial process. This month we again celebrated National Adoption Day, during which 200 foster children were adopted in jurisdictions throughout the Commonwealth.

Other urgent challenges have sparked our creative energy. We have accelerated efforts to help the thousands of litigants who represent themselves in court, even as we recognize that litigants are best served when they are represented by counsel. Securing representation for all parties, in all civil cases, remains our goal. But that is not the present reality. In 2006, for example, some seventy-seven percent of litigants appearing in our housing courts, and a similar percentage of litigants in our probate and family courts, were not represented by counsel.

To help address that challenge, we recently launched the limited assistance

representation pilot project in the Suffolk and Hampden Divisions of the Probate and Family Court. With the support of this Bar Association and others, the project was developed by the Supreme Judicial Court's Steering Committee on Self-Represented Litigants, chaired by Appeals Court Justice Cynthia J. Cohen. Limited assistance representation is just that. It permits attorneys and their clients to decide in a particular case which issues or which court hearings an attorney will handle for the client, without requiring the attorney to participate in every aspect of the proceeding.

The pilot project has been underway for a few short weeks. The response has been overwhelming, and positive. Already three hundred attorneys have attended information sessions held in Boston, in Chatham, and in Springfield to qualify attorneys to represent clients on a limited basis in the pilot courts. So many attorneys want to participate that the Steering Committee is hard at work to meet the demand. Attorneys who practice in other courts have also inquired about expanding the pilot program. Massachusetts is emerging as a national leader in addressing the challenges presented by self-represented litigants.

The bar has helped in other ways. In our trial courts, week after week, volunteer lawyers have stepped forward to advise and assist litigants as they seek to resolve their disputes. Most recently a "lawyer-for-a-day" program has been

instituted in the Northeast Division of the Housing Court in Lawrence. I look forward to visiting that court next month to see first-hand the work of these dedicated volunteers.

But despite our best efforts and those of the bar, many litigants remain unable to afford an attorney. What of them? The Steering Committee recently published an excellent handbook providing critical information to those who represent themselves, including information on how to obtain counsel. It has been sent to every civil clerk's office and every law library in the Commonwealth. It may also be found on the Trial Court's intranet and internet websites. Ellen O'Connor, the Director of the Judicial Institute, led the working group that developed this important resource guide.

Innovation and collaboration. Consider our jury system, which earns a special place in American history, and in the American psyche, because of its unique position as a repository of our democratic values. Our jury system is not perfect, but neither is it static. In Massachusetts, our courts, and the Office of Jury Commissioner have concentrated on making our jury system stronger. Two areas have garnered particular attention: the summonsing of jurors and the experience of jurors at trial.

Massachusetts is a leader in improving the process of summonsing the

venire. A "Judge's Journal" study lauded the Commonwealth for "the most comprehensive attempt to remedy the financial hardship and inconvenience associated with jury duty."[5] The plain-language Massachusetts jury summons is a national model. Our one-day/one trial system and the state-wide education campaign initiated by the Office of Jury Commissioner have been extremely effective in increasing the enthusiasm of people to serve as jurors. I commend in particular Jury Commissioner Pamela J. Wood for her strong leadership on these important initiatives.

Other new efforts to improve our jury system are underway. Studies suggest that juror comprehension of existing patterned instructions in some states is low and that improved comprehension occurs when instructions are clear and comprehensible.[6] Just yesterday the Justices of the Supreme Judicial Court considered an initiative proposed by this Bar Association to develop "plain English" jury instructions. While there is much detail to work out, the initiative now has the approval in principle of the Justices, the Chief Justice for Administration and Management and all of the Trial Court Chief Justices.

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[5] G.T. Munsterman and P.L. Hannaford, Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years, 36 The Judge's Journal, Fall 1997, at 8 .

[6] See, e.g., ABA Judicial Administration Division, Standards Relating to Jury Use and Management, Standard 16, commentary at p. 148 (1993); B. Dumas, Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Statutes, 67 Tenn. L. Rev. 701 (2000).

Collaboration. At the request of this Bar Association, the Boston Bar Association, and the Massachusetts Academy of Trial Attorneys, this past summer the Justices established the Advisory Committee on Massachusetts Evidence Law, chaired by Appeals Court Justice R. Marc Kantrowitz. The Committee's mandate is to compile existing Massachusetts evidence law into a single easy-to-use document. The Committee is hard at work, and we look forward to seeing the results of this important project.

Multi-jurisdictional practice. I am pleased to announce that recently the Justices adopted as part of our own Rules of Professional Conduct, the American Bar Association Model Rule 5.5, as proposed to us by this Court's Standing Advisory Committee on the Rules of Professional Conduct, chaired by attorney John Whitlock. The new Rule, which will become effective on January 1, 2007, governs the circumstances in which a lawyer may provide legal services in Massachusetts without being licensed to do so here. The Rule recognizes the realities of our modern national and global economy, while respecting the principle of state licensing and regulation of attorneys.

"Knowledge about the ideas embodied in the Constitution and the ways in which it shapes our lives is not passed down from generation to generation through

the gene pool; it must be learned anew by each generation."[7] That is former Associate Justice Sandra Day O'Connor speaking at the National Constitution Center. MBA President Mark Mason has made civic education a priority for this Bar Association. I welcome his collaboration with our own ever expanding efforts. Here are a few. For two years in partnership with Suffolk University, the Supreme Judicial Court has webcast every oral argument before the Court. The arguments are then archived, available for review. The Justices receive countless positive comments about the webcasts; their interest to teachers and students; their use as a training tool for attorneys preparing for appellate argument.

Webcasts of our oral arguments, educational programs in this spectacular building, and in other courthouses across the Commonwealth, the Supreme Judicial Court's educational website, through all of these efforts we have reached thousands of students and their teachers, and members of our communities. We collaborate with the Department of Education, with Discovering Justice, with Theatre Espresso and the Freedom Trail Foundation, with bar associations and professional development organizations. We have hosted programs for high school teachers about John Adams, and the Massachusetts Constitution, and its influence on our

[7] Associate Justice Sandra Day O'Connor, National Constitution Center, Liberty Medal Award, July 4, 2003.

national constitution and beyond our borders. A similar program for elementary school teachers is in the planning stages.

It is thrilling to come to work every day and to encounter visitors from near and far, eager to learn about the judiciary and its role in our constitutional democracy. The Justices have been privileged to host judicial colleagues from many nations, Russia, Canada, Israel, England, China, South Africa. These visits are always enlightening: we see judges, many from emerging democracies, draw insights from our constitutional democracy, our adherence to the rule of law. We in turn are inspired by their determination to meet the many challenges they face.

It is equally thrilling to have this beautiful building used for programs and celebrations involving judges, court staff, and lawyers: a swearing-in ceremony for new court officers; a meeting of the American Bar Association Board of Governors; a symposium to mark the centennial of Roscoe Pound's landmark speech, "The Popular Causes of Dissatisfaction with the Administration of Justice;" a ceremony to recognize outstanding judicial employees. The list is long.

There is evidence of improvement and energy everywhere. Some goals are new, others are of long standing. One concerns an issue I have touched on in almost every annual address to you: providing judges and court staff with reasonable compensation. This year the Legislature warrants our particular thanks

for enacting a long overdue pay raise for judges and clerks. I thank the leaders and members of this bar association, working in close consort with those of other bar associations, for acting as our champions as we worked to secure an increase in judicial pay.

Chief Justice John G. Roberts, Jr. has emphasized the importance of courthouse security, and stressed "the need for all branches of government, state and federal, to improve safety and security for judges and judicial employees . . .."[8] Chief Justice Mulligan and I welcome the consideration we have received from both the Legislature and the Executive Branch as we have made clear the security needs of our Commonwealth's courthouses, not only for judges and staff, but for all court users, jurors, litigants, witnesses and victims of crime. Our security needs have not been fully met, and I look forward to working with the Legislature and the Governor to secure the funds we need so that all who come to our courthouses may do so in safety.

Innovation and excellence, cooperation and collaboration, progress on the road to becoming a national model of excellence in everything we do. We are grappling seriously with the challenge of administrative modernization. We learn from administrative innovations of other states; and draw on the expertise of the

[8] Chief Justice John G. Roberts, Jr., 2005 Year End Report on the Federal Judiciary, p. 2.

National Center for State Courts. We also note with concern national developments that have spurred this Bar Association to focus this afternoon's panel on protecting the independence of the judiciary.

On November 7, 2006 voters across the nation defeated several state ballot initiatives attacking the foundations of fair and impartial courts. Some examples: Nearly 90 percent of South Dakota voters rejected an initiative known as "Jail 4 Judges," that would have abolished judicial immunity for judicial decisions, and established a grand jury with the power to indict judges who issued "offending opinions." In Colorado, 57 percent of voters opposed a constitutional amendment that would have imposed ten-year term limits on appellate court judges, including those currently serving. Oregon voters defeated an initiative that would have required judges to be elected by district, rather than statewide, an initiative motivated by its proponents' desire to dilute the impact of votes from large, urban sections of the state.[9]

In Massachusetts, we faced no such ballot initiatives, but there are recurrent attacks on our system of judicial selection and tenure. With the support of this Bar Association and others, I feel renewed confidence in the strength of public support for our constitutional structure of government, for our separation of powers and

[9] American Bar Association, Judicial Referenda, ABAJournal.com (November 9, 2006).

checks and balances. We must work together to ensure that future attacks on the judiciary as a separate, independent and equal branch of government are answered swiftly and decisively.

In September, I attended a national conference on the State of the Judiciary convened by the American Law Institute and Georgetown University Law Center. Co-chaired by former United States Supreme Court Associate Justice Sandra Day O'Connor and Associate Justice Stephen Breyer, the conference brought together business leaders, state and federal judges, law professors, corporate counsel and others to reflect upon attacks on the judiciary and to develop strategies to address them. Civic education and support from the bar emerged high on the list as two effective strategies.

In Massachusetts, we have an outstanding bar, with an unwavering commitment to supporting the judiciary. Unlike so many states, we have no judicial elections, no retention appointments, and none of the problems that such systems sometimes generate. How did Massachusetts come to stand almost alone in this regard? To my right stands the revered nineteenth century attorney and statesman Rufus Choate. In 1853, the state constitutional convention considered an amendment to the Massachusetts Constitution that would have provided for elected or reappointed judges. The eloquence of Rufus Choate persuaded the

delegates and, ultimately, the people of this Commonwealth, to reject a powerful national movement in support of such amendments. I invite each of you to read his speech.[10] It is compelling. It is timeless.

Today I honor the many distinguished bar leaders who have dedicated their energies to supporting and protecting our judiciary. Rufus Choate, Michael Greco, immediate Past president of the American Bar Association, one leader in the long line of outstanding presidents, officers, and section leaders of this Bar Association. I look out this afternoon to the hundreds of attorneys gathered here today. I see one Rufus Choate cast in bronze. I see many living, breathing Rufus Choates. Thank you to each and every one of you.

[10] Rufus Choate, Speech on the Judicial Tenure, delivered in a Massachusetts State Convention, July 14, 1853. Reprinted in Samuel Gilman Brown, *The Works of Rufus Choate*, Vol. II, (1862) at pp. 284-310.

Presentation on behalf of the Justices of the Supreme Judicial Court to

Edward J. Barshak and Robert J. Muldoon, Jr.

Before turning to the panel discussion, I have one happy task to perform. You have just heard me celebrate so many examples of effective collaboration between the courts and the bar. I offered many examples of the active efforts of attorneys dedicated to supporting and improving our judicial system. I invite President Mason to join me on the podium as I recognize, on behalf of the Justices of the Supreme Judicial Court, two attorneys who are outstanding examples of dedication to our judicial system.

In addition to their many, many other contributions to our legal system, these two attorneys have provided a combined total of almost seventy years of exemplary service to our Board of Bar Examiners. I refer to Edward J. Barshak and Robert J. Muldoon, Jr.

Between them, Attorney Barshak and Attorney Muldoon have professional accomplishments and awards too numerous to recite. They have used their skills and talents in numerous volunteer efforts on behalf of the profession and their communities. Each exemplifies how Justice Lewis F. Powell, Jr. once described lawyers:

> "Lawyers are not hermits and society would suffer if they were. Members of the legal profession customarily are leaders in the civic, charitable, cultural, and political life of most communities. Indeed, the professional responsibility of lawyers is thought to include the duty of civic and public participation."[11]

Our focus today is on one of their many contributions - their outstanding service as members of the Board of Bar Examiners, the Board that assists the Supreme Judicial Court in the critical function of determining eligibility for admission to the practice of law in the Commonwealth. Mr. Barshak was appointed by the Justices to the Board in 1969 and served until the end of last year, thirty-six years! Mr. Muldoon was appointed by the Justices in 1974; he has just ended his tenure, concluding thirty-two years of service. Six Chief Justices had the benefit of Mr. Barshak's assistance on the Board, five had the assistance of Mr. Muldoon. Both Mr. Barshak and Mr. Muldoon took on the additional large responsibility of serving as Board Chair.

If the goal of collaboration is to bring together the best minds and hearts to address the challenges faced by the judicial system, the Justices of the Supreme Judicial Court achieved that goal with these two appointments. In the decades that

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[11] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 402 (1976) (Powell, J., dissenting in part, concurring in part).

attorneys Barshak and Muldoon served on the Board, they inaugurated the multistate bar examination, the multistate professional responsibility examination, and automated operations of the Board. They accomplished all this while drafting bar examination questions, grading exams, responding to requests for accommodations, determining issues regarding character and fitness and eligibility of foreign applicants, at a time when the number of applications for admission skyrocketed.

The Court, the bar and the public are indeed fortunate that Edward Barshak and Robert Muldoon have been willing to devote their talents to these tasks for so many years. I am delighted to express the appreciation of the Justices for their extraordinary contributions, and to honor them here today before hundreds of attorneys who successfully withstood their close scrutiny of your credentials.