

State of the Judiciary
Chief Justice Hiram K. Undercofler, Georgia Supreme Court
Message to the Georgia State Bar Meeting
June 13, 1980, in Savannah, Georgia

You may have detected, by my opening remarks, that succeeding former Chief Justice H.E. Nichols is a hard act to follow. I note that this is the 10th annual "State of the Judiciary" address made to this Convention and that Justice Nichols has made five of them.

I am delighted that the Bar has seen fit to honor Justice Nichols at this Convention and to recognize his 32 years on the judicial benches of this state. During the five years he served as Chief Justice, he displayed leadership of the finest sort in espousing numerous projects and principles, not only on the Supreme Court but for the Judiciary as a whole. He and I came on the Court about the same time 14 years ago and it will be a sad day for me when he wraps up his judicial career at the end of this year.

I am honored that my colleagues elected me as Chief Justice to succeed Justice Nichols. However, I want to point out that the Georgia Supreme Court acts as a team. There are seven of us. Each justice has one vote. Each justice is independent. During my tenure, I have observed that each justice guards that independence zealously. When we sit around the table to decide and vote on cases, each justice speaks his mind freely and votes his convictions under the law. When a decision is rendered, you can be assured that it represents the studied and honest conclusion of a majority of those seven justices. Sometimes the discussions and debate are brutally frank. Occasionally they border on being too candid. But after the vote is taken we go on to the next case. And when we leave the room we are all friends. Contrary to what *The Brethren* says about the Supreme Court of the United States, we have no problem with which justice will author the opinion in any particular case. Quite simply, we have the clerk of the court distribute the cases in rotation as they are filed. Along with the other justices, I am assigned every seventh case.

No Illusions

I have no illusions about being Chief Justice. I am the Ceremonial Head of the Court and the Chief Executive Officer who keeps the business of the Court moving. But, as I said, we operate as a team. Anyone of us can fill the office as Chief Justice. As a matter of fact, and as most of you know, we have adopted a rotation system under which the Chief Justice will serve only a four-year term. Heretofore the Chief Justice traditionally served until he retired. I imagine the court will continue to elect the senior justice in service as Chief Justice. This avoids internal politics. It is like the old English law of primogeniture. The first born inherits the kingdom.

But it differs from any kingdom you have ever heard of. In the first place, the Justices of the Georgia Supreme Court are elected by the people for six-year terms. When the people wish to dispose of us, they behead us at the polls. This makes us politicians from the standpoint that we run for election, but it is somewhat of a contradiction because we cannot grant political favors and must decide cases impartially. We have accommodated these opposing requirements and responsibilities by divorcing ourselves from the typical political arenas. Generally, the public reciprocates by reelecting us if we have been performing satisfactorily.

The Three Branches of Government

All of you are familiar with our Constitutional Form of Government. Both under the United States Constitution and the Georgia Constitution, our government consists of three principal branches, the Executive, the Legislative, and the Judicial, with its checks and balances. Traditionally the judicial branch of government is the weakest. As has been said, the Judiciary has neither sword nor purse. In Georgia, the judicial branch of government has been weaker than in most states. From the founding of Georgia, the Judiciary has been badly fragmented. It has consisted of numerous courts operating independently of each other. The Supreme Court, which was established about 1850 to resolve conflicting decisions among the various courts, was highly controversial. Fifty years later this function of the Supreme Court, that of seeing that the laws were uniformly applied, had been accepted, but there was no overall administrative control of the Judiciary vested anywhere.

From an administrative standpoint, various courts operated independently. They still do. In 1901, at its meeting in Columbus, Georgia, the State Bar of Georgia recognized that the Georgia Judiciary was badly fragmented and recommended a more cohesive organization. In 1978, 77 years later, the Judicial Planning Commission again said the same thing. At present there is a commission attempting to design a constitutional amendment which hopefully will eliminate this fragmentation. It seems to me that until this is done the Judicial Branch of Government in Georgia will not be able to cope with an ever-expanding case load, both civil cases and criminal cases, with the minimal financing which is made available.

As an example, the case load in the Supreme Court has tripled in the last ten years. Presumably other courts have experienced a like increase. This increase tracks almost exactly the increase in the number of lawyers in Georgia during this same period, from about 4,000 to 12,700. As a matter of interest, last year the United States Supreme Court with nine justices decided 168 cases, including 130 signed opinions. The Georgia Supreme Court, with seven justices, decided 1400-plus cases, including 646 formal opinions. We are the busiest court of last resort in the nation according to the tabulation by one of the nation's leading law book publications. The Court of Appeals is equally as busy, setting new records virtually each year in the number of cases it must decide.

Judiciary Underfinanced

Besides being overloaded, the judiciary is underfinanced. The entire Georgia judicial system has a state appropriation of only 6/10th of 1% of the state budget. Let me point out that the counties fund some courts, such as state courts, juvenile courts, and others, partly through fees, costs and fines they receive. It is my observation and opinion that until the various courts in Georgia are unified and act as a unit rather than independently, we will not be able properly to inform the General Assembly of our needs so that we can properly serve the people and plan for an expeditious handling of an ever-increasing caseload in the ever-increasing complexities of modern society. Let me point out also that it is not the General Assembly's fault. It is the Judiciary's fault for not properly informing the General Assembly of our problems and needs and enlisting their assistance.

Money, of course, will not solve all the problems. But it will provide adequate staff to collect data, identify the problems, hopefully arrive at some solutions, and relieve the judges of routine paper work so that the judges can judge. After all, that is their job. And, actually, that is all the judges now have time to do.

In addition to adequate financing, a matter of great importance is the acquisition of at least limited judicial authority to promulgate procedural rules so that we can more efficiently process cases to a conclusion. As of now, except for local incidental authority such as scheduling cases and the like, the principal rules for various legal procedures are promulgated by the General Assembly. Unfortunately these rules are complex and in too many instances permit protracted litigation. The problem, of course, is less in civil litigation because generally the parties themselves are interested in an early conclusion, if for no reason other than to get on with other matters and minimize court costs and attorneys fees. Conversely, in criminal cases, particularly very serious criminal cases, the accused is not interested in an early determination; especially if he is out on bail.

It is in these criminal cases that various perfectly legal procedures are most often used for delay. Ideally there should be one trial and one appeal. If the judicial system could promulgate the rules, perhaps we could move closer to this ideal. In criminal cases, we also have the problem of dual jurisdiction between the Federal and State Courts. In death penalty cases it has been ascertained there are at least 11 available appeals after trial in the two court systems.

"Unified Appeal"

The General Assembly at its last session delegated to us authority to promulgate rules designed to consolidate these appeals rather than handle them piecemeal. We speak of it as "unified appeal." Former Chief justice Nichols is spearheading the project. He informs me that he expects to have it in operation, perhaps by next September. It is novel, but it has captured the interest of the other states which have problems similar to ours.

In essence, we need adequate financing and more control over the conduct of cases. To obtain this the Judiciary must be unified and a consensus obtained on what is needed.

At present, there is some thought that the Judiciary should be unified through a vertical alignment. That is, the Supreme Court would be head of the entire Judicial System and Direct the Administration of the entire court system. Such an approach may be questionable and may not be politically feasible. Historically our principal judicial officers are constitutional officers. Also, all our judges, with few exceptions, are elected by the people. They are answerable to the people. They have always been independent of higher administrative authority. They need to retain this independence. Therefore, rather than a vertical alignment of the judiciary, possibly there should be a group composed of representatives from each court which would, after deliberation, propose improvements in judicial administration. Then I would hope that the Supreme Court, it being the logical body, would be given authority to implement these procedural proposals by rule rather than having them enacted into law by the General Assembly. In this manner each court would have input into the proposals and each court would be cognizant of the other's problems and would benefit from the other's experience. Under such an arrangement, no one would be in a dictatorial position.

“Inundated with Appeals”

There is one other very critical problem. You may be tired of hearing about it, but the threat is very real. That is the enormous case load in your State Appellate Courts, the Georgia Supreme Court and the Georgia Court of Appeals. We are inundated with appeals. A solution to the problem must be found soon. If it is not, it is my opinion the appellate system as we have known it will simply collapse in the next five years. If this happens, the important issues will not get the attention they need, and the appeals will tend to become one-man reviews.

And who will suffer? You will, of course. The law will become more unsettled. It will make it more difficult to advise clients, more difficult to litigate, and more difficult and expensive to run your practice.

And why has this occurred? It is very simple. As mentioned, in the last ten years the number of lawyers has tripled, the number of Superior Court judges doubled, and additional courts of limited jurisdiction and innumerable administrative agencies have been created, and don't forget the Civil Practice Act. Courts have to spend too much time adjudicating controversies over discovery, frivolous motions, multiple appeals and the like.

As I see it there are two answers. We either have to have more bodies, that is more judges, or fewer appeals.

Creating more appellate courts or enlarging the present appellate courts is fraught with all sorts of problems and has all sorts of political ramifications. To me it is not a very satisfactory answer. As an example, I need only point to the U. S. 5th Circuit Court of Appeals. I believe they now have 25 judges. If they allot five minutes to each judge to address a case it would take two hours. And can you imagine a unanimous decision. How about a 13 to 12 split?

The other alternative is fewer appeals. Should your right of appeal be limited? I know your immediate reaction to that is negative. It was stated only recently in a magazine article that lawyers aren't very interested in the internal workings of appellate courts-their interest is limited to the cases they may have appealed. But I can't believe that, because eventually it will be an important case of yours that will suffer from an overloaded review court.

Eliminate the Trash

In my opinion we need to eliminate the trash. Our records show that about two-thirds of our appeals are affirmed out of approximately 2000 cases in the Court of Appeals, certs are applied for in about 20 percent, or 400 cases. Of these about 40 will be granted and reversed. That is a reversal rate of about two percent. So you see there must be a number of appeals that are without merit. I do not mean that all appeals which are affirmed should not be addressed, but in that group are many appeals which I describe as trash. It is the trash which needs to be eliminated. If this can be accomplished our problem will be eased substantially.

You know I'm getting to the age where I think about what I should do when I retire. I've heard no one should stop work altogether. On the other hand, the law practice being what it is today, no one should undertake real work for the first time in 15 years at retirement age. I have found the ideal job. I will sell legal pads. According to a study - they have studies for everything these days

- lawyers in the United States used enough legal pads last year to circle the earth 10 times. The average lawyer uses about 50 pads a year, or one pad per case.

We now have 12-thousand and 700 members in the State Bar of Georgia. A good legal pad salesman ought to be able to make a decent living in this state without much effort. Besides, I must have plenty of experience with legal pads. If we use one legal pad per case, then with our annual docket of 1500 cases, the Supreme Court uses 10,500 legal pads a year. However, this also produces a lot of trash. And with my luck, and this being Friday the 13th, as soon as I go into business, lawyers and judges would decide to eliminate the trash and the legal pad market would collapse.

The State Bar needs to express itself. Do you want to expand the size of the appellate courts or do you want to limit the right of appeal? You need to take a position or come up with an alternative proposal.

Throw Out Challenge

I throw out this challenge to you. This state is on the verge of undertaking the task of revising its Constitution. The State Bar of Georgia, in my opinion, needs to get into the forefront of any move to revise the judicial article and stay in the forefront to protect and support your courts; to make sure that we have organization, the money, the materials and the manpower to handle your cases and to turn out decisions that are articulate, well-reasoned and representative of the development of the law.

We have had commissions to study our needs before. But as far as I can ascertain we have had no concerted effort, certainly not in recent years, by the organized bar of this state to make improvements of the magnitude now under consideration.

So you have the challenge. The time is now. The stakes are your stakes. The future is your future.

The profession of law, in practice as an attorney and on the bench as a judge, virtually has been my life's career. I am proud of the profession and I am pleased to note that the great liberties upon which this country was founded more than 200 years ago are still intact. The law has constantly and continually concerned itself with those constitutional liberties to the end that we as a nation enjoy the greatest personal freedoms of any people on earth.

Our right to counsel when accused of crime, our right not to be compelled to give testimony against ourselves, our right to be secure in our homes against unreasonable intrusions, freedom of speech, freedom of the press – just to name a few of our many constitutional guarantees – are in no clear and immediate danger.

Laws Are Necessary

Aristotle said, "Man is a social animal." Accordingly, throughout history, laws of some kind were necessary to sustain the social compact. And, down through the ages, the greatest civilizations have had the greatest law. The United States belongs among the greatest of the great. We should all be proud that we are a part of it.

I would like to make this additional observation: the authors of the book *The Brethren* spent more than three years in research, during which they conducted hundreds of interviews of persons connected to the United States Supreme Court, particularly former law clerks to the nine justices, and some of the justices themselves.

Their work stands as a remarkable record for a really unusual reason: not one wisp of real scandal to tarnish our highest court in the land was turned up under this withering research unless you may wish to consider as scandal strong indications that some of the justices don't seem to like each other very much and some of them seem to question the intellectual capacities of certain of their colleagues. Our Highest Court remains unsullied and a critic might demand that the other two branches of our government should fare so well.

If you will pardon professional pride, we think our Supreme Court of Georgia could withstand the same sort of intense scrutiny. I can say the same thing for the Judiciary in general -in this state.

Thank you.