State of the Judiciary
Chief Justice Robert H. Jordan, Georgia Supreme Court
Message to the Georgia State Bar Meeting
June 12, 1981, in Savannah, Georgia

Today marks the 11th time that this forum has asked the Chief Justice of the Supreme Court to report on the State of the judiciary in Georgia. Former Chief Justice Hiram K. Undercofler delivered the report last year and for five years prior to that former Chief Justice H. E. Nichols made the reports. Both Justice Undercofier and Justice Nichols are present today, and I wish to recognize them for their many years of dedicated service.

It is an honor, a privilege and a responsibility that I feel deeply in reporting on the state of the judiciary in Georgia in 1981. It is my aim to divide the report into several parts so as to touch on many aspects affecting our branch of government.

First, I wish to state what is good about our judiciary and then to report on what I think are some of the serious problems facing our judiciary.

It is a natural human trait, I think, for us to dwell longer on our shortcomings than on our good points. I hope to strike some sort of balance. However, as a sort of disclaimer, please note that portions of the report may arise from a subjective viewpoint with which all of you may not agree. In making some of these comments, I speak only for myself.

I am happy to report that from the standpoint of professional and personal integrity, the judiciary in the State of Georgia remains at a high level. No scandal, or blemish of any consequence has sullied this state's judicial countenance in the past year. This is a tribute to the fine men and women who preside over the courts of this state, from the local tribunals of the most limited jurisdictions on up to the appellate courts.

We are making modest gains in some directions. Part of this results from our willingness to sit down and talk about our collective problems. We have been doing a lot of talking, holding convocations, seeking consensus, striving for teamwork and of unifying our goals and ideals. The cooperation between the Supreme Court and the Court of Appeals has been excellent

There are many members of the bench who warrant our thanks for having given of their free time in striving for a better judiciary. These include the members of the Judicial Council of Georgia, the Council of Superior Court Judges, the District Administrative Judges, and many other groups who have worked tirelessly toward this end. I publicly congratulate all of you for a job well done.

Judicial Council – Administrative Office of The Courts

The appropriation of $505,000 for fiscal year 1982 will allow the Judicial Council-Administrative Office of The Courts to have a staff of approximately 17 persons. This will permit that organization to continue to perform its function of providing central services to the Judicial System.

The Council recommended the creation of nine additional superior court judgeships in 1981, all of which were approved by the General Assembly with one exception.

The Supreme Court, upon recommendation of the Council, added a member to represent the magistrates, small claims, and traffic type courts. All elements of the judiciary are now represented, thus allowing the Council, AOC, to continue its important role as a service arm to the courts in this State.

Board Of Bar Examiners And Board To Determine Fitness of Bar Applicants

These two Boards perform very important functions. The Board to Determine Fitness approved over 1,200 new applicants after a thorough investigation. Many applicants were not approved and others who would not have been approved did not apply because they know that Georgia is doing a thorough job of investigating potential lawyers.

During 1980 the Board of Bar Examiners administered the Bar Exam to more than 2,500 applicants. There was a passing rate of approximately 37%. Under new standards recently adopted by the Supreme Court, this passing percentage should increase tremendously. It should be emphasized that the passing rate by graduates of ABA approved law schools has been, and is currently, higher than the national average.

State Disciplinary Board

There is both good and bad news from the State Disciplinary Board. This Board is doing an excellent job in performing its function. However, the lawyers have kept it entirely too busy. The Board in the last year received 995 complaints, and administered reprimands or other discipline to 44 attorneys, including 10 suspensions, three disbarments and two voluntary withdrawals.

The bar cannot be proud of this record of discipline. There are far too many violations of the Code of Professional Responsibility. It is hoped that lawyers will understand that this Code will be strictly, but fairly, enforced, resulting ultimately in fewer complaints from clients and the public.

Judicial Qualifications Commission

The Judicial Qualifications Commission received 71 complaints against judges in the past year. These complaints were thoroughly investigated and most of them closed as having no basis for charges of misconduct. Six formal and eleven informal opinions were issued by the Commission in areas dealing with judicial conduct.

The newly created *Fee Arbitration Committee is* functioning and has received many commendations from attorneys and clients alike who have used its services. The Judicial Nominating Commission, the Institute of Continuing Legal Education, the Institute of Continuing Judicial Education, and the Sentence Review Panel each continue to perform much needed functions and deserve the thanks of the bench and the bar. Without the dedicated service of all of these important Boards and Commissions, the judiciary simply could not carry out its mission of administering justice in Georgia.

Crime

Let me turn now to several matters which I consider to be of grave concern to the judiciary of Georgia. A recent Gallup poll showed that 59% of the American people lack confidence in the courts to convict and sentence criminals. This is a serious indictment and certainly deserves our attention. If the judiciary is to accept any degree of responsibility for the protection of our citizenry against the growing ravage of crime, we must admit that we are making but little headway.

The nightmare of violent crime is slowly paralyzing our society. We have been forced to alter our lifestyles. We purchase guns and double locks for our homes. As Judge Griffin Bell said recently in a speech in Talbotton, "We have given up and retreated. We now live behind the barricades."

In speaking of the growing street crime in Atlanta, Lewis Grizzard said, "It's war down there. It's the punks and drunks against the rest of us. "And" he said, "we're losing, dammit, we're losing."

In his annual report to the American Bar Association Chief Justice Burger had this to say in part, and I quote:

> "Today, the proud American boast that we are the most civilized, most prosperous, most peace-loving people leaves a bitter taste. We have prospered. True we are, and have been peace-loving in our relations with other nations." "Like it or not", he continued, "today we are approaching the status of an impotent society - whose capability of maintaining elementary security on the streets, in schools, and for the homes of our people is in doubt."

Terrifying statistics verify the chief justice's doubt. Washington, D. C., the nation's capital, with a population of 650,000, had more criminal homicides than that of Denmark and Sweden combined with a population of 12 million. New York City, with the same population as Sweden, has 20 times as many homicides. The burglary rate in the United States is 20 times higher than that of Japan.

But of course we need not look to the statistics of distant cities to understand the growing threat of crime. We have grim reminders in the tragic events in Atlanta today and those of yesterday in Columbus.

The Supreme Court of Georgia has spent a great deal of time and effort in considering its role in the criminal justice system and its responsibility in affording some degree of protection to our citizens against the chilling, crippling, and killing effects of crime. As you know, we have devised a uniform appeal procedure - the first state in the Union to do so - in an effort to cut down on the endless appeals in death penalty convictions. We put the Unified Appeal procedure into effect last August 25th and the first cases are now being reviewed under these rules. We have high hopes that this procedure will reduce the time span and help to reach a finality in criminal convictions.

That hope, however, is dimmed by recent developments in the federal courts which highlight the continuous encroachment of federal jurisdiction over the state court system. Some of my best

friends are federal judges, and what I have to say in no way reflects upon them personally, and, I hope, will not diminish our friendship. But I think at least some of them might agree with me that it is debilitating to and derogative of our state courts when a single federal district judge can strike down convictions if, in his opinion and his alone, a so-called rational trier of facts could not have decided that the defendant was guilty beyond a reasonable doubt.

Recently a federal district judge in Georgia vacated the death sentence in a case where the defendant pled guilty to murder and armed robbery of the victim in the sanctity of the victim's home. The crime was committed over seven years ago and the case has been to the Supreme Court of Georgia on three occasions and to the U. S. Supreme Court twice. The district judge, after the case had been pending in that court for two and a half years, reversed the death penalty on the grounds that in his opinion the Georgia Supreme Court had not "appropriately reviewed the case" and that to permit the death penalty in this case would "'shock the conscience."

In an appendix to the opinion the district judge explored his personal views on death penalty statutes and apparently concluded, as did a case he cited, that the development of a satisfactory proportionality review is "beyond present human ability." Such a conclusion, if applied, would void every death sentence which has been imposed under the provision of Georgia's death penalty act.

I would suggest that if a federal district judge is conscientiously opposed to the death penalty (which is the law in Georgia), such judge should recuse himself in a case involving the death penalty. The Witherspoon ruling should apply to judges as well as jurors.

Jackson versus Virginia and other Supreme Court opinions encourage district judges to attack state court convictions on grounds that were never envisioned under our traditional concept of federalism. The result is that every state court conviction-from murder to a D-U-I-is now subject to federal review. Virtually every criminal now is entitled to a de novo hearing in a federal court on the question of guilt or innocence. A continuation of this trend will leave the state courts engaging in useless charades, totally unable to exert any force of law or to finalize a conviction.

The intrusion is becoming complete. Whether we like it or not, the federal courts are now the final arbiters in all matters affecting state prisons, elections, education, civil rights, and criminal convictions. It is still argued that the bulk of litigation is handled by the state courts. This may be so, but all litigation that involves substantive rights in any area of the law is eventually now being adjudicated by the federal courts.

The intrusion of the federal judiciary on the jurisdiction of our state courts has not been by judicial decision alone. In the last decade, Congress has enacted no less than 70 statutes enlarging federal jurisdiction to cover relief already available in state courts. As a result, filings in the federal courts have increased from 55,000 cases in 1960 to over 200,000 in 1980, a gain of over 400%. Apparently federal jurisdiction is invoked by merely referring to the magic words, "due process, equal protection, and discrimination."

We note here that Senators Thurmond and Heflin have introduced legislation to establish a Federal Jurisdiction Review and Revision Commission in an effort to clear up the blur between jurisdiction of the federal courts and the state courts, in introducing this legislation, Senator

Thurmond remarked to the Senate that "I believe that the legal system of this Country is approaching a crisis through the growing confusion of jurisdiction between state and federal courts."

Legal scholars have recognized what they have referred to as a blurring of the jurisdictions for some time. Some have even advocated a merger of the federal and state systems. In my opinion, a merger of the two judiciaries would be unwise. We can ill afford unnecessary duplication of judicial effort. Instead, let us hope that a review and revision commission can come up with a proper solution that will return to us the long honored doctrine of federalism under which state court judgments are accorded some degree of recognition and finality.

I submit that we cannot resort to the clarion call of "state's rights" to reverse this trend. Instead, the call must be for more "state's responsibility" to demonstrate to Congress and the federal courts that state courts are capable of dispensing justice and equity in all areas of the law to all the citizens of our State, regardless of sex, creed or color. In order to accomplish this the state judiciary must shed its passive robes and assume the mantles of leadership and responsibility toward improving our courts and our systems of justice. It is time, in my opinion, to forcefully make known our needs to the other two branches of government. Too long have our voices been but mere whispers; too long have we been the forgotten branch.

The General Assembly historically has refused to adequately fund the courts and provide adequate salaries for judges. The Georgia Courts Journal in its last edition noted the General Assembly appropriated a little more than 20 and a half million dollars for the operation of the entire judiciary of this State for fiscal 1982, cutting the requested funds substantially. This figure represents a retrenchment from 1981 in the actual share of the state budget, from 64 hundreds of one per cent, to a shameful 60 hundreds of one per cent.

The General Assembly can appropriate millions of dollars for such projects as a World Congress Center, and fire ant eradication and, without batting an eye, cut our requested budget of $2,000,000 for indigent defense to exactly zero. This, of itself, speaks many words on why the federal judicial system has encroached upon the jurisdiction of our state judiciary. An indigent defense system is mandated not only by federal court decisions but by our constitution as well. The General Assembly has in effect invited the federal courts to overturn State convictions of indigents because of ineffective assistance of counsel.

Most appellate court judges and superior court judges have a take home pay of about $25,000 or $26,000 per year. Practically every active lawyer in Georgia earns more. At this Session of the General Assembly we asked for a modest increase in judicial compensation. The Senate passed a bill giving a small increase. It reached the House Rules Committee on the next to the last day of the Session where it was promptly killed by a vote of 17 to 2. We did not try to determine who our two friends were for fear of finding out who the 17 were, which would not have been judicious.

The appellate courts in Georgia are number one in the nation in workload and number 30 in compensation. Such a situation is utterly ridiculous.

The General Assembly will have the opportunity very soon to strengthen the state judiciary when it considers a proposed judicial article to the Constitution. A blue ribbon committee composed of some progressive legislators, lawyers, law school deans and professors, and laymen has been working for some four years on a proposed new judicial article to the constitution. They have proposed an article which has considerable merit and which would eventually strengthen the judiciary. The bottom line of the proposed article would give some rule making power to the courts-not to the Supreme Court – but to the class of courts involved. This power would be minimal since the General Assembly would have the veto power on any rule not to its liking. It is hoped that the General Assembly will accept this modest rulemaking proposal as well as the other progressive provisions of the proposed article.

If the state court system is to be kept from the shallows of inertia and ineffectiveness, two things must be accomplished:

1. Members of the General Assembly must be convinced of the dire necessity of providing adequate funding and at least some rule making power for the judiciary.

2. There must be a new recognition of the role of state and federal courts in our judicial system.

To this end I call upon and suggest that the incoming president of the State Bar and the Governor of Georgia immediately appoint a joint State-Federal Court Jurisdiction Commission composed of prominent attorneys and laymen to look into this serious problem. This commission, working with the commission to be established by the Congress, can hopefully delineate jurisdiction so as to assure for each court its rightful position in our judicial system.

Neither of these goals can be accomplished without the total and dedicated support of the lawyers of this State. Therefore, your help is earnestly solicited.

Chief Justice Burger in a recent address to the American Law Institute indicated that if the Bar loses interest in its obligation to work for the improvement of the state courts, the system of state courts might well dry up and waste away. I do not believe that the Bar of this State wishes that to happen. With your sincere help, we can and must succeed in maintaining for our state courts a vital and viable role in the administration of justice in our State.