

State of the Judiciary
Chief Justice Thomas J. Moyer, Ohio Supreme Court
Message to the Legislature, Columbus, Ohio
March 20, 2001

President Finan, Speaker Householder, I thank you for providing me with this opportunity to once again address the General Assembly on the state of the Ohio judiciary. I appear before you today with a sense of the past, to report on the present and with much hope for the future.

It is appropriate that we begin with the past because it is there that we find the fundamental principles upon which the American justice system is founded and from which it draws its strength.

The purpose of the American judicial system is to provide a process for the fair resolution of disputes among citizens pursuant to fundamental principles of independence and impartiality.

James Madison said, "Justice is the end of government. It is the end of every civilized society. It ever has been and ever will be pursued until liberty be obtained or lost in the pursuit."

Certainly a profound accomplishment for the American, and therefore the Ohio justice system, occurred over 220 years ago when the drafters of the United States Constitution, drawing upon the 13 state constitutions, established a system of government that by design, created tension between the executive, legislative and judicial branches.

That design reflects the belief of the framers' as succinctly stated by Madison, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

First and foremost for us, in Ohio's judiciary today, the doctrine of judicial review of legislative enactments to determine their constitutionality was established by the Ohio Supreme Court in the case of *Rutherford v. M'Faddon*.

Little notice is given today to the fact that Justice Tod escaped impeachment by one vote for following the lead of John Marshall in declaring that the Ohio Supreme Court possessed the authority to declare as unconstitutional certain acts of the Legislature.

Such a legislative reaction would be unthinkable today-would it not? Tempering the theory of pure separation of powers is the necessity of interdependence between the executive, legislative and judicial branches.

The realization that the doctrine of separation of powers was not meant to be an impenetrable wall between or among the branches of government was stated succinctly by U.S. Supreme Court Justice Robert Jackson when he observed:

"While the Constitution uses power the better to secure liberty, it also contemplates that practice will integrate the disbursed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Separateness but interdependence; autonomy but reciprocity. When a court interprets and applies legislation; when it reviews the actions of administrators in the executive branch, when it sentences a convicted felon to prison, it acts independently.

When the Supreme Court adopts rules of superintendence for our courts and rules for admission to the practice of law and the discipline of lawyers and judges, its acts are separate and autonomous. And when the court declares a statute to be unconstitutional, it is exercising its most profound, independent constitutional power.

The adoption of the judiciary budget, the rejection of proposed rules of evidence, the testimony of judges before legislative committees and the creation of joint judicial and legislative commissions demonstrate our interdependence.

We find reciprocity of sorts even in the facilities we have occupied over the years.

Many of you know that until 1974 what is now the Senate office building housed the Ohio Supreme Court and the Attorney General's office. But the Court's earlier home was in this building down the hallway in front of me-in what is now the office of the Speaker of the House.

Mr. Speaker, I know you have been working late at night. Those voices you may have heard are real-but do not fear, they are the voices of decisions of a distant past.

There can be no more dramatic example of reciprocity than the exclusion of the courts from orders of the Governor imposing across the board cuts in the operating budgets of state agencies and offices. We have reciprocated with voluntary reductions in spending and most recently in the budget request submitted for the next biennium.

I have risked stating the obvious in this brief history lesson because this constructive relationship is not easily established and sustained.

Ohio has had a long tradition of mutual respect among the branches of government as our constitutional powers have intersected. It is a tradition that has served our citizens as they deserve to be served.

As we examine the accomplishments of the past, the initiatives of the present and the promises for the future it is apparent that one flows into the other. The system is driven by its vibrancy.

There is no better means of demonstrating that relationship than looking inside several courts throughout Ohio, as you will if you take advantage of the Judicial Legislative Exchange Program offered by the Ohio Judicial Conference.

Before we begin our tour a few introductory remarks are in order. The mission of the courts is no longer simply to conduct trials and settlement conferences, impose sentences or punish status offenders.

Most of Ohio's 706 judges, the court magistrates and court personnel are required to use new methods to fulfill our traditional role.

Many of the over 3 million cases disposed of by Ohio courts each year present the challenges of reducing conflict in the process, expanding access to the courts, using new methods to reduce the number of repeat offenders, providing our citizens with reasons to trust the exercise of our discretion and of sustaining confidence that those who would seek to be judges are worthy of the high calling.

I ask you to envision the courthouses and court buildings in your districts. They may be grand old buildings, refurbished with a community's appreciation for architecture and links to the past, such as those in Canton, Findlay and Youngstown.

Or they may be a new efficient structure such as those in Butler, Williams and Clermont Counties.

Use your mind's eye. Picture the seat of the judiciary back home.

President Finan, Representative Driehaus, and members of the Hamilton County Delegation think of the Hamilton County Courthouse. It is becoming a virtual courthouse pursuant to a pilot project under review by the Supreme Court.

A complaint in one of the 27 new cases filed in Ohio courts each minute of a working day is being transmitted electronically to the clerk's office. Other pleadings will be filed using the same technology.

Senator Hottinger and Representative Evans, in your district citizens are paying parking tickets with the click of a mouse. The benefits of the Internet are spreading.

Some of the funds for these two examples are derived from legislation that permits courts to provide for technology improvements through the assessment of court costs.

Senator McLin, Senator Jacobson and Representative John White, two of Ohio's 39 successful drug courts are in Montgomery County. At a graduation ceremony last month a young woman who had completed the juvenile court rehabilitation program wrote these words,

"A few months ago someone tried to tell me I was weak and was not going to amount to anything. Presently, I'm working and have a very promising outlook on the future for myself. Had I not been put into drug court, I would hate to see what I would be like; if even alive."

Each adult non-violent offender kept out of prison by a successful drug court experience saves Ohio an estimated five thousand dollars; and statistics indicate that both adults and juveniles are

less likely to be arrested again for the conduct that brought them to court. Drug Court programs save money and they save lives.

Ohio has received a higher percentage of federal funds for drug courts than any other state because the courts, local boards, the Department of Alcohol and Drug Addiction Services and the Supreme Court work collaboratively to derive the highest benefit from the funds.

Let us move now to a trial court in the Medina district of Representative Calvert and Senator Amstutz where the trial judge may be asking counsel for both parties if they have any objection to a question that has been submitted by a juror to the judge to be answered by a witness. The juror also may have been permitted to take notes and upon entering the jury room to deliberate with her colleagues and could be given a copy of the judge's charge to the jury.

Representative Ford and Senator Gardner, you may notice in the common pleas court of Lucas County the absence of a large number of prospective jurors seated in a jury lounge waiting to be called to jury service.

That is because the court there, by placing prospective jurors on call, permits them to be at home or at a work place, subject to a call or a message that informs them whether their services will be needed the following day

These are examples of changing attitudes regarding the role of jurors that respect a juror's time and ability to participate more meaningfully in a trial.

Senator Armbruster and Representatives Metelsky, Manning and Lendrum and Senator Mumper and Representatives Core and Reinhard, when you visit the courthouse in Lorain County or the family court in Marion you will find a relatively new judge filling one of the 44 judgeships created in the last 14 years by the General Assembly.

During that period, the administrative offices of the court and chief justice have advised the General Assembly with respect to the need for new judgeships.

It is a relationship that in our view, has helped assure the citizens who pay for the court system that new judgeships are created only when caseloads and other factors require additional judicial services.

Senator Herrington and Representative Coughlin, you may visit the Akron Municipal Court and observe one of the newest examples of creative court programs. There, a non-violent defendant whose repeated arrests result from a mental illness, is being referred to a treatment provider under the order of the court.

The design of this program is similar to the elements of drug court programs that have reduced recidivism rates in municipal and common pleas courts.

Most of you, upon visiting a municipal court, a common pleas court, a court of appeals or even the Supreme Court will find that mediation is offered as an alternative to adjudication. It is a process in which anger and harsh words are muted by a desire to get to "yes."

Many of you represent districts in which citizens can now resolve their legal dispute with the aid of court-funded neutral persons who assist the disputants in resolving their own dispute.

Since 1995, the General Assembly has provided funds that have enabled us to establish 120 court-connected mediation programs.

In the home county of Speaker Householder a community organization supports several kinds of court mediation.

Court staff and volunteer mediators could be seen mediating a typical dispute between a non-violent juvenile and a victim of vandalism or shoplifting.

In the agreement, the juvenile agrees to end his pattern of truancy and make restitution as the victim agrees to provide a part-time job for the juvenile in his shop.

If we accompany Senator Wachtmann and Representatives Latta and Buehrer to their district we find that the counties of Henry, Fulton, Defiance and Williams have combined their resources to fund court mediation.

We are permitted to observe a mediation in which the parties, divorced for three years, are expressing the importance of the mandatory education course they were required to attend prior to the filing of the divorce decree.

They were able to draft a pre-decree mediation agreement that included a parenting plan to meet the needs of their three-year-old son. They return to mediation to change their parenting arrangements as their son prepares to enter school.

The court mediator is especially qualified by training and experience and a required 52 hours of specialized training in family mediation.

On another floor of the courthouse we may see a mediator from an adjacent county leaving a mediation which he has completed with a mediator for this court to resolve a complex partnership case. The mediation involves several parties, many legal and personal issues and claims of more than 1.5 million dollars.

Although the mediation consumed an entire day, the mediators, most importantly the parties, the attorneys and the judge are all grateful that the parties resolved their dispute without the intervention of a jury, a judge, or even an arbitrator.

Today more than 20 domestic relations and 14 juvenile courts offer free parenting mediation services. There are more than 30 juvenile courts that provide mediation for status and delinquency offenders.

Thirty common pleas courts have staff mediators and we are on schedule to meet my goal of providing mediation in every common pleas court by the year 2005.

There will always be disputes that require litigation and appeals. But there is reason to believe that one day the adversary system of resolving disputes will be the alternative.

Finally, upon your visit to any court in Ohio, you will notice the security measures in place to assure citizens and others who use our court facilities that they are, as they always have been, safe places for the resolution of their disputes.

The 12 million dollar line item appropriation adopted by the General Assembly in 1997 has been used to evaluate the security needs of every court in Ohio, train court personnel in security measures and to grant funds to every court for the purchase of security equipment

In order to realize the full measure of its potential, a court system in a democratic country must be accessible to all citizens. In 1993, the General Assembly authorized the creation of the Ohio Legal Assistance Foundation to augment the provision of legal services to the poor. A portion of lawyer registration fees and interest earned on lawyer trust accounts composes a large percentage of the legal assistance fund.

One of the innovations provided by the Foundation is a hotline intake system that can be used by lawyers answering legal questions over the telephone by automatically prompting questions and information. The software holds the potential of providing legal services to many more citizens throughout Ohio.

In cooperation with the Foundation and the Columbus Bar Association, Governor Taft and Attorney General Montgomery have established programs in which lawyers working for their offices provide pro bono legal assistance.

We have a long road to travel to the destination of full legal services for all who need them, but we are making steady progress.

On behalf of all of Ohio's judges, I thank Representative Hoops and the General Assembly for the improvement in judicial compensation adopted in the last session.

The certainty produced by a schedule of multiple year increases, is especially appreciated by those of us whose responsibility it is to remind you of the need for judges to be adequately compensated.

Likewise, funding for the conversion of the Ohio Departments building to become the home for the Ohio Supreme Court and its affiliated agencies is a recognition by the leaders of the legislative branch that the third branch should have its own house, that is functionally efficient and symbolically appropriate.

I am pleased to announce today the creation of a task force to establish standards for guardians ad litem who represent children in court.

Guardians ad litem play a special role in our judicial system. They represent children at times when they are most vulnerable-in cases involving custody, visitation and domestic violence.

As guardians of the court system, it is our responsibility to ensure that these children receive competent representation. The charge of the taskforce is to develop uniform standards and financial accountability for the programs across the state because these children deserve no less.

Common Pleas Judge David Ellwood, of Guernsey County will chair the taskforce.

Before proposing some ideas for the continuing intersection of the legislative, executive and judicial branches, I would like to tell you briefly about an activity that appears in no organization chart or budget line item.

It is the Judicial Family Institute and it recognizes that spouses and other members of judges' families are exposed to circumstances for which they may be unprepared.

The experience of others and some professional advice can be helpful. Ethical considerations, possible changes in lifestyle, security issues, relations with friends and children's relations with teachers, peers and others are all issues unique to being the spouse or child of a judge.

In its first year, the Institute has provided education programs and mentors for the spouses of new judges elected or appointed since November of last year.

The idea and the leadership of the program came from the number one judicial spouse in Ohio, Mary Moyer. Mary, thank you. Please stand to be recognized.

If our past is a prologue to the future, we will continue to be well-served by our interdependence. As we prepare for the first biennium in the new century, we observe that a vibrant judicial branch must continue to seek the assistance of the legislative branch if it is to meet its responsibilities for the administration of justice.

Among the 70 recommendations of the Ohio Courts Futures Commission is this: "Judicial officers should not engage in the private practice of law."

The self-evident rationale for that recommendation is stated as follows:

"Real and perceived conflicts of interest arise from private attorneys serving as advocates for clients in a courtroom one day and as part-time judges in the same courtroom the next."

Hear the words of a part-time judge in Southeast Ohio. "It is axiomatic that lawyers are advocates and judges are not. If a judge serves in both capacities, the public can and often becomes confused as to which role the lawyer-judge is playing at any given moment.

The often repeated mantra I hear is, "how can you be both a sitting judge and practicing lawyer at the same time?" Ohio, by permitting a part time trial court judge in my opinion diminishes the independence of the judiciary."

The potential conflict is obvious and we must move to eliminate it.

In 69 Ohio courts today, citizens will appear before a part-time judge. In some counties there are several part-time courts that could be combined into fewer full-time courts. In fact, the General Assembly has adopted legislation at the request of a few counties to do just that.

I propose that a joint legislative judicial committee be formed to review case statistics, population and other factors, and to develop a long-range plan to phase out part time judging. That will assure every citizen that the judge before whom they may appear has a responsibility and an allegiance only to the administration of the law.

I regret to admit to you a well-known fact: some lawyers, in fact a very small percentage of the 36,000 lawyers actively practicing in Ohio, do not conduct themselves by the codes of professional conduct adopted by the Ohio Supreme Court.

Since 1985, the Supreme Court Clients' Security Fund has compensated 861 clients a total of 5.5 million dollars for their lawyer's breach of duty.

The Fund receives no public funding; all funds are allocated from the biannual lawyer registration fee imposed by the Supreme Court. More than 20% of the total compensation paid resulted from a lawyer's theft of insurance settlement checks.

A lawyer receives a settlement check from an insurance company, forges the name of the client who is not aware that the lawyer has received the check, and keeps the money.

It is estimated that 90% of claims recently arising from the misconduct of a Youngstown lawyer and a Cleveland lawyer derive from insurance settlement theft.

I am requesting on behalf of the Board of the Clients' Security Fund and the Court that the General Assembly adopt legislation similar to that existing in at least eight states that would require a client to receive notice that his or her lawyer has received a check from the insurance company in settlement of the client's claim.

I am aware that legislation was offered in a previous session of the General Assembly that was met with objections by the insurance industry. The time has come to eliminate an opportunity for theft of clients' funds.

At this point I express my strong support for House Bill 84 sponsored by Representative Jean Schmidt that will eliminate the opportunity for elected officials to resign their office after being reelected to a new term in order to receive both retirement benefits and compensation for services rendered in a new term of office.

Two items in the judiciary budget we have submitted to the General Assembly deserve special mention.

The first is a modest proposal that we believe will increase the representation of racial minorities in the legal profession.

The second represents our long-term commitment to creating access to and efficiencies in the justice system through the application of technology.

A profession responsible for establishing and maintaining order in a civilized society must reflect the diversity of that society if it is to extend its legacy into this century.

In recent years Ohio's law schools have with some success, increased their efforts to recruit and retain minority students. The challenge requires more resources.

For that reason our budget proposal includes \$685,000 in the second year of the next biennium to fund the Commission for Legal Education Opportunity, also known as CLEO.

The proposal is modeled after a successful program initiated by the Indiana Supreme Court and a national program funded by Congress.

We have worked with Ohio law school deans and the Ohio State Bar Association to develop a program that will increase the admission and graduation rates of students of racial minorities and some economically and educationally disadvantaged students with an intensive six-week course of study during the summer preceding their entry into law school, followed by financial and other forms of assistance while in law school.

This is one of nearly 70 recommendations made by the Commission on Racial Fairness. U.S. District Court Judge Algenon Marbley is leading the implementation taskforce that is scheduled to issue its recommendations by the Fall of this year.

Included on a list of traditional definitions attached to judges would not be such words as cutting edge, progressive, bleeding edge, technologically proficient.

One may be surprised then to know that most of the 527 courts in Ohio are at least partially computerized. Only a few have no computers. Indeed, the clerks of courts are responsible for some of it.

The problem is that there are 90 different computer systems making communications among the various courts virtually impossible.

The Supreme Court expended \$144,000 of grant funds to collect the data from the 22 different computer systems in 37 drug courts.

A common refrain running through the recommendations of the Ohio Courts Futures Commission is the exhortation that courts should employ technology wherever practicable to enhance the administration of justice and to improve the quality of service.

You have assisted us in overcoming inertia; our budget requests will sustain the momentum.

The Supreme Court Advisory Committee on Technology and the Courts, chaired by Franklin County Common Pleas Judge John Bessey, is developing proposed standards that would make all court computer systems in Ohio compatible with each other. That task includes addressing difficult issues of privacy and access.

The Court has concurred with a recommendation that uniform electronic signature standards be established and proposed rules of practice have been filed with the General Assembly to implement the recommendation.

By creating the means for electronic submission of court filings, lawyers will save time and expense for their clients. And for the procrastinator, it may be the difference between filing a client's action within a statute of limitations or having to pay a malpractice claim.

We have a record of spending our appropriations prudently. Consistent with that practice, there will be no attempt to provide courts with all of the digital adornments available in the marketplace.

Courts should not be in the business of testing technology or adopting technology for its own sake.

We should not be the bleeding edge.

Technology must be compatible with the mandate of the courts to provide a fair and efficient judicial system that meets the needs of its citizens.

There is no division of Ohio's courts that need and deserve the very best we can provide more than those courts exercising jurisdiction over juveniles.

For that reason, one half of the 1 million dollar technology budget request will be used to establish the Juvenile Data Network, a collaborative effort between the courts, law enforcement agencies and the Ohio Department of Youth Services.

The Network will be a central computerized repository of information relating to every juvenile who has appeared in a juvenile court.

A family move, a parent's divorce, a child appears before judges in different counties and the child's violation of the law may be recorded as an isolated event rather than a series of adjudications.

The Network will allow court and law enforcement officials to know the actual status of a juvenile's court record regardless of where a juvenile appears in court.

A secondary benefit of the Network will enable us to compile information for empirical research of juvenile crime and prevention.

I have one final matter to discuss. It is more important than anything I have said.

It transcends standards, technology, new initiatives and the status of court dockets.

It is actually a decision we Ohioans must make for ourselves.

It warrants no line item in a budget, should provoke vigorous debate among people of good will and will determine the quality of justice in Ohio for years to come.

We must answer the question: how important is it to the citizens of Ohio that the judges of our courts are principled persons of the highest character, stewards of an institution that is and is believed to be, dedicated in all its actions to the immutable principles of justice?

Perfection is elusive but it is a worthy goal. We can begin the journey by taking small steps.

The elective process for selecting judges is very attractive in theory but in practice it has produced conflicts with the principle of impartiality and independence.

When Roscoe Pound told the American Bar Association in 1906, that "putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench, " he was also speaking to us.

It is interesting to observe that judges were not always elected in Ohio. In fact in the year Ohio became a state the legislature was the most powerful branch.

The Governor was denied the veto power and appellate judges were appointed by the two houses in joint session for "a term of seven years so long as they behave well." I know you would not expect me to propose that Ohio return to the halcyon days of 1803.

Judicial campaigns in Ohio and across the country have been politicized and funded as never before, threatening damage to our fundamental belief in the rule of law.

The Supreme Court has adopted some of the most stringent judicial campaign rules in the nation but our authority is limited. We must do more and I ask for your help.

The public sentiment urging campaign funding reform is generating proposed solutions in our nation's capital.

That same sentiment should produce an earnest search for solutions in our state capital.

Your action will assure our citizens that Ohio's political leaders understand the importance of impartial justice.

There are several proposals that should be implemented whether or not Ohio retains the current elective system for selecting judges. I urge you to take the following actions:

1. Adopt legislation similar in purpose to that proposed by Representative Ray Miller and to be introduced by Representative Ann Womer Benjamin that would define "advocacy" for purposes of determining whether contributors to so-called independent campaigns must be reported.

Recent federal court opinions have suggested that it is the content and purpose of the message of a political advertisement that should control the determination of whether the advertisement is express- or issue- advocacy.

Every person who contributes to a campaign to elect or defeat a candidate should be publicly identified.

2. Adopt legislation that would require the reporting of contributions to judicial campaigns with a frequency that is compatible with technology in the Secretary of State's office.

At a minimum we should require that as of the first of September of a campaign year, any contribution of more than \$200 to a campaign for a candidate for a court of appeals or Supreme Court should be electronically reported to the Secretary of State within two business days of receipt by a campaign treasurer.

The current requirement for Supreme Court campaigns is \$500 beginning 19 days before an election.

3. At a minimum, adopt legislation similar to that introduced in the last session by Representative Trakas that would raise from six to ten, the number of years an attorney must practice law before qualifying to become a judge.

4. It is judges who hold up the conduct of others against the bright light of the rules of our civilized society. It is we who impose consequences upon those who break the rules.

Should we not then expect that the citizens we serve will judge our conduct by the highest standards of the community?

I must admit to you that I have a growing concern that a number of judges do not understand that their conduct inside or outside the courtroom diminishes their personal status as a judge and unfairly threatens the perception of our judiciary.

The numbers are small but they are growing. The time is overdue for us to establish an evaluation process for the selection of judges, whether they are to be elected or not elected.

The Ohio Courts Futures Commission, the American Bar Association, the American Judicature Society, Supreme Court Chief Justices and a number of states through the adoption of legislation have all recognized the necessity of broad-based, widely representative commissions examining the qualifications of judicial candidates and in some instances even requiring a testing of their knowledge as a prerequisite to being a candidate.

The Columbus Bar Association has adopted a very effective mid-term evaluation system that evaluates the conduct of sitting judges for the purpose of assisting them to improve.

The Supreme Court's constitutional authority enables us to affect some change but we cannot do it alone.

5. My views with respect to the need to change the political election of judges in our courts of appeals and the Supreme Court are well known. They predate by many years the election contests of last year.

During the past three months, I have discussed with a number of leaders, the need for change. I am very encouraged.

I find among labor leaders, political party leaders, organizations, the Governor and leadership of the General Assembly a willingness to sit at the same table in an effort to determine whether common ground can be found.

For that reason I am proposing that the leaders of the General Assembly create a Commission on Judicial Selection and Qualifications that would report its recommendations to the General Assembly, to the Governor and to the Chief Justice by early 2002.

The Commission should include Representatives of the General Assembly, designees of the Governor and the Chief Justice, labor, the business community, interested civic organizations and the organized Bar. And, of course, it must be bipartisan and should reflect the diversity of our state.

I stand prepared to assist the effort in any way you deem appropriate. Mr. Speaker, our history has given us firm foundations upon which we have committed ourselves to the public's business.

I speak for judges throughout Ohio as I express gratitude for the legacy with much hope for our future.