

State of the Judiciary  
Chief Justice Jean H. Toal, South Carolina Supreme Court  
Message to the Legislature  
March 6, 2002, in Columbia, South Carolina

There is a tide in the affairs of men,  
Which taken at the flood leads on to fortune.  
Omitted, all the voyage of their life is bound in the shallows  
and in miseries.  
And we must take the current when it serves  
or lose our ventures.

Shakespeare

As American icons collapsed under the evil acts of our enemies, we were more frightened, more angry, and more confused than at any time since December 7, 1941.

Through it all, Americans rediscovered what has always been right and good about our way of life: we rolled up our sleeves; we dusted off our sense of charity and saluted firefighters and police officers as heroes and heroines. Through the ash and smoke and devastation, we saw the clearest evidence of the instability of steel and concrete and the permanence of our beliefs - beliefs which led our nation's founders to adopt the rule of law as the foundation of our national life.

These beliefs...more than two and a quarter centuries in the making...are a central fiber of our public discussion and military action since September 11th.

Time and again, the President and other world leaders have proclaimed, "We will bring them to justice." Is there a bolder statement of confidence in America's courts than to suggest that we will expose, to the American justice system, most of those suspected of committing terrorist acts?

Why can an American president promise the world that we are prepared to determine the fate of a suspected terrorist in the same forum, by the same rules as we determine the fate of a suspected thief?

We know that in a democracy, the justice system draws its strength from constant principles and consistent practice; everyone is subject to and protected by the same rules. In America, a person accused of committing a terrorist act and a person arrested for exceeding a speed limit have the same expectation - due process of law, an impartial fact-finder, independent judgment and a penalty that is appropriate to a finding of guilt.

We speak of justice in times of trouble because it is in justice that we find comfort, even solace. Predictability and consistency are basic elements of the rule of law.

Citizens of New York, their judges and court administrators have provided a living monument to our system of justice. One New York court was within the damage zone of the collapsed World Trade Center. Court operations were moved and reopened in a matter of days. With no phone

service in lower Manhattan, court administrators put in place an internet-based phone system. Like all New Yorkers, Chief Judge Judith Kaye has been deeply touched by the attacks. As she recalls the events of that day and those that followed, she talks movingly about the dedication of those who were scheduled to serve jury duty.

With lower Manhattan in shambles, it was impossible to reach the courts by phone or public transportation. Still, jurors appeared by the hundreds. They were eager to serve. Many even declined offers to be excused.

The endurance of New York's court system at a time of ultimate crisis is a powerful testimony to the stability of ordered liberty and to America's confidence in our system of law.

It is in that spirit that I have come to report to you on the State of our Judiciary and to offer some observations as your Chief Justice on some of the court issues you will face.

### Judicial Selection and Judicial Independence

One of the most awesome of the General Assembly's institutional responsibilities is your duty to select judges. Twenty one of the 50 states select judges by popular election, 26 of the 50 states select judges by appointment of the Governor. Three states use some form of legislative election. South Carolina, has since Colonial times, followed this ruggedly independent course of election of judges by its General Assembly.

Our legislative selection system is rooted in a healthy distrust of putting too much authority in the executive and in a strong desire to assure judicial independence by protecting the selection process from the temporary passions of popular election. Judicial independence is the cornerstone of any system of judgment or dispute resolution.

Independence is the hand maiden of fairness and consistency, the hallmarks of a successful judicial system. The perceived absence of judicial independence was from early colonial times one of the catalysts for the creation of our system of legislative election.

South Carolina's constitutional design has proved a wise one - even more so in this age of instant sound bite politics and incredibly costly election campaigns.

Over the last 30 years, beginning with South Carolina's adoption of a modern judicial article in 1972, this General Assembly has led the effort to introduce a high level of scrutiny of potential judges and to level the playing field so that the election process is open to all candidates. Our State has an objective screening process which involves review by the legislature, the public and the legal profession. The result is that we have a judiciary which is slowly beginning to reflect the diversity of South Carolina's citizenry. Have we achieved the goal of a truly diverse judiciary? No, we have not, and there continues to be some very thoughtful debate within your ranks about what can be done to improve diversity in our judiciary.

Let me make some observations as to where we need to concentrate. South Carolina's latest census reveals that almost 30% of our citizens are African-American and almost 52% of our citizens are women. At the present time, the profile of our currently sitting statewide judiciary of 112 judges is that 16% are women and 7% are African-American.

Let's look for a moment at the pool from which these judges are selected. At the present, there are approximately 10,500 lawyers licensed to practice in South Carolina. Of this number, approximately 6% are black and 27% are women. We have one law school in South Carolina, and it produces the vast majority of practicing lawyers and judges in our State. At the moment, approximately 9% of the University of South Carolina Law School student body is black and approximately 45% are women.

Improving diversity on the bench of South Carolina begins with a strong effort to attract a broader base of high school and college students to consider a career in the law. South Carolina devotes less public resources to legal education for our people than all but a handful of states. Plans are underway to construct a new law school and the search for a new dean is well underway. As an old baseball fan, I say, "if you build it, they will come." Increasing the law school's resources is a key component.

Supporting the placement of a broader diversity of young lawyers on state boards and commissions might give them an opportunity to demonstrate their talents on a broader stage.

Public confidence in our judiciary is enhanced when the faces and backgrounds of our judges reflect those of all South Carolinians. As you can see from the statistics, you are beginning to reflect fairly closely, the diversity of the available pool. If we continue to improve the size of the pool, diversity on the bench will surely follow.

There is a great deal of debate nationally about what effect the process of selecting judges has on the independence of the judges selected. Our South Carolina system of legislative election and rigorous public screening is one which ensures that our judges are accountable to the public but not subservient to the momentary public will. Judges must decide their cases without fear or favor. But just as importantly, you have the right and the duty to ask judicial candidates the tough questions. You have been wise stewards of your authority to select capable judges and the result is a balanced selection system which produces a nationally recognized judiciary, men and women of great integrity and ability. I am proud to serve with every man and woman who wears the robe in South Carolina.

### Interbranch Cooperation

Apart from judicial elections, over the years, the primary method of communicating between our branches has been legislative hearings over a specific bill. Judges have been able to provide their expertise to your debate on a variety of issues. The much needed legislation to reform the Guardian ad Litem system in South Carolina, which is close to passage, is an excellent example. I have discussed with Speaker Wilkins and President Pro Tempore McConnell the creation of a Legislative-Judicial Interbranch Forum as an opportunity for representatives of the judicial and legislative branches to exchange information and perspectives as we work together to promote public safety and the preservation of due process. These Interbranch Forums exist in several of our sister states as a collaborative project of the Chief Justice, the President Pro Tempore of the Senate and the Speaker of the House. The forum would come together during the legislature's off season. We hope to announce in the near future the formation of this forum with appointments by each of us, of members of our branch.

## Management of our Court System

Last year, I identified the continued backlog of cases in criminal court - the general sessions of circuit court - as our top management problem. In the past, we have attempted to attack the backlog by increasing the number of circuit court judges. We have not added any trial judges in six years, but our backlogs in all courts continue to soar. I believe we can attack this problem on two fronts: first, by developing new ways of managing the way we try cases and second, by using modern technology to manage more efficiently.

### General Sessions Docketing Pilot for the 5th Circuit

I support continued control by the solicitors of the management of criminal trial dockets in our State. Under the leadership of Justice Costa Pleicones and retired Solicitor Dudley Saleeby, a task force of solicitors, public defenders, private lawyers and clerks of court developed the plan for a pilot model to manage the general sessions docket.

Fifth Circuit Solicitor Barney Giese graciously agreed to pilot a differential case management system in Richland County. This system aims to use fair but set time schedules to streamline the progress of criminal cases without spending additional dollars.

Among those who have contributed to the implementation of this program are: Judge Henry Floyd; Solicitor Barney Giese and his staff, especially Elizabeth Levy; Public Defender Lee Coggiola and her staff; private defense bar including I. S. Leevy Johnson and Joe McCulloch; law enforcement agencies, including Sheriff Leon Lott; Chief/Assistant City Manager Charles Austin; Chief Magistrate William Womble; City Judge Lester Bates and Clerk of Court Barbara Scott and her staff.

While the program is only in the beginning stages, early signs of cooperation are encouraging. This is the sort of innovative problem-solving mechanism that I sought to implement without the expenditure of additional funds but rather through bringing together all the players in the system to effect a positive change. What this really boils down to is fostering cooperation and getting everyone to agree to follow a fairly strictly delineated set of rules.

A positive outgrowth of the formation of the committee is that it has encouraged others including Trey Gowdy, the Solicitor in the Seventh Circuit, Ralph Hoisington in the Ninth Circuit, Greg Hembree in the Fifteenth, Bob Ariail in the Thirteenth, Barbara Morgan in the Second, and others to institute similar programs. Of course, Solicitor Tommy Pope of the Sixteenth and Donnie Myers of the Eleventh have been using their own models for several years. They provide great leadership in this venture. In short, the cooperation among the solicitors throughout the State, in the effort to reduce case backlog, has been very significant.

### Court Automation

Last year, I identified as our principal management goal the delivery of fair, compassionate, effective and timely justice through the use of technology. In an arena of severe budget cut backs, greater efficiency in the use of existing personnel is the key to reducing our case backlog.

Although we have sustained severe cuts to our recurring budget resulting in restricted rotation and reduction in many services, we have kept our courthouse doors open in South Carolina.

Our real success story has been to utilize existing nonrecurring department funds and grant monies obtained in partnership with the criminal justice community to continue our effort to create a statewide case management system. We have involved clerks of courts, technology directors, and many other local officials in the design and award of a contract for a case management system which will be piloted in Greenville, Pickens and Richland Counties. By the end of 2002, we expect to have automated the management of cases in magistrate, and circuit court, civil and criminal in 28% of the State.

The decisions of police officers, judges and juries generate a lot of paper memorializing their decisions and declaring what should happen next with a case. These papers have power: the suspension of a license, commitment to jail, release from prison, issuance of a protective order. In our personal lives, we know what the information age is like, because we experience it in everyday life. We take that card with the magnetic stripe and put it in the gas pump. The machine knows whether it is okay to give us gas. It charges our account even before we leave the pump. Unfortunately, our court world doesn't work like the credit card industry.

If a judge in Sumter issues a protective order for a battered spouse and the police in Conway find him waiting for her outside a restaurant, they may have no way of knowing that something harmful may be about to happen. If they have access to a computer, the order probably doesn't show up on their database.

All this occurs because there has never been any central coordination of the way local court data is collected, displayed and conveyed, despite the thousands of dollars spent at the local level. We are unable to transmit information effectively and efficiently to the people who need it - here in state government, or in local government, or law enforcement, or even inside the court system itself. This cold reality, and its consequences for citizens and for their government, has led us to devise a strategy to correct these problems.

As I said, these papers have power - but could have even more if they could be accessed by everyone who needs to know what these papers direct to be done.

There are some real heroes who have encouraged our beginning efforts. Federal sources include significant Commerce - Justice - State appropriations secured under the leadership of Senator Ernest Hollings, and Byrne Grants, National Criminal History Improvement Program Grants and Court Improvement Program Funds secured through the assistance of Sled Chief Robert Stewart, and Director Boykin Rose and Burke Fitzpatrick of Department of Public Safety.

We have used these funds to help create websites for each of the 46 clerks of court and to provide basic hardware and connectivity to our clerks. These websites will in the future be the point of access by law enforcement, judges, attorneys, litigants and members of the public for court records, decisions and information.

Our Supreme Court website is the point of access for everything from Bar Exam results, to trial

judges schedules, to court opinions, to court rules and manual, and shortly, forms provided by Court Administration will be capable of being filled out and downloaded from the site.

The internet based justice information and case management system we are developing will be a national model, particularly for connecting information from rural jurisdictions.

Post September 11th, there is much national focus on access to state court records, state criminal information and other state records. These are the crucial databases which can be used in our national antiterrorism and bioterrorism efforts.

Major encouragement for our management initiatives has also been given by Speaker Wilkins and Ways and Means Chairman Harrell. Times are very difficult financially for our beloved State, but the Speaker and Chairman Harrell have treated the Judicial Department as a coequal branch of government. The same is true for the President Pro Tempore of the Senate and Chairman Hugh Leatherman of the Senate Finance Committee.

When the history of court modernization and the continued vitality of an independent and responsible judiciary in South Carolina is written, the names of our Judiciary Chairmen Glenn McConnell and Jim Harrison will be written large as guardians of our independence and our accountability.

#### Indigent Defense

In South Carolina, as in the nation, your state court system handles better than 95% of all criminal cases. The vast majority of criminal defendants whose cases are processed through our state system are represented by public defenders or other attorneys compensated through the Office of Indigent Defense or attorneys who are uncompensated at all.

Almost all of the defendants in death penalty cases in South Carolina are represented by public defenders or by attorneys paid by the Office of Indigent Defense.

The Office of Indigent Defense Fund currently expends \$9.5 million a year. Of this fund last year, almost \$3 million was spent on less than 20 death penalty cases. The South Carolina Death Penalty Statute requires that the Judicial Department issue a biennial report as to the average attorney fees and expert testimony expended for these cases. I am in the process of assembling from the Office of Indigent Defense and court records detailed information regarding the expense history of these cases. I hope to complete the study this summer. You may wish to defer any fee increases to this fund until you receive my report.

#### Court Fees

As resource allocation becomes tighter, South Carolina should examine its court fines and fee structure to determine whether the users of the system are contributing their fair share to its operation. Both the House Ways and Means Committee and the Senate Finance Committee have under consideration various proposals. I support the efforts by our clerks of court to revise the filing fees. I urge that, before any revision is adopted, you take a comprehensive look at the entire fees and fines structure. I am committed to working with local government and with you to

develop a modern court fees and fines structure.

## The Future

The central theme of my approach to the management of your court system is partnership. In many states, the court system is administered by a large, centralized bureaucracy. In South Carolina, management of our system is centered in the 46 clerks of court. The Constitution requires that the Chief Justice provide the administrative leadership.

In this time of scarce resources, the clerks and I are using our combined talents and resources to keep our system going. Partnerships with law enforcement and with our solicitors are an additional way of squeezing the maximum from scarce financial resources. All these partnerships begin with you.

While current economic turbulence may make our present course somewhat uncertain, the future is as bright and solid and undaunted as is the bedrock optimism of our people. Shakespeare's injunction that the tide in the affairs of men must be taken at the flood is exactly the right course for your court system. We will be bold. We will do more with less, and for the safety and security of our nation we will endure and prevail.

As judges, we must remember that we are in the final analysis problem solvers. All else must give way to the search for truth which is the core of the law.

The motto of my court is Nil Ultra, but we abide in the certainty that there is a higher authority. "What doth thy God require of thee? Do justly, love mercy and walk humbly with your God."