

State of the Judiciary
Chief Justice Jean H. Toal, South Carolina Supreme Court
Message to the Legislature
February 24, 2010, in Columbia, South Carolina

Mr. President, Mr. Speaker, Mr. Speaker *Pro Tempore* and Members of the Joint Assembly:

Oliver Wendell Holmes, Jr. authored a 1921 U.S. Supreme Court opinion interpreting a section of the then very newly adopted Internal Revenue Code. He famously wrote, 'Upon this point, a page of history is worth a volume of logic.' Things have not changed very much since trying to construe the Internal Revenue Code in 1921.

As I present this address, I will be looking back in our history to give some context to the current situation in which your judiciary finds itself. But I guess, that's as it should be. An appellate judge spends much of her time examining the past in order to find an answer to the controversy presented by a case. That past may be in history books, court decisions, the legislation you enact, constitutional provisions or executive decisions.

As a prelude to today's address on the state of your judiciary, a page of history is in order. Today is the 25th anniversary of your annual invitation to the Chief Justice of South Carolina to deliver the State of the Judiciary Address to the Joint Assembly. This milestone is an enduring symbol of the harmony between the legislative branch and the judicial branch, and it was not always so. 1985 is the mark of the year which resolved a long-standing and very bitter dispute between the branches that began as I began my service in the House in 1975. The spirit of respect for each branch's constitutional authority and responsibility has, I think, remained the hallmark of your relationship with the judicial branch and the judicial branch's relationship with the legislature.

No one will ever come to service on the South Carolina Supreme Court who has the depth and quality of appellate experience that Justice Hearn brings to our court. Her career as a lawyer began as a law clerk to a Justice on our court, Julius B. Ness. After a distinguished career as a lawyer and as a family court judge, Justice Hearn's four years as a member of the Court of Appeals and over ten years as its Chief, makes her a highly skilled member of our court.

We rejoice in your selection of John Few as the new Chief Judge of the Court of Appeals. A ten-year veteran of circuit court service, he is energetic and he has already begun work in his new role.

Before we get to finances, I want to look again at a page of history to set the context at where we stand. 35 years ago, I sat in your seats as a freshman legislator. Senators John Land and John Matthews, Rep. Dan Cooper's father -- Rep. Dolly Cooper -- and Rep. Cathy Harvin's late husband -- Alex Harvin -- and I were in a group of 52 new members who came to service the first year of single-member districts in the House. Mr. Speaker, we could have elected a freshman speaker, if we would have been bold enough. Our first term as freshmen legislators ended in 1976, with the beginning of a national financial crisis that was every bit as tough as the financial crisis we are facing today. "Stagflation"-- a combination of a stagnant economy and

rampant inflation, and the beginning of a severe Mid-East conflict centered in Iran -- brought gas shortages, 17% interest rates and unemployment in South Carolina which in some counties topped out at 27%.

So how did South Carolina and America come out of this profound economic crisis of the 1970s? In South Carolina, the governmental structure began to change with judicial modernization. We developed a uniform system based on a business model, which brings social order and stability. We also modernized the Office of the Governor by amending the Constitution to allow a governor to serve two terms. Dick Riley spearheaded these two efforts and they set the stage for a new approach in South Carolina to economic development under Gov. Carroll Campbell that resulted in such business relocations and success stories as BMW, Michelin, Pirelli and many other national relocations. On the legislative side, we re-engineered the way we do business as a new generation of House and Senate leadership developed a sophisticated staff of highly trained research personnel for all committees. The General Assembly began to be equipped to make independent decisions about the direction of this State. On the national scene, economic prosperity that began in the Reagan years sustained a period of unprecedented national and global business growth through several successive generations of presidents and state and local leaders. Today, we face another enormous state and national challenge.

The stability of your court system is the bedrock of social order and stability in this State. We will not continue to attract new investment in our State -- which is the key to moving out of the economic crisis in which we lag at this time -- if our court system unravels. And, our court system is beginning to unravel. This is a snapshot of the funding sources and expenditures in recent years for your court system.

As I began my tenure as your Chief Justice ten years ago, it took about \$46.5 million to run the state court system and almost all of it was raised by regular general appropriations funds. There were no federal funds and very little in the way of state fees. Nine years later I approached this fiscal year with general appropriations money of only \$28 million and state fines and fees of \$18 million and \$6.5 million of federal funds. All of the federal funds I have acquired over the last ten years have been used to re-engineer automation of the court systems to place new automation and new high speed connectivity in every county of South Carolina. No state funds there. As I approached this past year, we had already sustained \$6 million in a shortfall the year before and I made it up by cuts to travel, by other cuts within the department and by some use of carryover funds.

This year the across-the-board cuts left me \$7.5 million in a deficit and right at the last of the session last year, you replaced \$4 million of recurring money with stimulus money, ARRA money, one time money that won't be repeated this year. Your court system is \$11.5 million down at this time and about to run out of the little bit of carryover money that I carefully hoarded year after year to expend on nonrecurring projects -- which includes repairs to the two buildings that I rent from the State. But the State does not have the ability to repair on this very campus the Supreme Court Building and the Court of Appeals Building. We can't continue to operate like this. You can see that the operation is almost entirely salaries and benefits. The operation is only \$12 million and \$6 million of that is comprised of federal funds, that have been gotten every year to automate the court system and to automate the counties.

I can't operate your court system on the \$46 million that was appropriated ten years ago and what will that mean if that can't happen? Courts will have to close in counties, terms of court will have to be eliminated, and other very, very severe steps will have to be taken.

What have we already done? We've done a lot. We've reduced judges' travel. We have eliminated it for law clerks. We've restricted travel for court reporters and the rest of the things you see listed in the slide, including hiring freezes, cutting reimbursements to judges for monthly judges' allowances. We now have a freeze on, such that you as a judge lose your secretary, we make you double up with someone else, except in counties where there is only one of you. We are doing everything we can with the resources we have right now, but I can't run the system for you without some major negative decisions. So what will those next steps be?

Of course I, like you, am inundated with calls from law clerks. They are my newest hires and, therefore, would have to be the ones upon whom the initial reductions in force would fall. I sent out a letter last fall so people would have plenty of time to plan letting the law clerks know that I might not be able to keep them on past March. It's in the balance right now and the finance director of the branch and I look at these figures many times each week to see how long I can keep going. The Court of Appeals staff has already been asked to reduce their staff from 3 to 2 staff persons. They can eliminate their secretary/administrative assistant. They can eliminate a law clerk, but I have got to have some cut in personnel.

Reduction of court reporters is now being considered. I would be forced to keep everything open to run a deficit, and I cannot live with myself doing that. I am in a scrum of other entities and state government who are budgeted in the same subcommittees of the House and Senate that I am budgeted in and when they run a deficit, it has to come from someplace else in the subcommittee and that's how I got the \$4 million in ARRA money last year. It penalizes anybody who runs an entity of state government on a business model. You cannot penalize a whole branch of state government -- and particularly one that is as fundamental to the rule of law and public order. Public order is at stake here.

Gang activity is up all around this State. When you look at some of the communities that are cursed with the increase in murders, violent crime and gang activity, you know very well that if they are not brought to justice, that kind of activity escalates. We can't afford to turn into the kinds of countries we see around the world where social order has been torn, because the ability to exist as a people is destroyed by that. Any ability we have to say in this small state that we've got something that is so attractive that you should come here and do business is destroyed if basic social order cannot be maintained. I have not talked in this dire a tone the entire time I have addressed you for the ten years I have been your Chief.

I am a "can do" person about moving forward, but I don't whine. I am desperately afraid that if we don't change the way we are funding the judicial system, we are going to have a major breakdown in our ability to deliver court services. There is a plus side to delivering court services.

The slide I show you of the United States and South Carolina is in the red. We have been cut more than any other state court in the country by National Center for State Court standards.

Our case loads continue to be the highest per judge of any state in the country, which means we have less trial judges per 100,000 population than anybody else in the country. We are running a very lean ship in your judicial department. There isn't any fat there. For years I have asked for more judges.

We haven't created a new trial judgeship in 13 years. I have tried to re-engineer the way we do business to make up for that, but if you cut travel and everything else, you just don't have the ability to place the judges and, frankly, I don't have the ability to pay them. Judicial elections are now in a free situation and I think very rightly so until the judicial matters affecting selection are disposed. When they are disposed and judicial elections get back on the table, will I have to come to the Judicial Merit Selection Committee and say, "Don't elect any more judges because I can't pay them?" That's how dire this situation is.

Our trial court case load continues to move up, and particularly on the civil side, it is exploding now because of foreclosures and other things associated with a bad economy. I am trying to move heaven and earth to rejigger the way we try those cases and move them through the system. I passed an administrative order from the Chief this summer that gave debtors some relief until banks were able to counsel with them about their rights under the new ARRA legislation. That has given some relief, but we have got to move these matters through the system; otherwise, business and economics grind to a halt in this State.

The plus side of the picture is we are doing a lot of very good things. Need creates inventiveness and that's a good thing. Justice Pleicones has taken on the re-engineering of the General Sessions system and it continues on with a good deal of pressure being put on the solicitors to adopt a more business-like approach to the way they call cases. We are still the only State in the country where the prosecutor controls the docket. I have said to the solicitors that I don't want to interfere with that, but I insist you adopt an organized business-like standardized way of moving cases forward and not just put on the back burner the cases that are old and the cases where you don't have the witnesses to prosecute. You have got to make some tough decisions about your docket if you're going to control it. We are providing help in that regard and that is what Justice Pleicones is managing.

We have also taken a creative approach to condemnation cases with special beginning-to-end management. We have taken sophisticated construction cases and given them beginning-to-end management and we are disposing a lot of them now. There might be 20 lawyers in a case and if you keep the pressure on them, they'll generally settle these cases eventually. You've got to keep the cases moving with regular attention by a judge that would fall to the bottom if we can't reelect the judges and place them out in the courthouses. We are using ADR; we're using fast track jury trials, and business courts have been a wonderful success, and that has been a key impact on talking to businesses who are thinking about locating in South Carolina.

We are not competitive with Georgia, North Carolina and surrounding states in being able to say that you can process your business through the court system if you have business-to-business disputes. We now have a business court set up that gives some relief there and there are a lot more things that we could do if we can get back to any kind of a normal funding situation. What can we do about it? Many of you know that the raising of fees for filing cases is being discussed.

I know there is some concern about access to justice issues and about where the lines ought to be drawn. It is fair to have those who use the system pay for it. If you went from \$150 to file a civil lawsuit to \$300, it would be a cheap price to pay for access to a court system that can resolve a dispute. Smaller disputes don't cost that.

You are now giving your magistrate courts \$7,500 in jurisdiction. That could go up and, of course, the expense it costs to try a case in magistrate court is less. We also have the ability to deal with indigent plaintiffs and their access. We have got to do something to keep our courthouses open. Other positive things that are taking place in the system by way of new initiatives, include a task force on criminal procedure. Howard King headed up that effort for a year. We have had public hearings on criminal procedure innovations and we hope to be able to submit to the General Assembly next year, the process of vetting these new changes. They are aimed at trying to streamline the criminal docket and set a level playing field of exchange of information between the defense and prosecution. We also made amendments in the rule that requires lawyers to accept no pay appointments -- that's Rule 608 -- I believe we have come up with a more equitable system.

Many would like us to stop appointing lawyers if they cannot be paid on indigent criminal cases and family court cases. I would love to stop that, too, but the U.S. Supreme Court decisions in this area require representation and that's the only place we have to go.

Your increased funding in the Office of Indigent Defense and your reorganization of that office has been a major step forward in the creation of circuit public defenders. We are making a lot of progress even with some tough situations funding-wise to push along the General Sessions docket. Technology has been the signature of my administration as you know and ten years after we got started, we are looked at across this country as a leader in using an internet-based platform to do the business of the court. That was a wild, way-out idea ten years ago and I came to it because we didn't have the money to buy the big mainframe computers it would take to automate the whole state court system. We decided to use an internet-based system. I got a series of federal congressionally mandated awards and other grants to set this system up.

When you have got California and Massachusetts coming to South Carolina to look at a model system, and see how a rural State can use broadband and high speed connectivity to manage its business, we've arrived. We have got a lot to be proud of. The people who have made it work are the people in the smallest places in South Carolina -- in magistrates' offices and clerks' offices because that's where the automation starts. It doesn't start in the big shot offices in Columbia. It starts in the most rural areas of the State. Our decision was that we were not going to pick the low hanging fruit and leave the people out in the country to fend for themselves. The biggest grants we've made without asking for any payback have been in the small counties that just can't afford the wiring, the computers and whatever it takes to get them up and moving. It is a wonderful success story that shows what you can do. We now own that system. We charge modest maintenance fees. My next step is going to be to try to get some grants to go to electronic filing. The lawyers want it very badly and the general public does, too. I don't have the money now to create that system, but I am putting in for some grants to see if I can start it, and if I do, South Carolina will own it. And we'll use every bit of the proceeds that come from electronic

filings to try to see if we can reduce what counties have to pay to zero for the maintenance of our statewide case management system.

Sustainability is a part of what we are doing and, again, business looks at this system we have engineered as the most successful automation of a governmental system that has ever been in this State and in many other states. So again, we have a lot to be proud for. The gold on the map indicates the counties that are now automated. We are in progress in the green, and the blue are the next counties we are going to. That will leave a few small counties and, frankly, this probably needs some updating because we have already been in Saluda, Union and several other counties to talk about how we'll get started. I hope to be able to show you a gold map next year.

The solicitors have been almost totally automated. Their system interfaces with the court system. Again, they did not have to pay a nickel for it. I got grants. They helped me develop the system and they now have all the tools they need from a technological standpoint to move their cases along.

Sentencing is a South Carolina crisis and one of the finest things this body has done was to create last year a Sentencing Reform Commission. The Pugh Charitable Trust thought so much of what South Carolina was willing to do, that they invested major grant money in making this system a success. When you look down at the members of your bodies that have worked on this thing -- Gerald Malloy, Jake Knotts, Chip Campsen, Murrell Smith, Doug Jennings, and Keith Kelly -- they deserve major, major credit for staying with it. They've got a report. It's not the most dramatic thing that can be done, but it is a wonderful start toward looking at a saner way of dealing with sentencing in South Carolina, so that we use our precious dollars to keep in jail the people that are violent and need to be kept in jail and put into some kind of alternative programs the people whose lives we really could change and get back into productive citizenship. I am very proud of Aphrodite Konduros, Billy Keesley and Don Beatty on my court. Don has taken the court's leadership position on this particular activity and I think much good will come of it.

The slide that deals with the details of sentencing -- I won't go over it in detail -- but it will be on my website. It paints a picture of what kind of costs we are into now for housing the inmate population. You don't even have to do anything more than to look at what happens every year with the deficit spending they have to do in their budget just to keep the burgeoning population in the penitentiaries to know that we've got to do something different.

We have a deep interest in outreach programs that reach school children and teachers and assist them in educating them about the Constitution and government. They call it social studies now and I think they are kind of a victim of the name that is given to them. I don't know what social studies is -- it sounds vaguely like something that I don't want to be a part of. In my old-fashioned days it was government, history, civics and economics. It is foundational to anyone who is going to be a productive, decent and law abiding citizen in South Carolina that they know something about government.

I have partnered with Sandra Connors' court project. In retirement she is as busy as anybody you could ever imagine. She decided to reach out and develop an on-line, web-based program for middle schoolers and high schoolers that would teach them about government. Kids spend over

44 hours a week in front of their computers on an average. Some spend a lot more time than that and they love playing on-line games. So, she went to Steven Spielberg and got him to develop for her on-line games that teach them how the court operates and they are wonderful. I decided to get involved for South Carolina and now we have got a group of teachers together. We are going to initiate this in our schools. We've got lesson plans that teachers can use and we are going to develop a program of scholarships for teachers to get educational credit toward their Masters or Ph.D. for learning how to use web-based programs in the classroom. It is a wonderful outreach program that we are really excited about.

Just as Associate Justice Kittredge heads up the commission on the profession, the slide will give you all the things that they are about. And I will simply say that this is a commission about so much good to help to increase professionalism and increase the quality of the way lawyers operate and the way judges operate in South Carolina. And, also, whether its mentoring programs for the youngest lawyers or judicial internship programs or looking at lawyer education or looking at lawyer conduct and discipline and judicial conduct rules, this commission has deeply looked at some of the most enduring problems about assuring the quality of South Carolina's legal profession. We all owe Justice Kittredge and his commission our support and our deep gratitude for what they are doing for the good of the order.

In my view tomorrow we will look back on today as a time when we changed the world or the world changed us. I believe with all my heart that with every crisis, there comes opportunity. Those little pages of history I gave you as I move through this address I think demonstrate that South Carolina and South Carolinians are "can do" people and we can move through this time as I moved through it when I sat in your seats.

Government will be the better for it and we as South Carolinians will be the better for it. The best way out of where we are now is to be sure that there is a new generation that will take the lead.

You know I always finish with my grandson. There is Patrick in Washington, D.C., at "Snowmageddon" in his ice fort. I thought Star Wars was the edge of technology 15 years ago. Patrick made a R2D2 costume for Halloween and there he is as a droid. He is also making biscuits with his Pop. That is the future we're working for in South Carolina. That's the future I'm dedicated to and you're dedicated to. I thank you from the bottom of my heart and on behalf of all who wear the robe in South Carolina for looking deeply and seriously at your court system in helping us move forward in a wise way.

Godspeed.