State of the Judiciary
Chief Justice Francis G. Dunn, South Dakota Supreme Court
Message to the Legislature
January 27, 1977, in Pierre, South Dakota

Reverend Schatz, Lieutenant Governor Wollman, Speaker Hansen, Constitutional Officers and members of the Fifty-Second Session of the Legislature. Thank you for graciously extending me an invitation to report on the state of the Judiciary. Your public recognition that we are indeed a third and equal branch of government is heartwarming to me and to my colleagues, Johnny Carson has his Ed McMahon, and you will note that I have brought along my own cheering section. May I introduce Associate Justices Roger L. Wollman, Laurence J. Zastrow, Donald J. Porter and Robert E. Morgan.

The Unified Court System went into effect on January 7, 1975 and came completely under the control of the Judiciary on July 1, 1975, with the beginning of the fiscal year and a full budget for the courts.

I am not going to bore you with our problems over the past couple of years. Suffice to say that we now have our housekeeping under control. It was no easy task to start from scratch and build up a personnel system for 500 people; to budget for the entire court system; to pay employees and service their needs; to institute a simple and meaningful system of gathering data so we would know where the workloads existed; to provide a uniform accounting and reporting system for clerks of courts and magistrates in all counties of the state; and to develop a Court Services Department that is professionally trained and capable of providing accurate presentence reports for the trial judges and giving the close supervision required where an admitted felon is permitted out on the streets under a probation order. This has been done, and the administration of the court system is operating smoothly under eight dedicated Presiding Judges and a small but excellent staff in the Court Administrator's office. We feel that the Unified Court System has progressed to the point where it now should be tested in the areas of court management and control. That is the name of the game if we are to carry out the mandate of the people to provide a court system that will judiciously dispose of litigation at the least cost to the taxpayers.

We have hired Mark Geddes as our new Court Administrator primarily because he has been employed by the National Center for State Courts for the past few years as a trouble-shooter to go into various states in this territory, including South Dakota, to seek out problems in the management and control of court systems and correct them.

The past year has brought about a sharp increase in litigation in this state. The Judicial System, like all public institutions, is receiving verbal abuse in this country, but the citizens of this state, at least, still prefer to take their case to an independent Judiciary. Our statistics show that contested litigation in the trial court is up some 20% in one year. If we have any doubt as to these statistics, we know that appeals to the Supreme Court rose from 218 in 1975 to 297 in 1976, which indicates a 36% increase. Where is this litigation coming from? Well, first of all, we know that criminal trials are up as much as 30% in metropolitan areas. We know that the Attorney General has been very aggressive, especially in the investigation and prosecution of drug abusers. Probably just as important, is that the citizens of this state are refusing to accept

political decisions at any level. I refer to decisions of school boards, city commissions, county commissions, state boards and the like. All of these cases are being brought into court for final decision. In addition, I think the Legislators in the past few years must bear part of the burden because of the plain volume of legislative measures passed. Every new statute that affects some citizen's rights is being challenged, and that means more litigation.

In the face of these statistics, we could be here in a panic calling for more judges, more court personnel and more money. Except for a few isolated instances, there is no change in our budget request this year. We have chosen to proceed in this manner for a couple of reasons. One reason—the economic condition of the state—is obvious, but, probably more important, we wish to find out what can be done by more effectively handling the administration of justice.

From the inception of the Unified Court System, we have been concerned with the disparity of workloads between judges in the various circuits. We have judges in some circuits trying 45 to 60 contested cases per judge per year while in other circuits 10 to 18 cases per judge are tried each year. The workload can never be completely equalized because of the judicial service we feel is necessary for each county and town, and this requires that some judges in rural areas travel considerably. But workloads should be equalized wherever possible. You will recall that in 1975 a Circuit Judge was replaced with a law-trained magistrate in the Eighth Circuit after a full hearing. We held another hearing in1975 relative to giving some relief to the Seventh Circuit at Rapid City. We found the backlog there was of a temporary nature because of a judge who had been ill for an extended period and because of the drawn-out Custer County Courthouse trials. This was taken care of by sending five judges from other circuits into Rapid City for a week each until the criminal backlog was broken.

This past year, after a full hearing at Huron in November, we moved to consolidate the Third and Ninth Circuits, thus removing a judgeship in that area and placing it in the First Circuit where the caseload warrants another judge. This was made possible upon the retirement of Judge Manson in the Third Circuit. This move also provided relief to the Second Circuit, as that circuit was reduced to Minnehaha County alone by placing Lincoln and Turner Counties in the First Circuit.

I indicated a year ago that a new judge was needed in the First Circuit and that we would be addressing this matter with you this year. We have now provided this judge from the old Third Circuit without any increase in Circuit Judges or in the budget. As I indicated last year, it is not popular to eliminate sitting judges from a certain area, but we feel that it is our duty to constantly keep a surveillance of workload per judge and make changes where we find it will equalize the workloads. Surprisingly, the change has been well received in most areas. This may have been because we held a public hearing and received input from the citizens of the area before a decision was made. We will continue this study.

One of the leading causes of delay in the Judicial System is the furnishing of transcripts, not only for appeal but for use by trial judges in close questions of fact in deciding a case. In the busier trial courts, the court reporters who are in court every day have little time for preparing these transcripts. Under the old system, a court reporter was assigned to a particular judge, and the reporter had extreme loyalty to this one judge; however, he felt little or no responsibility for any work of other judges. Under the Unified Court System, it is necessary that this be changed so that reporters are pooled and can be moved around and used where they are needed, thus

eliminating much of the delay in the furnishing of transcripts and decisions of cases. Some circuits are presently operating under the new system successfully and hopefully we can bring the entire system under the plan.

Further, we plan to monitor problems of delay at all levels of the court system. A computerized judicial information system has been designed and will be tested within a few months. We will provide new court rules that will alleviate the delay once problem areas are identified.

We are also engaged in a program to bring better judicial service to the small towns of South Dakota under the Unified Court System. Actually, the old Justice of the Peace system was ideal for the small towns. The Justice of the Peace cost a small town nothing as he worked for his fees and, while he might not have had much legal training, he was always there, and the old system did not require any travel to bring a person into court. You will remember, of course, that some of the justice handed out in these small towns was one of the compelling reasons for reform in the court system. At least in one instance that I know of, a county constable switched hats and sat as the Justice of the Peace after arresting someone. Regardless of what brought about the change, the justices, judges and other court personnel are committed to bringing better service to the small communities.

I believe the Legislature could be helpful here by increasing the jurisdiction of lay magistrates to permit their hearing petty offenses and small claims. If a person is pleading guilty to a traffic offense or other petty crime, the present system works, as the arresting officer need only have the defendant sign a power of attorney, collect the fine under a schedule and mail it to the clerk of courts in the presence of the defendant. The travel and expense occur when the defendant pleads not guilty to these petty offenses and the city officer must take the defendant to the nearest law-trained magistrate or judge. If lay magistrates were given this added jurisdiction to try petty offenses, we could adjust our present system to having a lay magistrate available in every town for at least one day per week, or have him on call for an emergency. This procedure would also provide safeguards for the defendant in that he could always demand to be taken before a judge or a law-trained magistrate if he so chose.

Plea bargaining is being used extensively in some areas. The courts generally have accepted this device for the disposition of a criminal calendar as a necessary evil. I have some real reservations as it is practiced in some areas. If you have a strong State's Attorney and an equally strong defense lawyer, the results are fairly satisfactory as both know the strength and weakness of a case and can bargain effectively. If either one is weak or scared to go near a courtroom, you have a generally unsatisfactory result, especially when you also have a judge eager to clear his criminal calendar. This could be responsible for some of the discrepancies we hear of in sentences for very similar crimes. We will make a survey of plea bargaining during this coming year with a view towards determining its effect upon sentencing and with a possibility of new rules forbidding or sharply curtailing this method of obtaining guilty pleas.

Finally, a word about the Supreme Court itself. It has been a rather sad but eventful year. A death, a defeat and retirement have substantially changed the personnel of this Court. We miss Justice Doyle, Justice Coler, and Justice Winans, as all performed well for this Court. However, we have found Justice Zastrow to be a sharp, capable, young lawyer. If he had any awe of sitting on this Court at the age of 31, he has not shown it to date. We look forward to working with

Justices Porter and Morgan who have been outstanding attorneys with two of the more prestigious law firms in the state. I mention in passing that Justice Winans could prepare for retirement and left little, if any, of his work for the present Supreme Court. Unfortunately, you cannot plan for death or defeat, and the current members of the Court have had to accept reassignment of over 25 cases in addition to the Court's already heavy load of assigned cases.

In this next year, we must endeavor to get the appellate workload under control. It does little good to eliminate delay at lower levels of the court system only to have a bottleneck at the top. It is my firm belief that a five-man court can only properly handle 120 full-blown decisions per year. We issue collegiate decisions, which simply means that each justice studies every case, examines the record, does his own research and comes to his own conclusion. At the rate of 120 decisions per year, this would mean that each justice would consider 10 cases per month and author 2, and this is about the limit of any justice's capacity. Last year we issued 131 published decisions covering 152 appeals com- pared to 111 in 1975 and 85 in 1974. In addition to the 152 appeals which were decided by written decisions in 1976, the Supreme Court considered and disposed of 100 cases on motions to dismiss, applications for inter- mediate appeal, writs of mandamus, habeas corpus, certiorari and prohibition. Twenty-three petitions for rehearing were also considered by the court in 1976. This required considerable research and a conference of the Court at least once each week.

In an effort to alleviate this workload, we have reorganized the Clerk's office, placing it in the hands of two very efficient young women —Jill Engel as Clerk and Dorothy Smith as Deputy Clerk. This frees Lyman Melby, former Clerk, who is an excellent research lawyer, to head up a screening committee composed of himself and a couple of law clerks. We are asking this screening committee to pull out cases that are obviously not ready for argument and those that require no oral argument or little oral argument. We are also asking the screening committee to pick out cases that can be disposed of by order or with per curiam opinions instead of full-dress, published decisions. Hopefully, with a full complement on the Court for the next year and these added devices, we can meet the challenge. We are hopeful, too, that this situation may be temporary as our statistics also indicate that litigation in the trial courts subsided during the last six months of 1976 compared to the first six months of the same year. This may be the result of economic conditions in the state. However, if litigation continues to increase next year, we, the Bar and the citizenry may well be seeking some relief for the Supreme Court.

When you judge the Unified Court System or any other court system, there are a few things you should always keep in mind. First of all, we are in a controversial business. In every lawsuit there is a loser, and he is unhappy. That has always been true and it will never change. The only new dimension that has been added in this day of mass media is that the loser often has a microphone put before him and is asked to comment on the decision at a time when he is angry and frustrated at his loss. His comments generally do not follow the law of the case, but instead he lashes out at the courts or the attorneys for his losing venture, and, if possible, tries to inject some hidden and sinister motive for the decision. There is no forum for the Court to respond to these statements, and the result can well be an undeserved lack of confidence in the courts.

Secondly, there are many decisions, especially in the criminal field, that are forced upon a trial court by decisions of the United States Supreme Court, even though they may not seem necessary or popular in a particular state. I refer here to the requirement of competent counsel

for an indigent which has caused considerable consternation among county commissioners (who have to pay for it) and attorneys who feel they are not paid enough. I speak also of such things as the more rigid rules on the taking of a confession, in finding probable cause for arrest and search and seizure, and a ruling that intoxicated persons can no longer be incarcerated in jail. Any court system must abide by these rules as laid down by the highest court in the land.

In my first appearance here, and at a time when the state has economic problems, I certainly am hesitant to talk about judicial salaries, but, charged with the responsibility of holding a Judicial System together and making it work, I feel that I must.

Judicial salaries have not been raised since February of 1974, effective July 1, 1974. With the exception of Constitutional Officers, every other employee in State Government has had some raise in salary in 1975 and 1976. I do not need to tell you of the adverse effects of inflation during that period, and I have already told you of the increase in litigation in those same years which has very meaningfully raised the in- come of attorneys and increased the workload of judges. To be realistic, we must compare judges' salaries with attorneys' income and not to any other profession or craft because a judge must be a lawyer.

We have been fortunate in attracting some lawyers to the bench because of their genuine interest in public service and the honor and prestige of the office, even though judicial salaries generally have not been commensurate with the income of a lawyer in private practice. But when the honor and prestige is costing him $25,000 or $30,000 a year, a judge must seriously consider returning to private practice, especially if he has a family to raise and educate.

We should not have to turn to the very young or the very old for judicial appointments. The ideal judges should be chosen from lawyers in the age group from 35 to 55 who have had considerable legal experience and yet still maintain a lively interest in community affairs. But it is this very age group that is being forced out of the market by insufficient pay.

The retirement program for judges is no longer attractive to an attorney thinking about aspiring to the bench. A judge pays 6% of his income into a retirement fund for the privilege of receiving a retirement roughly of one-half of his salary at age 66. He pays income tax on the money paid into retirement, so that in order to place $1,800 into retirement funds he actually pays approximately $2,400. The private attorney, on the other hand, under recent federal legislation, can set aside $7,500 per year from his income, tax free, and thus build up a retirement account far superior to that of a judge at the end of 20 years.

I do not expect any miracles, but I do urgently request that you consider a pay increase seriously and objectively. These judges sit in judgment over the lives of people and over property running into the millions of dollars each year. While this is a matter of immediate concern to the Judicial System, it will fast become a matter of great importance to the business community and the public at large. I raise this issue only because I sincerely believe it requires the prompt attention of the Legislature.

The Legislature in the past has indicated an interest in fines and forfeitures collected by the Court System and in the distribution of these funds.

In 1976 total state fines collected were in the sum of $2,203,481 compared to $1,824,939 in 1975 and $999,988 in 1974—or an increase of 120% since court reorganization with its accompanying uniform fines and accounting methods. These fines are distributed to the school districts within the counties where collected.

Bail forfeitures for 1976 were $65,015 compared to $25,520 in 1975. Bail forfeitures are remitted to the general fund.

Municipal fines in 1976 totaled $831,553 compared to $768,434 in 1975. Under the statutory formula of 25% in 1975, $192,108 was paid into the general fund, and in 1976 with 30% of the funds remitted, $249,466 was sent to the general fund. The balance remained with the municipalities. We wish to emphasize that the total sum for courts is in our budget request as we have no access to funds from fines and forfeitures—except, of course, as you allocate them from the general fund.

For the second year in a row, an entire section of the court budget has been eliminated by the Bureau of Finance and Management and placed in a new Department of Corrections. This year, the court's request, as well as last year's budget, is not properly presented to you. Accordingly, we are presenting our budget directly to the Legislature in order to fulfill our constitutional duty of preparing a budget of the people and services necessary to run the entire Unified Court System.

I have spoken out on this matter before the Joint Appropriations Committee and a copy of those remarks will be made available to you. I emphasize again that probation should remain with the courts where it logically and traditionally belongs; the question of whether that result is best reached under the present system or some alternative program is for the Legislature to decide. I only ask that the matter be settled so that we can go about our business of administering justice.

I wish to state that the Judicial System is moving ahead. Outsiders coming into our state are amazed at the progress that has been made in just 18 months. I have indicated some problem areas that need to be addressed and we are proceeding to implement measures to correct them. I wish to emphasize that they are not new problems—they have just become evident since statistics are being kept and the Court System has become visible on a statewide basis.

We also have some good things to report.

1. One-third more cases are being tried and disposed of per judge than under the old system. The Unified System cannot claim credit for all of this because of increased litigation and the fact that most of our judges would have responded to this challenge under any system. However, the organization and the flexibility of the Unified System in permitting the sending of judges into problem areas has certainly aided in keeping the calendars moving.

2. Felony criminal calendars are under control in all eight circuits, and defendants are being tried within reasonable standards.

3. We have had no serious complaints on civil calendars. This, of course, is more

difficult for a court system to manage, as these matters are largely in the hands of the attorneys until the case is definitely on the trial calendar.

4. Complaints that reach my office receive prompt attention, and I mean within a matter of days.

5. I wish to report that the Judicial Qualifications Commission, under Chairman Sam Masten of Canton, is operating effectively. In the past year the Commission has considered six complaints against judges, mostly for failing to get out decisions promptly. In most instances, the Commission has been able to deal with the complaints by calling the judge before the Commission and without resorting to recommendation for further action by the Supreme Court. The Commission reports that one complaint has not been properly taken care of by the trial judge and further action is pending.

6. The uniform accounting and reporting system for clerks and magistrates is largely responsible for the 120% increase in fines going into our school funds. This, of course is an estimate as there had been no records kept in the past by the Justices of the Peace.

So ends my first report on the State of the Judiciary. It was not meant to be a glowing report because problems still exist and more will come along.

The flexibility provided by the new system devised by the Constitutional Revision Commission and this Legislature provides avenues of approach to these problems that never existed before. As the complexity of our society and the corresponding litigation increases, I truly believe that our citizenry will be grateful for the foresight shown in enacting a modern system of courts at a time when many felt there was no need.

Again, I thank you for permitting me to address this Legislature.