State of the Judiciary
Chief Justice Roger L. Wollman, South Dakota Supreme Court
Message to the Legislature
January 25, 1979, in Pierre, South Dakota

Mr. President, Mr. Speaker, Governor Janklow, members of the Legislature, and members of the Executive Branch. Today marks the third consecutive year that you have invited the Judicial Branch of government to report on the accomplishments, needs, and plans of the Judiciary. My colleagues and I appreciate this opportunity to give you a brief review of the highlights of the Unified Judicial System during the past year.

WORK OF THE SUPREME COURT

I can report that 1978 was the most productive year in the Court's recent history. We heard arguments in 146 cases. Additionally, forty-one cases were submitted on briefs without oral argument.

The Court handed down 202 written opinions disposing of 244 appeals. By comparison, in 1977 the Court handed down ninety-nine written opinions disposing of 130 appeals. At the close of the year, we had some fifty-four cases under advisement that had been argued and were awaiting decision, as compared to seventy-two such cases at the end of 1977. When Chief Justice Dunn spoke to you one year ago, there were some sixty-six cases ready for argument that had not been heard. As I stand before you today, the Court has heard, or will hear within the next two months, all cases that are presently ready for argument. Let me hasten to add, however, that there is no dearth of work for us to do, for we have at least 159 appeals that have been filed and which will be ready for argument in the near future. In addition, new appeals are being filed at the same rate as in recent years. I can say, then, that as a result of the herculean efforts of my colleagues, together with the outstanding cooperation of the circuit judges who were called upon to sit with us on cases during the course of the year, the Court has made massive strides towards reducing the backlog of cases awaiting argument and disposition.

Several factors played a part in the more than one hundred percent increase in the Court's output during the past year. First, we implemented new internal operating procedures designed to shorten the time in which opinions are handed down once cases have been argued or submitted on briefs. Although we might prefer to be able to spend more time in reflection on each case, we, as you, are faced with an increase in our workload that requires us constantly to forge ahead if we are not to be inundated by the unrelenting stream of cases. Let me hasten to assure you, however, that notwithstanding these procedural innovations, each Justice reviews and participates fully in each decision. We will not substitute speed for substance, nor quickness for quality in our quest for currentness in the disposition of cases, nor do we ever intend to permit a computerized form of assembly line case decision to supplant the individualized case-by-case adjudication that is the mark of our appellate system.

A second factor accounting for our increased productivity during the past year was the simple fact that it was the second full year that the five members of the Court had worked together as a

body. As Chief Justice Dunn told you one year ago, a turnover in the membership of the Court slows the appellate procedure until the individual Justices gain confidence in themselves and in their work and in the work of their colleagues. I speak from experience when I join in Justice Dunn's comments. Still another reason for the Court's increased productivity was the use of per curiam opinions to dispose of those more or less routine cases that can adequately be decided on the basis of well-settled principles of law. Although these cases are given the same full review by each member of the Court, the Justice who is responsible for preparing the opinion in such a case is not expected to write an extended, in-depth review of the facts or the principles of law involved.

Another reason for our increased productivity has been our more efficient use of our law clerks. These highly capable young men and women are of great assistance in preparing pre-argument memos and conducting research beyond the scope of the authorities presented in the briefs. Through their assistance in researching, we are given additional time to fulfill our principal function—that of engaging in the contemplative thought, the rigorous intellectual analysis, and the careful draftsmanship that result in a coherent, consistent body of law rather than a series of ad hoc, unrelated decisions.

In this regard, I am happy to note that the Governor's recommended budget includes the two positions for staff attorneys that we had requested. Through these two positions, which we most respectfully request that you approve, we hope to establish a staff that will be able to render great assistance in researching legal questions, screening appeals for procedural defects and problems, preparing memoranda for Court discussions, and identifying those cases that might well be placed on the per curiam calendar. In addition, we would expect these career persons to develop an expertise in drafting proposed rules for the Court and in identifying those areas of our present rules that would need to be superseded or statutes that would need to be repealed. Lacking such staff support, we have been forced to impose upon your Code Counsel, Mr. Vickerman, and the members of his staff to perform this function for us.

These, then, are some of the factors that played a part in increasing the Court's output of opinions during the past year. We hope to refine and improve upon our procedures during the coming year in an effort to become even more productive. I would hope that when a representative of the Court stands before you a year from now it can be said that the work of the Court is completely current.

In addition to performing its principal function, that of deciding cases, the Court was also busy in its administrative and rulemaking roles.

I am pleased to report to you that effective July 1, 1978, the Court adopted the new rules of disciplinary enforcement governing the conduct of attorneys that Chief Justice Dunn mentioned in his address last year. Created by these rules was a seven-member board known as the "The Disciplinary Board of the State Bar of South Dakota." For the first time in the history of this State, a non-lawyer member position was created on the body that receives and considers complaints against members of the Bar. After careful consideration, the Court selected a former member of this very Chamber, The Honorable Merwyn H. Walter, of Roswell, as the Court's first appointee to this highly important body.

Chief Justice Dunn also spoke to you last year of the proposed new appellate rules and rules of evidence that the Court had under consideration. I can report that the new rules of evidence went into effect on July 1, 1978, and from all reports have been well received. We will be asking for legislative action in those areas of these rules which we determined should be held in abeyance pending the repeal of presently existing rules. We ask for your cooperation in this endeavor.

The Court has also adopted the new civil appellate rules, effective July 1, 1979. These new rules are the result of the diligent work of a committee headed by Justices Morgan and Porter of our Court and are designed to reduce the time required to submit a case on appeal and to streamline and simplify appellate procedures to the end that the cost to litigants will be reduced.

The Court also adopted, effective January 1, 1979, rules of appellate procedure governing appeals from the magistrate courts.

We have also revised our personnel rules to insure that employees of the Unified Judicial System receive equal treatment throughout the State. We have also revised the travel regulations of the Unified Judicial System so that they are now essentially the same as those of the legislative and executive branches of state government.

In addition to processing the tremendous volume of work that is generated by the large number of appellate filings and the corresponding number of written opinions, the Clerk of the Supreme Court, Mrs. Gloria J. Engel, and the members of her staff, are proceeding apace in completing the microfilming of the Court's records from statehood to the present day. This is a monumental undertaking. To date, some 5,500 cases have been prepared for microfilming. Some 3,800 files have already been microfilmed, out of the approximately 11,000 cases that will ultimately be recorded in this manner. Although this is a laborious task, the knowledge that our records have been permanently safeguarded will make the effort expended by Mrs. Engel and her staff seem well worthwhile indeed.

During the past year, under the direction of our Chief of Legal Research and Law Librarian, Lyman A. Melby, we were able to upgrade our law library, both in physical appearance and setting as well as in the number and quality of volumes. This latter achievement was made directly possible by your generous appropriation for the purchase of those state codes and legal treatises that our library lacked. Too often, I fear, we of the executive and judicial branches come before you only as supplicants for money and not as the grateful recipients thereof, and on behalf of the Court I would like to express our special appreciation and gratitude for your support of our efforts to upgrade our law library.

UNIFIED JUDICIAL SYSTEM

I will touch upon a few highlights of the work of our State Court Administrator, Mark Geddes, and his staff during the past year.

We are making continuing efforts to improve and streamline our judicial information system. To collect current, accurate, meaningful statistical information is a time-consuming task. Much of

this information is primarily useful to us at the Supreme Court level, for it is we who must justify our budget requests by setting forth, in the arcane language of those who deal in budgetary matters, the "performance indicators" that offer the bench marks of comparison that will support our requests.

At the same time, we are endeavoring to make the collected statistics of more practical value to our circuit judges and trial court personnel. To that end, we are even now seeking out a qualified individual who has special capabilities in translating the information that our system collects into an easily understandable system of reports that will assist our Presiding Judges in making the well-informed decisions that are necessary to expedite the work in their respective circuits.

I might add at this point that our judicial information system has proved to be of great value in maintaining control over our inventories, payroll records, and budget reports. Moreover, it assists the Presiding Judges of our eight judicial circuits to identify those areas in which additional resources are necessary and, equally important, those areas in which economies of operation may very well be effected by a reduction in personnel.

As a part of our overall efforts to promote economy and efficiency within the Unified Judicial System, we are undertaking a study of the desirability of microfilming records in our circuit and magistrate courts. A committee headed by Presiding Judge Robert A. Miller of the Sixth Judicial Circuit will conduct the study and then make recommendations to the Court.

The Court has determined that a Judicial Planning Committee should be created. This will be a body of judges, public officials, legislative representatives, and interested lay persons who will assess the long-range needs of the Unified Judicial System and who will make recommendations to the Court. We ask for your support in authorizing the staff positions for this committee, which will be funded by Law Enforcement Assistance Administration funds.

A word now about the fines and forfeitures collected by the Unified Judicial System. The courts, of course, were never intended to be, and should never become, instrumentalities whose principal function it is to collect money and thus somehow become economically self-sufficient. On the other hand, the imposition of court-imposed fines and forfeitures necessarily results in the collection of substantial amounts of money. In Fiscal Year 1978, (and all of the following figures are rounded off) state fines collected totaled $2,324,000.00. These fines were distributed to school districts within the counties wherein they were collected. Court-imposed forfeitures totaled $49,500.00. Fines and forfeitures for violations of municipal ordinances amounted to $1,244,000.00, of which thirty-five percent came into the state general fund, with the balance remaining with the cities wherein collected.

COURT SERVICES DEPARTMENT

We have now had the benefit of eighteen months' experience in administering the adult probation program and the alternative care program (formerly called the Youth Services Program). At the close of Fiscal Year 1978, some 1,016 adult felons, who might very well have otherwise been committed to the already overcrowded State Penitentiary, were receiving probation services from our court service officers.

With respect to the alternative care program, some 310 children were placed in foster homes and group-care facilities under the supervision of our court service officers as an alternative to being committed to the State Training School. Some 1,200 young people were diverted from becoming formally involved in the juvenile justice system and were provided, along with their families, services without the stigma of the label of delinquency. Our circuit courts placed 847 young people in community-based probation programs as an alternative to expensive institutional care. At a time when the juvenile population between the ages of ten and eighteen decreased by eight percent in South Dakota from Fiscal Year 1975 to Fiscal Year 1978, the commitments by our courts to the State Training School decreased by some forty-five percent, a tribute to the screening processes and supervision of the court service officers and to the awareness and recognition on the part of our circuit judges of the benefits of the alternative programs available to meet the needs of those young people whose conduct has demonstrated their need for supervision.

Effective July 1, 1978, the Unified Judicial System developed a misdemeanor court services program under the direction of Jay Newberger, our Director of Court Services. The principal purpose of this program is to provide our judges and magistrates with pertinent information for sentencing purposes and to provide selected offenders with treatment services as an alternative to being committed to jail. I would point out that during the first six months of this program, our court service officers collected nearly $31,000.00 out of the $51,000.00 in restitution that misdemeanant violators were ordered to repay by our judges and magistrates. We can assume that most, if not all, of the remainder of that sum will be collected in due course of time. In this regard, I would also point out that 424 juvenile offenders were required to pay victims almost $44,000.00 as a result of our Victim Assistance Restitution Program in Fiscal Year 1978.

We have instituted a formalized training program to provide professional development training to our court service officers, a program that promises to be highly successful.

Although this is neither the time nor the place for an extended discussion of the problem, I feel that I must at least briefly allude to the situation at the State Training School that has given rise to wide-spread publicity concerning the limitation on the number of young people that can be committed to that facility. As you may know, events of recent days have rendered moot the factual situation that had caused one of our circuit judges to deem it necessary to institute judicial proceedings against the Superintendent of the Training School. Accordingly, there will no longer be the necessity for an appeal from those proceedings. Mr. Newberger and I have communicated our thoughts on this matter to the chairman and members of the Appropriations Subcommittee, and we stand ready to offer any additional information that might be of help in resolving what may be a recurring problem. As we seek to resolve this matter, I think that it would behoove all of us to give heed to the suggestion contained in an editorial that appeared in the Sioux Falls Argus Leader on December 21, 1978, to the effect that reasoned deliberation and communication might very well be a much better vehicle for the resolution of this problem than continued litigation. In saying this, however, I want to make it unmistakably clear that our circuit judges must of necessity be free to discharge the awesome responsibility that you have placed upon them to make those decisions with respect to the disposition of juvenile cases that will be consistent both with the best interests of the young person affected and those of the public at

large. As we of the judicial and legislative branches seek to carry out those responsibilities that have been separately allocated to us, we would do well not to substitute our judgments for those judgments that have been committed to the discretion of another branch of government. These comments should not to be taken as a call to confrontation, but as a plea for cooperation. I am confident that our circuit judges have respected and will respect the limitations that result from finite resources, and I am equally confident that you will provide the resources necessary to remove any unwarranted restrictions upon their awesome duty to make well-considered judgments affecting the lives of those young people who are in need of supervision.

WORK OF THE CIRCUIT COURTS AND MAGISTRATE COURTS

I am happy to report that from all of the information available to us, the work in the circuit courts and magistrate courts is being accomplished with dispatch. The Presiding Judges meet regularly with me and with our administrative staff for the purpose of resolving problems of administration and adopting uniform procedures for the more efficient administration of our court system. I have found the Presiding Judges to be of invaluable support in working to achieve the goals that the Unified Judicial System was designed to accomplish. Through their strong leadership, the work in the trial courts is being expediously carried out.

We have pursued our policy of supporting continuing judicial education for our circuit judges. I note that one of our circuit judges, Judge Christensen of the Second Circuit, has been selected to attend a specialized training program in state antitrust litigation at the National Judicial College. Other of our circuit judges have been asked to teach at national seminars specializing in juvenile court matters. It is a source of pride to us when our judges achieve this professional recognition.

In keeping with our policy of reviewing the need for judicial services whenever a vacancy is created as a result of death, resignation, or retirement, we conducted a hearing in the Third Judicial Circuit in Huron in early May in view of Judge Cheever's announced retirement effective July 1. In late August, we held a hearing in Rapid City to assess the needs in the Seventh Judicial Circuit in the light of Judge Bottum's mandatory retirement on January 2, 1979. Following an extensive presentation of evidence at these hearings, the Court concluded that there should be no change in the number of circuit judges in those circuits. Following the election of Judge Henderson and Judge Fosheim to our Court, we reviewed the information presented at the earlier hearings in the light of more recent statistics and again concluded that there should be no change in the number of circuit judges within the Third and Seventh Circuits.

We also conducted a hearing in Sioux Falls on the need for additional service in the magistrate court in the Second Judicial Circuit, following which we concluded that the workload justified the creation of a second full-time law-trained magistrate position.

UNIFIED JUDICIAL SYSTEM BUDGET

In keeping with our past policy, the Court submitted its Fiscal Year 1980 budget request to the Governor's Budget and Finance Office. Not only did we submit all information submitted in prior years, at our direction Mr. Ellenbecker, our Budget and Finance Officer, submitted additional details requested by that office. Without going into the details of our requested budget

or the action that the Governor's Budget Office took with respect to that request, suffice it to say that not all of our proposals were included within the Governor's recommended budget. I have taken up this matter with the Appropriations Subcommittee and stand ready to provide additional information and explanation as required. As the Court fulfills its constitutional mandate of submitting annual budgets for the Unified Judicial System, we should come before you as a separate and equal branch of government, clothed with at least that degree of respect for our fiscal restraint and budgetary responsibility that will lend a presumption of correctness to our proposed budget. We would hope to demonstrate with respect to our budgets a credibility that may very well be unique in state government. We seek not to play charades with the budget office or with the Appropriations Committee, but rather seek to present budgets that represent, in our collective judgment, that which is necessary if the Unified Judicial System is to fulfill its responsibility of providing effective, speedy justice to the citizens of this State. This is not to say that we are insensitive or oblivious to the fiscal constraints and limitations of revenue that the Legislature must consider in allocating the resources among the branches and agencies of state government, but that indeed we in the first instance have taken those constraints and limitations into account in formulating our budget requests.

One final word on fiscal matters. On behalf of the Judiciary, I want to express our thanks for the salary increase that you granted to us this past year. We appreciate your consideration of a subject that does not rank high in the scale of popular values, and we know that you will give us your continued support in keeping our salaries abreast of the inexorable tide of inflation.

OTHER HIGHLIGHTS OF THE PAST YEAR

Once again the passing of the year has seen a turnover in the membership of the Court. As you know, Justice Zastrow was defeated in the primary election and Justice Porter was defeated in the general election. Their successors who sit before you today bring to the Court many years of legal and judicial experience. Justice Henderson is no stranger to these legislative halls, having served as a member of the State Senate in 1965 and 1966, and again in 1969 and 1970. He comes to us from a background of twenty-two years in the private practice of law and four years as a judge of the Seventh Judicial Circuit, having been elected as circuit judge in 1974. We look forward to the benefit of his combined legal, legislative, and judicial experience during the coming years of his service with the Court.

Justice Fosheim comes to us as one of our senior circuit judges, having been appointed to the circuit bench by Governor Herseth in 1959 after thirteen years in the private practice of law. He was appointed the first Presiding Judge of the Ninth Judicial Circuit in 1973 following court reorganization, and was named Presiding Judge of the Third Judicial Circuit when the Third and Ninth Circuits were combined in 1977. We look forward to the benefit of his long years of experience on the trial bench as he takes his place with us on the Court.

I might add that only a few short hours ago we completed our first term of court with our new colleagues.

During the past year the Court continued its policy of holding terms of court outside the city of Pierre. Last March we heard arguments at the Law School in Vermillion, and in October we

heard arguments on the campus of South Dakota State University in Brookings. We plan to hear three days of arguments at the Law School this coming March.

This past September, Justice Dunn announced to us that he did not desire another term as Chief Justice. After my experiences during the past four and one-half months, I can well understand his decision not to serve another term, but had he expressed a willingness to serve, the position would have been his again. Whatever accomplishments the Court can be credited with during the past four years, they are due to his extraordinarily able leadership. The most fitting tribute that I could pay to him today would be to say that he, like all great leaders, led by example and not by edict; by deed and not by decree. He completed the process of court reorganization that was begun under the leadership of Chief Justice Biegelmeier, and he never once flinched or faltered at the hard decisions inherent in that process. The Bench, the Bar, and the public of this State owe him a debt of gratitude that will not soon be repaid. We look forward to his continued service on our Court and in the wise counsel and advice that he has so unstintingly given to us in the days that have passed.

CONCLUSION

When Chief Justice Dunn addressed you from this very same podium last January, he spoke eloquently of the concept of the separation of powers that exists in our tripartite form of government and at the same time pointed out the crucial interdependence and support within that same form of government. Slightly more than one week ago, Governor Janklow addressed the same subject in his State of the State address. I need not belabor the issue, for I believe that the point has been well made. I would merely emphasize, however, that when we of the judicial branch speak in terms of the separation of powers, we seek not an imperial but an independent judiciary. Nor do we wish to engage in rhetorical warfare with our co-equal branches of government. There may very well be inevitable tensions and conflicts inherent in a tripartite form of government such as ours. I can only pledge that during my term of service I will do what I can on behalf of the Judiciary of this State to minimize that tension and conflict.

I would close these remarks, then, by paraphrasing the words of Emmet John Hughes that appeared in an article on the powers of the Presidency in a recent issue of Fortune magazine: A court can survive only with the people's support and trust, but it must prove itself no mere creature of their acclaim and applause. It must pursue its largest aims assuredly, but not arrogantly. It must treat the other branches of government respectfully, but not meekly. It must wear its mantle of responsibility courageously, and not complacently.

As we enter upon this new year, my colleagues and I intend to follow those precepts. As we do, we look to you for cooperation where cooperation is due, for assistance where it is yours to give, and for the reciprocal deference for our institutional role that we have so diligently labored to extend to the other branches of government. I am confident that as we strive to fulfill our constitutional roles in the months and years that lie ahead, we will grant to each other that respect that is the hallmark of a government that is founded upon the concept of separation of powers—a respect that is granted not grudgingly, but gladly; not glibly, but genuinely.

In that attitude of mutual cooperation and respect, let us then pursue our separate but yet related

goals, secure in the knowledge that we are keeping faith with those who constitute the ultimate source of our strength and our authority—the citizens of this great State.

Mr. President, Mr. Speaker, my colleagues and I thank you for this opportunity to appear here today, and we look forward to meeting and working with you and your colleagues in the days and weeks that lie ahead.