

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 2003, in Pierre, South Dakota

Dear Governor Rounds, members of the Legislature, Constitutional Officers, my fellow Justices, Circuit Court Judges, employees of the Unified Judicial System and all citizens of the State of South Dakota:

As I begin my second year as Chief Justice of the South Dakota Supreme Court, it is my pleasure to bring you, for the first time in many years, both an oral and written report on the state of the judiciary. I am pleased to report to you that the Unified Judicial System is strong and working well to meet the challenges facing us.

SEPARATION OF POWERS

In 1889, our constitutional convention created three separate, co-equal, branches of government, the legislative, executive and judicial. This concept is based on our Federal Constitution and exists in every other state in the country.

While the theoretical concept of separation of powers is well known, its actual operation can be less clear. For me, it is comparable to the tasks I came to comprehend in my 20 years of service on the Sisseton Volunteer Fire Department. To get the job done of putting out a fire, you needed a fireman to hook up the hose from the hydrant to the fire truck, a second fireman to run the pumps on the truck and a third to operate the hose nozzle to put water on the fire. Should the hose nozzle fireman decide to leave his post and inspect the hydrant or truck, no water gets to the fire. Should the truck operator decide he would like an up-front view of the fire next to the nozzleman, soon the truck is non-operational and no water is pumped through it to the hose nozzle operator. If the operator of the hydrant and hose decides to go sit in the truck and take a break, a hose can break or couplings come loose and the water spills on the ground instead of getting to the fire. The bottom line for firemen, as well as those of us who serve the public in state government, is that we all have our separate jobs to do and to successfully complete our constitutional tasks, we must faithfully tend to our duties and let those with other duties do the same.

THE LIMITED NATURE OF JUDICIAL POWERS

From time to time the judiciary is criticized for decisions it makes or orders it issues or does not issue. Often, a court's actions are a result of the limited nature of the powers the judiciary possesses. A former Justice of the United States Supreme Court stated that being a judge is not a roving license to do good. The Federal and South Dakota Constitutions, along with the laws passed by Congress and this Legislature, comprise the framework that guides judicial decision making. Judges are not free to enforce laws they like and discard the ones they do not; they must enforce all evenly.

The Courts are also limited in their decisions by the evidence they receive in an individual case. Just “knowing” or “feeling” a person is guilty is not enough. The constitutional protections of our criminal system require that a person accused of a crime be convicted only by sufficient evidence proved beyond a reasonable doubt to the satisfaction of all twelve jurors.

If a case is appealed, the Supreme Court is limited to the record that was created at trial. No new evidence is taken, but rather a review of the decisions made at the trial level is undertaken. In reviewing these cases, we are guided by the proposition that a person is entitled to a fair trial, not a perfect one. Only if there was error committed at the trial which prejudiced the rights of a party to a point where it called into question the outcome of the trial, is the case reversed and sent back to the trial court for a re-trial without that error.

CHANGING TIMES-CHANGING CHALLENGES

Some areas of the law are constant and some are not. If I were able to meet our constitutional fathers such as Madison, Hamilton and Jefferson, despite the 200-year difference in our legal experiences, they and I could converse intelligently in certain areas of the law and for the most part understand what the other was saying. However, in other areas of the law, societal pressures and needs have forged a necessity to create new legal responses or significantly modify those that exist.

Approximately ten years ago at a judicial educational meeting, each Supreme Court Justice and Circuit Court Judge in this state was asked to list, in order of priority, the ten things that would most significantly impact the South Dakota judiciary in the next ten years. With no group discussion, it was anticipated the answers would be diverse. Instead, every judge in that room listed as his or her number one factor the disintegration of the family. This prediction has been prophetic. Those of us who have been in the judicial system for some time see the results of this change on a daily basis. This evolving situation is becoming more of a challenge all the time, not only to work with the individual who is before the judge but also with family members. Many of our new programs, which I shall discuss later in detail, are in response to this challenge. We are most grateful for the support that has been provided in this area by the legislative and executive branches of our government.

THE ON-GOING WORK OF OUR COURTS

I am pleased to announce a newly updated Unified Judicial System’s Website where an expanded amount of information regarding our court system can be found. The annual report found on that Website should provide you with detailed statistical and written information regarding the entire Unified Judicial System.

Presently, the South Dakota Supreme Court hears arguments in approximately 90 appeals each year. This past August marked a new era for the coverage of these Supreme Court oral arguments. In cooperation with the South Dakota Public Broadcasting and the Bureau of Information and Technology, the Unified Judicial System launched “live” online streaming over the Internet of the audio portion of the Supreme Court’s oral arguments. Following some adjustments of the audio equipment in the courtroom, in November, the UJS publicly

commenced this new method of accessing the Supreme Court's proceedings. This service allows interested persons, who do not often attend appellate arguments, to listen to the oral argument of an appeal from their home, office or school. It also provides "gavel-to-gavel" coverage of the arguments, which better educates and informs the citizens of this state about the appellate process and their state government.

The broadcast is "live" and then is archived for Internet access at any time. A schedule of cases to be heard in any of the terms of Court is also available online. This new service includes the two terms during which the Court travels annually to high schools and colleges within the state to hear oral arguments.

The Court is also currently reviewing the rules for expanded media coverage of its appellate proceedings. These rules, published at SDCL 15-24-5 through -12 and available on the UJS Website, were adopted as a pilot project following a public hearing in June 2001. A second public hearing is scheduled for February 2003 to address the permanent adoption of these rules.

It is my pleasure to report that the Supreme Court is current with our cases. In FY2002, the Supreme Court disposed of 428 cases. We are firmly committed to ensuring the citizens of this State the highest quality of justice with timely decisions.

At the circuit court level, overall case filings have remained consistent with past years; however, we have seen significant increases in three major areas. While we welcome the use of this judicial procedure by those in need of its protection, the continual increase in domestic protection orders is cause for concern by showing the large size of the problem and its negative effects on the all-too many victims of this type of abuse. In FY2002, there were 2,893 people who appeared in circuit court on petitions alleging domestic abuse and seeking the court's protection from other people. In response to this increase, the court is again working with the Department of Social Services to staff domestic violence coordinators in both Sioux Falls and Rapid City to assist victims of domestic violence through a time of high emotions that can be difficult for many. This past fiscal year we also saw a 25% increase in the number of felony filings brought to circuit court and a significant increase in small claims filings. Further details concerning the work of the circuit courts and the entire system can be found throughout the Annual Report.

FISCAL MATTERS

For the past several years the Unified Judicial System has responded to the ever- increasing demands upon it with basically the same number of employees. This has been accomplished by the dedication and hard work of our personnel throughout the judicial system. We currently have 465 full-time FTE's. In prior years we have sought additional FTE's only when convinced that they were essential to our mission.

The Supreme Court and Presiding Judges are well aware of the fiscal challenges that currently face our State. For the upcoming year, we will be requesting a budget increase of only 1.3% in general fund appropriation and an overall budgetary decrease, rather than increase, of .3% excluding salary policy and health insurance. We believe this budget will allow us to continue to

provide the people of this state with an effective judiciary.

I would further call to your attention that the judiciary is an instrument of the state that provides revenue to various units of government. In the past fiscal year we collected \$27.5 million dollars for these purposes, as compared to our general fund budget of \$25.3 million.

PERSONNEL CHANGES

Justice Steven Zinter, of Pierre, was appointed to the Supreme Court in April 2002 after the retirement of Chief Justice Robert Miller. Justice Robert Amundson retired in October last year after serving the State of South Dakota for four years at the circuit court level and eleven years on the Supreme Court. Recently, Governor Janklow announced the appointment of Presiding Judge Judith Meierhenry of Sioux Falls to fill that vacancy. Justice Zinter and Justice Meierhenry bring decades of legal and judicial experience with them to their new positions. They will become valued members of this Court. We wish Justices Miller and Amundson a long and happy retirement.

In the circuit courts, Judge Jack Delaney was appointed as Circuit Court Judge to replace Presiding Judge John Fitzgerald, who passed away suddenly the previous year. Judge Stuart Tiede was appointed to a vacancy in the Second Judicial Circuit created by the retirement of Judge Richard Bogue. Recently the Supreme Court transferred a judgeship from the Sixth Judicial Circuit to the Seventh Judicial Circuit after we held a public hearing to determine the optimum need throughout the state for this vacant judgeship. It is scheduled to be filled by an appointment by the Governor in the near future.

We continue to offer to the judges and staff of the Unified Judicial System the highest quality of training to enable them to perform their duties in the best manner possible. Last summer the UJS hosted a four-state judicial conference inviting judges from Idaho, Montana and North Dakota. The UJS continues to value its on-going efforts to bring important and quality educational opportunities to its judges and employees.

SPECIAL COMMITTEES

The Unified Judicial System has two primary councils to assist the Supreme Court in the administrative oversight of the courts of South Dakota. These are the Planning and Administrative Advisory Council and the Presiding Judges Council.

The mission of the Planning and Administrative Advisory Council (PAAC) is to advise the Supreme Court on major administrative and procedural matters pertaining to resources, technology, demographics and planning. The Council, which meets quarterly, is considering such issues as how to economically provide judicial services to citizens in counties with rapidly expanding populations; how to provide the same services to citizens in counties facing declining populations, court reporting services and matters dealing with pro-se litigation. The Council will submit written proposals and recommendations to the Supreme Court for consideration.

The Council of the Presiding Judges includes each of the Presiding Judges of the seven judicial

circuits. Presiding Judges have administrative supervision and authority over the operations of the circuit courts, clerks of court and all other court personnel within the circuits. The Presiding Judges meet quarterly to discuss administrative issues and make recommendations when appropriate to the Supreme Court on administrative matters having statewide implication.

TECHNOLOGY IN THE COURTS

In February of 2002, UJS began pilot programs of a Juvenile Case Management and Civil Register of Actions systems in the Second Circuit. The juvenile portion of the system tracks delinquency, Children in Need of Supervision, and abuse/neglect cases and has created the “building blocks” for developing of a juvenile probation system. The civil ROA portion of the system tracks documents filed in civil cases and has created the “building blocks” for developing of a civil case management system.

COURT SERVICES

Since 1997 the judiciary has adhered to the restorative justice philosophy of community corrections. This philosophy balances the safety of the community with victim and community restoration and offender competency building.

During this past year, the Court Services Division advanced this philosophy with the introduction and implementation of new juvenile and adult risk and needs assessments. These “new era” research-based assessments will assist the judiciary with community safety issues. Additionally, these assessments more specifically identify and target issues within offender populations thus yielding a more efficient and effective service implementation.

Since July 1999, the UJS has been operating a Juvenile Intensive Probation Program (JIPP). This program continues to yield obvious benefits by keeping hundreds of youth out of more costly Department of Corrections placements.

There are, however, less obvious but perhaps equally beneficial rewards from this program. Through this program, we have learned that by identifying specific populations of offenders and applying specialized services to these specific populations, positive outcomes can be greatly enhanced. Using what we’ve learned, we are now piloting a Child in Need of Supervision (CHIN’s) Project in two counties. By changing the focus of a CHIN’s case from a child-centered issue to a family-centered issue, outcomes can be positively affected. The project is designed around a short-term (90-day) high impact treatment model involving mental health, education, and employment services managed by a team including a court services officer, the dispositional judge and the service providers. The project was only recently initiated so results are not yet forthcoming. The UJS received a grant for this study and a sincere thank you goes out to Senators Tom Daschle, Tim Johnson and Congressman John Thune.

The UJS is also in the program design phase for two projects affecting adult offender populations. One project targets DUI offenders. Since 1994, DUI filings have averaged nearly 9,000 per year with approximately 7,000 convictions. This particular population severely impacts the citizens of this State. The Court Services Division is currently studying research-based

programming designed for DUI offenders. It is the UJS's intent to pilot this programming along with specifically applied sanctions to the DUI population within specific jurisdictions, to measure its effect in comparison to non-participating jurisdictions in South Dakota. The program's effectiveness will be measured by comparing recidivism rates among the two populations.

Also, a second pilot design, being developed in conjunction with the Attorney General's Office, will be implemented to measure effectiveness of day reporting combined with specific sanctions in reducing recidivism of the Domestic Violence population.

The UJS recognizes the obligation to continue to develop alternative programming to address the special needs and unique problems of specific populations. Society changes and so we, as a service delivery system, need to continually evaluate and test in order to deliver services as efficiently and effectively as possible. In most instances, probation continues to provide the citizens of this State with an extremely cost-effective incarceration alternative.

DEATH PENALTY CASES

The people of South Dakota through this legislative body have decided that the death penalty is an appropriate punishment in a limited number of cases involving murder. The death penalty has been upheld as constitutional by both the United States Supreme Court and the Supreme Court of South Dakota.

The press has reported that in some other states, the quality of legal representation and fairness of the legal proceedings provided to a person facing the death penalty has been called into question.

In South Dakota, cases that involve the death penalty are taken most seriously by those in the judiciary and bar. Routinely, more than a single attorney is provided to the accused. Capable veteran members of the South Dakota Bar have stepped forward and accepted court-appointments to represent these accused. The trial courts have provided the accused with expert witnesses to prepare a defense. Significant blocks of times are allocated for preparation and trial of the case to avoid a "rush to judgment."

If a conviction results, the South Dakota Supreme Court allows 200 pages in briefing on appeal by each party instead of the normal 40 pages. Three hours are set aside for oral argument instead of the one hour that is allocated to other non-capital cases. The Justices spend many months carefully studying the substantial trial record, and our Court gives a detailed opinion on the issues raised by the defendant on appeal.

All members of the judiciary in this State are fully aware of what is at stake in these cases, and they will continue to do everything humanly possible to make sure the judicial system works as accurately and fairly as possible.

CONCLUSION

Last year, as I prepared my first message to you, it was clear that this nation had been attacked, although we were somewhat uncertain as to those who had attacked us and their goals. In the past year it has become clear that our enemies do not merely seek to destroy buildings, but have, as their ultimate goal, the destruction of any system of government and society that does not adhere to their dictatorial ways. In their view, the concept of equal justice under law gives way to any conduct that supports their terrorist goals. It is a tribute to our system of government that once again, as we have done for over 200 years, we are able to honor our citizens' legal rights while facing an enemy on the battlefield. History provides us with the ultimate result. This new group of would-be dictators is in reality no different than the other previous tyrannical "isms" which now grace only history's garbage heap. People, when given a chance, will not willingly follow such fanatics. Rather, as was forecast by a great American about 150 years ago, a government of the people, by the people and for the people shall not perish from this earth. For those who wish to argue the point, Lincoln made this observation in 1863. What other forms of government in existence in 1863 continue to exist today other than those that let the people decide?

In closing, I want to take this opportunity to thank Justices Sabers, Amundson, Konenkamp, Zinter, Meierhenry and Acting Justice Gors for their support and encouragement over the past year as I continue to serve the people of this great state as Chief Justice. The third branch of government, the judiciary, continues to be one of the finest in the nation because of the dedication and hard work of all employees of the Unified Judicial System who serve with excellence in response to the needs of our citizens.

Thank You

Respectfully submitted,

David Gilbertson
Chief Justice