

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 12, 2005, in Pierre, South Dakota

Dear Governor Rounds, Lt. Governor, Daugaard, 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 fourth year as Chief Justice of the South Dakota Supreme Court, it is my pleasure to bring you, once again, both an oral and a written report on the state of the judiciary in South Dakota. I am pleased to report to you that the Unified Judicial System is strong and working well to meet the challenges that face us.

THE ONGOING WORK OF OUR COURTS

The public may have the perception of the judiciary as an independent judge on the bench, a wise individual, but nevertheless an individual, dispensing individual justice. Many in the legal profession may share that view. However, the first week I became a judge, a wise veteran presiding judge shared with me his view of the South Dakota judiciary. He said it was like many persons in a boat powered solely by rowing. For the boat to move forward, each person must not only row, but row in rhythm. Should a single person get bored or tired and let his or her oar drop into the water, the boat would cease moving forward and probably start going in aimless circles. It was good advice then and it still is today. I am pleased to report that those who make up the UJS are rowing in sync.

The Supreme Court is once again, as it has been in prior years, current with its caseload. We anticipate handling about 475 filings on an annual basis. Because all cases may be appealed to us as a matter of right under the South Dakota Constitution, we face a broad spectrum of legal issues. I would like to thank Justices Sabers, Konenkamp, Zinter and Meierhenry for their cooperation in once again achieving a timely resolution of the disputes that are brought before us.

As Thomas Jefferson noted, "information is the currency of democracy."

Our oral arguments and written opinions continue to be available on the Internet at no cost at "sdjudicial.com." Anyone may now listen to our cases live as they are being argued. We also archive our oral arguments and opinions so the public may review any case of interest at their convenience.

For the past 28 years, the Court has held a fall term of court outside of its courtroom in Pierre. This year the Court held its November term of court at Dakota Wesleyan College in Mitchell. We were pleased to inaugurate their new multi-purpose center by holding our term there. Once again, we also held our March term of court at the School of Law at the University of South Dakota.

At the magistrate and circuit court levels, the courts that each of you has in your local county, the number of criminal filings increased. Of that, a cause for concern is the small increase in felony filings. Only last year I was able to report to you that felony filings had decreased 7.5% over the previous year. In FY 2004, 3,727 people appeared in circuit court on petitions alleging them to be victims of domestic abuse and seeking the court's protection from other people. This was an increase of 3.4% in such applications and is in addition to the 24% increase of a year ago.

Victims of domestic violence are not limited to adults in need of orders of protection. Even more helpless are the children who are victims of abuse and neglect. In FY 2004, the number of filings in South Dakota for abuse and neglect rose by 490 over the previous year. Although we comprise a state of many cultures, a common thread of our heritage is the long-standing recognition of care for the needs of children. The biblical admonition that little children are to be protected rather than treated as another piece of family property to use or abuse is a hallmark of our country's Judeo-Christian heritage that arrived on our shores with the Pilgrims and continues to this day. Similar traditions of concern and care for children come from our state's Native American culture. It has received continual legal recognition from our earliest statutes. There is no other way to view this large statistical increase than with alarm and concern. While we have been characterized as a "throw-away society," it can in no way include indifference to the plight of children in need.

Caseload statistics for your local counties are available in the Annual Report of the UJS available on our Web site.

FISCAL MATTERS

For the past several years, the Unified Judicial System has responded to the ever-increasing demands placed upon it with basically the same number of employees. We accomplished this through the dedication and hard work of 479 full-time personnel in the judicial system. We have sought additional FTEs for the UJS only when we were convinced they were essential to our mission.

The Supreme Court and the presiding circuit 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 1.8% in general fund appropriations and an overall budgetary increase of 2.9%, excluding salary policy and health insurance. This budget will allow us to continue to provide the people of this state with an effective judiciary utilizing the existing number of judges and justices. Even with the requested increase, the UJS budget represents a very small portion of the state's total budget, that being 2.8%.

On the other hand, I would call to your attention the fact that the judiciary is an instrument of the state that provides revenue to various units of government. In the past fiscal year, we collected \$21.4 million, as compared to our general fund budget of \$26.5 million. Of that \$21.4 million, we returned approximately \$13.5 million to the counties and school districts, \$7.1 million to the state and \$850,000 to the cities.

PERSONNEL CHANGES

This year we are proposing to shift some tasks that involve technology from contracts with out-of-state vendors to new employees of the UJS. We are fully cognizant of the long-term implications of adding additional staff. However, we looked at our dedicated employees who work in this area compared to the money that is required for outside contracts with vendors, and concluded that this employee option is the best way to perform technology tasks. The UJS currently spends substantial sums in contracts with these out-of-state vendors. It is a cause for concern that in certain instances, the contracted vendors may understand some internal technological operations of the UJS better than we do. From a policy standpoint, this is outsourcing jobs that could go to South Dakotans in South Dakota. Moreover, we intend to achieve greater productivity by this change.

RULES FOR JUDICIAL ELECTIONS

Judicial elections in various forms are the norm for nearly every state in this country. South Dakota has undergone a transition over the years in how it selects its judges.

Judicial elections attempt to strike a proper balance between making the judges of this state accountable to the electorate and maintaining the impartiality of the judiciary. The impartiality of the judiciary in this state is not bi-partisan; it is non-partisan with equal justice for all being the goal.

In territorial days, the President of the United States appointed and removed our judges. From 1889 to the 1920s, judges were elected on a partisan ballot. However, the citizens became uncomfortable with the concept "vote for me because I am the Republican/Democratic candidate for judge." At that time, non-partisan elections were instituted. In 1980, the voters of this state approved a merit/retention election system for Supreme Court justices.

Voters this past November had the opportunity to pass on a somewhat similar proposal for circuit court judges. The citizens of this state chose to retain our current non-partisan system of direct contested elections of circuit judges. They concluded that this system has served us well in the past and is appropriate to retain for the future. The discussion over the merits of the two election systems served a valuable purpose in that it drew the public's attention to an issue that ordinarily does not receive significant public study and review. Ultimately, the citizens of this state had the final say on how they wish to select their circuit judges.

Until recent years, South Dakota had strict guidelines that controlled the conduct of candidates in a judicial campaign. In keeping with the concept of impartiality to litigants when they enter a courtroom, judges were not allowed to announce their positions on issues that were likely to come before them, nor were they allowed to pre-judge cases by committing to how they would rule on the issue before both sides had an opportunity to present evidence and argue their positions in court. One judge put it in baseball terms: Judges are like umpires. How can you call a pitch a ball or a strike before it is even thrown?

Our rules also had strict limitations on how money could be raised for judicial elections. It had to

be raised without the judicial candidate knowing the name of or the amount given by the contributor and under no circumstances could the judicial candidate directly solicit lawyers or the parties involved in lawsuits for contributions. This was to avoid the claim that judicial decisions could be bought or influenced. Consequently, in many instances judicial elections were run solely by the candidate's funds and little was spent other than a lot of shoe leather going from door to door.

In the past couple of years, federal decisions from the United States Supreme Court and other federal courts have invalidated or at least called into question many of our most important current judicial election rules. With these rules now in doubt, we must fashion a way to maintain the impartiality of the judiciary and avoid the specter of direct solicitation of attorneys, litigants and potential litigants by judicial candidates. We also hope judicial elections do not become the high-priced, vitriolic and often disgusting contests we have observed taking place in other states. For example, it was reported that the successful candidates for one state's Supreme Court spent ten million dollars in a partisan election for an electoral triumph that resulted in a six-year term on that court. In the twenty states that held contested Supreme Court elections in 2004, \$35 million was raised for election campaigns.

To protect the fairness and integrity of our judicial elections, in the next year or two, the UJS will commence a review of its judicial election rules in an attempt to avoid an "anything goes" situation in judicial campaigning while still complying with the federal court rulings. The current concern over the lack of enforceable judicial rules was summed up by a friend of mine who described it as the Super Bowl in the fourth quarter. The game is tied; however, there are no referees and no rules.

COURTHOUSES

In 1862, our first Territorial Legislature met in Yankton. One of its first acts was to organize local government by counties. That was soon followed by the construction of courthouses to provide a place for those entities of government to allow citizens to conduct the day-to-day legal business that affects their lives. That method continues to this day and will do so into the indefinite future. Of South Dakota's 66 counties, 64 have courthouses. I would suspect that if you took all the state governmental buildings and attempted to measure how much of the business of government is conducted therein it would be a tiny fraction of the business that is done in the 64 county courthouses across this state.

Courthouses mirror the life of the community-the sorrow, the joys and everything in-between. Bernie Hunhoff, a former member of the State Senate, described their function in his South Dakota Magazine in an article entitled "Prairie Palaces of Justice":

Births and deaths are logged there. Elections end there. Marriages start and stop there. Business, family and neighborhood feuds go public there. The joy of land ownership is recorded, protected (and taxed) there. Wise black-robed judges, eloquent attorneys, pistol-packing sheriffs, easy talking politicals, and number-wise bureaucrats serve us from their surrounds-the marbled stairways, stained glass, war monuments and a maze of hallways, doors and desks and file cabinets....

I would agree with Mr. Hunhoff. The morning before I was sworn in as a circuit judge in 1986, I conducted my two final hearings as an attorney. One was for the adoption of a child. Events do not get any happier than that. The second was to open a probate for a young man who had died in his early 20s.

If you go back to the original pictures of a county-seat town, you would often see wooden structures for homes, businesses, schools and even churches and then you would see this huge, brick and often domed building dominating the town and area. That building was the courthouse. This shows the importance those early settlers placed upon the law. Many of the early leaders were immigrants who came from countries where they had to answer to autocratic kings or face anarchy. To them, coming to this country and state where matters were decided fairly by the law and not by the whims of rulers or mobs was of the utmost importance, and justified the time and expense of constructing a majestic courthouse. Moreover, it allowed for the dispensing of justice in their own locale by a jury of their own people.

Over the years, we have torn down and replaced houses, businesses, schools and churches with newer and larger structures. The "mom and pop" stores have given way to malls, strip-malls and Wal-Marts. However, rarely have we torn down a courthouse. Most often demolition has been avoided by modernization and building additions to the original structure. In many counties, those palaces of justice have welcomed the public for a century or more. Three that are still in use pre-date our statehood. Many are older than this Capitol building.

I have been in most of these buildings. They are found in towns that range in size from Sioux Falls to three that have fewer than one hundred persons. I am impressed by the local pride in "our courthouse" and the effort made to keep it up despite, in most instances, its advancing age.

INTERACTIVE VIDEO CONFERENCING (ITV)

It is no secret that the population within our state has been shifting in recent decades. This has resulted in growth in some counties and a decline in others. While caseloads and their budgetary considerations determine the amount of judicial services the UJS provides to a county, we will do our best to see that all citizens have access to legal services in their local courthouse on a reasonable basis.

Minnehaha County, which boasts a fast growing population, has met the increased demands for judicial services placed upon it by constructing a new courthouse. Pennington County has kept the grace and elegance of its old courthouse while expanding and improving its facility. Lincoln County, which is currently the 14th fastest growing county in the nation, is still using a century-old courthouse but is considering its options for future needs. Caseloads have experienced major growth and projections for the future are that both civil and criminal filings will continue to increase substantially in these types of growth areas. This will call upon counties with expanding populations to plan for future needs and growth. While judges may be physically present in the courthouse, exploding caseloads call for a maximization of their available time to avoid backlogs.

Currently, in many sparsely populated counties the judge comes once or twice a month. In the meantime situations may arise that call for quicker judicial action. Matters such as the issuing of temporary domestic protection orders, setting of bond in criminal matters, and deciding whether to hold a juvenile in detention fall into this category.

We are attempting to enhance access to a judge for our citizens through a system called interactive video conferencing (ITV). It is in essence a two-way television system where the persons on each end can talk to and see each other. As an example, if a person is charged with a criminal offense in Ziebach County, they are incarcerated in Sturgis. For a bond hearing that may take five minutes, the Ziebach County Sheriff travels from Dupree to Sturgis, returns to Dupree for the hearing, and then after the five-minute hearing, returns the prisoner to Sturgis if bond is denied and finally drives back to Dupree. With the use of ITV, not one mile would have to be driven. The prisoner and possibly the defense attorney could remain in Sturgis, the state's attorney could stay in Dupree and the judge could be in either place or elsewhere. The obvious financial savings to the taxpayers and counties will be substantial.

Last year we commenced a pilot project with interactive video conferencing in the Fifth Judicial Circuit by placing systems in Brown, Day, Walworth and Roberts Counties. The court officials in that circuit report it has been an unqualified success. We will be moving forward this year to place the system in several counties in the Sixth Judicial Circuit, which is in the central portion of the state, and the Fourth Judicial Circuit, which is in the northwest portion of the state.

I wish to emphasize that ITV is not a program to eliminate personal visits to the counties by the judges; it is in addition to those visits. Judges will continue to make their regularly scheduled live visits to their respective counties where they hold court. ITV will allow quick access to a judge when needed at other times and will avoid the winter weather problems that often make travel by a judge difficult or impossible. It will also allow more efficient use of a judge's time. When I was a judge, there were many instances where I would drive a 200-mile round-trip for a five-minute hearing. The hearing was necessary but the price was four hours of windshield time. My goal is to see that the interactive video conferencing system is installed in every courthouse in the state where the caseload justified the investment.

COURTHOUSES-CLERKS OF COURT OFFICES

The number of filings of actions and caseloads are a good guide to determine how many hours a clerk of court's office should be open. In several counties, these numbers are very small. To justify keeping the office open or to increase business hours, the UJS has used computers and technology to shift workloads to these rural areas.

Criminal background checks provide one opportunity for the shifting of work within the UJS. Because of terrorism and security concerns, criminal background checks are becoming more frequent. In South Dakota potential employers, government, schools, churches and volunteer organizations request such checks. The number of these requested checks is exploding. In FY 2004, the UJS performed approximately 96,000 background searches. It is anticipated that in FY 2005 we will do over 115,000 searches. Since a computer does the searches, they can be done at a rural clerk of court's office just as easily as in Pierre or at an urban clerk's office.

We are considering a similar change in the way we handle traffic tickets. Currently, when a motorist is stopped for a traffic violation, they have the option of pleading guilty and paying the fine by mail in lieu of a court appearance. The vast majority of tickets are handled in this manner at the courthouse in the county where the violation occurred. Under the new proposal, rather than sending the ticket to a busy urban clerk's office should the arrest have occurred in that county, the ticket would be sent to a rural clerk's office for processing. Our goal is to equalize workloads and keep the doors of the clerks of court offices open for the public to the extent it can be economically justified.

COURTHOUSES-RURAL LEGAL SERVICES

An essential issue in retaining the viability of our rural courthouses is keeping access to local legal services. While South Dakota has a sufficient number of attorneys, their location is not distributed in the same manner as the population. The Secretary of the State Bar informs me that one-third of the active members of the entire State Bar have post office addresses in Minnehaha and Lincoln Counties. Compare that with the number of attorneys in small or even medium-sized county seats. The few attorneys who remain in these rural locales are in many instances approaching retirement and there are no replacements in sight. With the full cooperation of Dean Vickrey, I have attempted to urge those students who attend our Law School at the University of South Dakota to consider the professional opportunities in these smaller county seats. A hospital will not last long with no doctors and a courthouse and judicial system with no lawyers faces the same grim future. Local county lawyers should not suffer the same fate as the tin lizzie or the buggy whip.

As I drive across this state, I sadly note all too many abandoned farms, homes, stores, churches and schools. The UJS will use its best efforts to see that courthouses are not added to that list. In the era of two dollar per gallon gas, we hope to provide access to judicial services within a reasonable distance for all of our citizens.

COURTHOUSES-AMERICANS WITH DISABILITIES ACT

In 1990, Congress passed the Americans with Disabilities Act. One goal of this Act is to allow those with physical disabilities to achieve the same access to public facilities that those without them enjoy. Although the county commissioners in each county are to be generally complimented on their efforts to keep up their courthouses, they are still, in many instances dealing with a building that was designed 100 years ago or more. Newer courthouses are a rarity in this state. Our 100-year-old courthouses were built with no thought to the needs of the disabled. In all too many counties, steps up or steps down preclude access by the physically disabled even into the building, let alone to the courtroom or clerk's office. This is becoming more of an issue in counties where the population is aging. Citizens who were vigorous in their younger days now find stairs an obstacle or impossibility. Moreover, the courtroom is always found on the top floor of the courthouse, be it the second floor or in some instances, the third floor.

In visiting with judges and clerks of court, they attempt to provide access to court services for

those with physical disabilities by holding hearings on the ground floor or in adjacent buildings. Hearings have been held in courthouse parking lots, nursing homes or even personal homes.

This past summer, the United States Supreme Court decided a case concerning access to courthouses by disabled persons. It arose out of Tennessee, which has a system similar to ours where the counties physically and financially control the courthouses. The Supreme Court held that if equal access is denied, the county and the state could be held liable for damages. This gives us cause for concern as to whether South Dakota faces future litigation for lack of equal access.

Some courthouses, especially the newer ones, do a good job of providing equal access. There are a few excellent exceptions to the problems faced by older courthouses such as Spink County, which built a courthouse in 1927 containing an elevator. All three floors of this courthouse, including the judge's bench, are fully accessible.

Under the Americans with Disabilities Act, the days of holding hearings in jail cells and churches across the street may no longer be acceptable. Simply excusing a person summoned for jury duty on the basis that he or she cannot function in the same manner as a citizen fully capable of using all their motor skills is no longer any more appropriate than are some of the other archaic bars to jury service based on race, religion, sex or other discarded notions-now seen as repugnant to a fair and impartial jury. This area of the law is evolving for courthouses as it is for all public buildings.

In visiting with county officials, they are concerned about the issue and want to comply. However, given the 100-year-old structures they are dealing with and the tight local county finances, installing elevators or other solutions is not always feasible. It may take a combined effort by the State of South Dakota and the counties to address successfully the challenge to provide equal access to all South Dakotans. As Sir Winston Churchill noted, "A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty."

COURTHOUSES-EQUAL JUSTICE

Courthouses would be merely a collection of stone, plaster, wood and other materials if they did not stand for something special. That special concept is equal justice under the law. With that in mind, the Supreme Court created an Equal Justice Commission in early 2004. Its task is to identify any inequalities in our judicial system and make recommendations to the Supreme Court to successfully address them. The commission is broad based, with membership composed of citizens, lawyers and judges. The goal of the commission is contained in its title: "Equal Justice." It goes without saying that justice that is not equal and fair is simply not justice at all.

The eleven-member commission is in the process of conducting a series of public hearings throughout the state. It will then undertake the process of making its recommendations to the South Dakota Supreme Court

REVISION OF THE CRIMINAL CODE

Last year, this Legislature established a commission, comprised of legislators, judges and lawyers, to study the possibility of a new criminal code. It has been several decades since such a project was undertaken by this body and enacted into law.

The report of the Criminal Code Revision Commission is now before you and it is my understanding that it will be taken up by you during this session. The Supreme Court has said on numerous occasions that public policy decisions concerning the definition of criminal acts are best left to you. However, I would respectfully suggest that in the matter of sentencing, the old axiom, "the punishment should fit the crime" is an appropriate one. In my opinion, the more discretion left to the judges of this state in fashioning sentences, the better. The nationwide uproar over sentencing alternatives such as guidelines shows the problems with looking up a criminal sentence in a sentencing table in the same manner one would look up the tax due on an IRS tax table. Sentencing should not be uniformly dealt out in an endless repetition like a fast food franchise grinding out hamburgers-all being the same, or as one commentator astutely described it, as "McJustice."

Judicial discretion is especially important for young, first-time offenders. I would estimate that of the suspended impositions of sentence I gave first-time felons when I was a circuit judge, over 75% successfully completed the program and did not re-enter the criminal system; rather, they became useful, law-abiding citizens.

You, as a Legislature, face a daunting task when undertaking a comprehensive review of the entire criminal code. Keeping what has proven itself over the test of time while updating other sections to bring them into relevance with 2005 is certainly a challenge. I wish you the best in this undertaking.

CONCLUSION

We are at war with a terrorist enemy that follows no rules of civilization and has sworn to destroy us. It is a testimony to our people and form of government that in the midst of this, we not only go on with our daily lives, but continue to conduct an open, democratic government, including free elections and judicial proceedings that attempt to provide equal justice for all.

A review of our history as a people shows that we have rarely been without significant challenges, but we have successfully overcome them. Benjamin Franklin predicted our success over 200 years ago.

In 1787, this country was a disorganized collection of states so loosely connected that it appeared the entire experiment in democracy might collapse into chaos. In a last attempt to salvage the victory of the American Revolution, delegates met at a Constitutional Convention. At numerous times, disagreements between the states threatened to wreck this effort. Finally, through some timely compromises, our Constitution was approved.

At the end of the convention, Benjamin Franklin, then in his 80s, rose and commented on the chair occupied by George Washington, the convention chairperson. The back of the chair contained a carving of a partial sun on the horizon. In reference to the fate of the new United

States, Franklin mused that throughout the convention he had looked at the carving, pondering whether the partial sun was a rising sun or a setting sun for the new country. With the adoption of the Constitution, he declared, "but now at length I have the happiness to know that it is a rising and not a setting sun."

Franklin was correct. May we all strive to serve the people within our constitutional duties to ensure that the sun of the United States and South Dakota continues to be a rising sun and not a setting sun.

May God continue to bless us all, especially those who defend us in harm's way.

Respectfully submitted

David Gilbertson
Chief Justice