

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 13, 2011, in Pierre, South Dakota

Governor Daugaard, Lt. Governor Michels, members of the Legislature, Constitutional Officer, my fellow Justices, Judges, and all citizens of the State of South Dakota:

This year we welcome a new Governor, Lt. Governor and a significant number of new Legislators. In a tradition started by President George Washington in 1796 when he voluntarily stepped down from the Presidency, the citizens elected to public office who retire from that office at the end of their terms are replaced by others. The government, however, continues.

While we welcome the new, we remain fully aware that significant challenges confront us, especially in the fiscal area. Our state continues to experience the demands of too few dollars being chased by too many needs. Last year and probably this year we will see few, if any, new programs. New proposals of promise rather than receiving a “yes” or “no” answer on their merits are now told to “wait.” We have to be realists. The current economic conditions dictate that some non-essential needs may go unmet, be delayed, or scaled back. Other are in a holding pattern when expansion is needed. As a state government we have found out first hand the effect of President Harry Truman’s observation, “it’s a recession when your neighbor loses his job; it’s a depression when you lose your own job.”

Yet this situation should not cloud our obligation to plan for the future of this State. South Dakota was literally born during what many believe to be our greatest national crisis. In 1861 the United States was falling apart and a Civil War loomed on the horizon. Congress, rather than simply wringing its hands and preparing for war, passed a statute that created the Dakota Territory. By 1862 the war was going from bad to worse for the Lincoln administration. Yet Lincoln had the foresight to get Congress to pass the Homestead Act which opened up huge tracts of land in Dakota Territory for settlement by tens of thousands of settlers. That year Congress also passed the Land Grant College Act which resulted in a substantial benefit to higher education in this State. We would do well to learn from this example.

We must be fiscal realists based on our current situation. But we also must go ahead and plan for a future which will carry with it a brighter day. Why? It is due to the fact that there is no moratorium on crime, drug addiction, alcoholism, domestic abuse, or the need for access to justice. If anything, our current economic woes have increased these problems. While our present ability to respond is muted by our financial situation, we need to plan for the day when our resources will once again allow a more positive response. As Thomas Jefferson said, “I like the dreams of the future better than the history of the past.”

The purpose of this year’s message is to touch on the present and future challenges facing the Unified Judicial System and to briefly inform you about how we are dealing with them.

Our constitution mandates a balanced budget. That mandate, however, does not mean stagnation

in planning for our future needs. In fact, to maximize the effectiveness of government in the future, the mandate compels just the opposite. For example, in 2009, this Legislature wisely sought a report from the UJS about the potential expansion of the “drug court” type programs to additional areas of South Dakota. We provided that report to the Legislature in 2010.

Planning for the future is essential. Reduced to its essence, I recall the Boy Scout motto I learned decades ago, “Be Prepared.”

TECHNOLOGY OVERHAUL

For the past five years, a committee of the Unified Judicial System studied the need for updating our computer software programs. We are a state-wide unified judicial system, which maintains offices in virtually every county courthouse in the state. We need our judges and employees to be able to maintain adequate contact with each other, our central judicial administration in Pierre, and other state agencies. Some software programs we currently use date from the early 1980’s and can no longer reliably be maintained.

We are joining nearly every other states’ judicial system in moving forward into the next generation of programming. Recently, this UJS committee selected a vendor and recommended a four year implementation program for our new case management system. During this period we will train our staff on the new programs and acquire the needed funding. We secured funding when last year’s Legislature agreed to increase the surcharge on civil and criminal fees. Over the implementation period the fee increase should raise the needed funds. Even with this increase, South Dakota charges substantially lower fees than our surrounding states. At the end of the implementation period in 2015, all UJS programs should be up-to- date and electronic filing a reality.

CAMERAS IN THE TRIAL COURTS

A current Supreme Court rule prohibits the broadcasting, televising, recording, or photographing of trial court proceedings. Two years ago the Supreme Court created a committee to study the subject of cameras in the trial courts. The committee was comprised of judges, members of the bar and the media, a representative from the counties, and law enforcement. The committee members brought forth three separate proposals. Each proposal allowed cameras in the trial courts, although in differing degrees. There is also the option of retaining the current prohibition on cameras in trial court proceedings. The proposal which would allow direct Internet streaming of trial court proceedings is no longer considered a viable option due to its cost and our inability to fund it. A public hearing on the subject was held in Pierre on October 7th. The Supreme Court has the matter under active consideration using the committee’s report and public input as a guide.

INTERPRETERS

Last year the Supreme Court created a committee to study the subject of interpreters in the courtroom and in related judicial functions. Why? During his time on the circuit court bench in Sioux Falls, Justice Severson estimates he conducted hearings in 16 languages. With the change

in demographics in South Dakota this issue exists in rural areas as well as our urban areas.

The issue of governmental services provided to those not fluent in English is one of intense discussion across our nation. The courts are constitutionally mandated to allow an accused to present an adequate defense to a criminal charge. How do you defend what you cannot understand?

This committee is broad based with judges, court reporters, interpreters, law enforcement, a representative of the counties, and members of the bar. Because each state approaches the issue of interpreters differently, the committee will have many options to study before presenting its report to the Supreme Court. As with the committee on cameras in the trial courts, the Supreme Court is interested in a thorough report, not a quick one.

Moreover, this state has a history of welcoming immigrants and trying to incorporate their participation into our system of government. In our first attempt at statehood in 1883 when a proposed constitution was drafted, the constitutional convention directed that 1000 copies of the document be printed both in German and in Norwegian. After the drafting of the 1885 proposed constitution, this concept was expanded as 20,000 copies of the constitution were printed for distribution in newspapers in German, a like amount in “Scandinavian,” and 10,000 copies in Russian. In 1889 prior to the achievement of statehood, another effort was made to provide copies of our proposed constitution in languages other than English.

DRUG COURTS

Our efforts to promote the breaking of the cycle of addiction and criminal activity continue. We have substance abuse programs modeled after what is generically called “drug courts” in the Northern Black Hills, Pierre, and Sioux Falls. We are very pleased with the positive results the programs are achieving. Many of the program participants have been able to break their addiction, stay out of trouble with the law, and maintain themselves as law-abiding, sober, and employed citizens, often for the first time in their adult lives. We hope that future funding will be available to expand the program into other areas of the state. We have learned “one size does not fit all.” Each program needs to be tailored to the specific needs and facilities of the locality it serves.

In anticipation of future funding to allow additional programs, we held a planning session last August for those judicial circuits interested in having a “drug court” style program. A national expert informed us that the age of those becoming addicted is dropping. We now commonly see drug addicts in this nation in the 12 to 14 age group. Moreover, we now know this addiction poses a clear risk of permanent brain damage as the brain is not fully developed until age 25.

This expert also told us that the substances being abused are also changing to some extent. The fastest growing addiction is that of prescription drugs. Prevention is more difficult because the initial acquisition is legal—from a pharmacy per a prescription from a doctor. Pills left in the family medicine cabinet pose a tempting source of drugs for younger members of the family who abuse the drug rather than gain medical benefits from it.

An individual who is close to graduating from one of our drug court programs tells a compelling story. Prior to entering the drug court, her life had been a history of substance abuse and run-ins with the law. When she entered the program she was facing felony charges and probably headed for prison. This mother of five describes her former life which resulted in her five children being placed in foster care by the Department of Social Services at taxpayer expense. Because of her progress in the program, she has now regained custody of her five children and is maintaining a drug and alcohol-free life. The foster care bill to the taxpayers for her five children has dropped from approximately \$50,000 a year to zero. This is an example of substantial taxpayer savings while also improving the life of this individual and her children. Everybody wins. As Chief Sitting Bull observed, "let us put our minds together to see what life we can make for our children."

COURT PROTECTION OF OUR SENIORS

As I told you last year in my message, while our state is aging we have few laws and programs on the books to specifically protect our elderly from abuse and crime. Examples of top scams against the elderly, according to one expert, include: (1) reverse equity mortgage scams, (2) fake e-mails from the Social Security Administration, (3) impersonating a grandchild in trouble, (4) home repair scams, (5) prepaid funeral scams, (6) Medicare fraud scams, and (7) investment scams. To this can be added physical abuse or neglect. The list is hardly all inclusive. This issue is quickly becoming a national priority and South Dakota should definitely become more aggressive in its protection of its senior citizens. This is a problem the judiciary as well as others need to address. There have been, however, no substantive moves to do so.

The portico of the United States Supreme Court building contains sculptures of what the building's architect, Cass Gilbert, believed were history's great law givers. Central is Moses holding the Ten Commandments. The Fifth of those Commandments is "honor thy Father and thy Mother."

THE VANISHING ATTORNEY IN RURAL AREAS

The University of South Dakota School of Law traditionally graduated a sufficient number of new attorneys to replace those who moved, retired, or died. Today, however, because of the economy, many USD law school graduates are unable to find employment in the legal field in South Dakota. This leaves them with options such as working in a retail store or seeking employment outside of South Dakota. An upturn in our economy resulting in expanded job opportunities may ultimately solve this problem.

Despite this unemployment, the availability of attorneys in rural and reservation areas continues to decline. We face the very real possibility of whole sections of this state being without access to legal services. Larger populated areas are becoming islands of justice in a rural sea of justice denied. For example, the city of Miller boasted eight attorneys in 1986. Today it has three. Mobridge claimed 10 attorneys in 1986. Today it has five. During the same time period, the number of local attorneys in Wessington Springs dropped from three to one.

Many attorneys who remain in small towns are close to retirement age. Logic dictates that law

school graduates who cannot find jobs will seek opportunities in rural areas where the need is the greatest. Law school graduates who have personally visited with me, however, identify several reasons which preclude them from this option. The economics of setting up a law practice for a person heavily burdened with school loans is daunting. The lack of access to an experienced lawyer in that locale, who agrees to serve as a mentor is also a major reason that law school graduates do not set up a practice in rural areas. I oppose the expenditure of public dollars to solve a problem like this without a concrete plan to make sure this type of investment will produce results. At this point no such plan exists. We are still in the discussion stage. The problem, however, has at least been identified and cannot be ignored.

ACCESS TO THE COURTS BY THE UNDERPRIVILEGED

A Chief Justice from another state told me that 70% of the divorces in her state are now done by people attempting to represent themselves. We have an increasing number of our citizens who cannot afford to hire an attorney even if one is available in their area. Yet these citizens need and deserve access to our courts. We have worked with the Access to Justice Program of the State Bar to encourage attorneys to provide free legal services to those who need them. Currently there are 275 attorneys who have agreed to do so, an increase of 100 attorneys from last year. This number, while impressive, falls significantly short of the existing need.

Our Unified Judicial System has created many legal forms for those individuals who for various reasons, economic and otherwise, will be representing themselves in a judicial proceeding. At this point the forms deal with domestic relations issues such as divorce, name changes, and child support. Many of these forms are available free on the Internet at the UJS website, <http://ujs.sd.gov/>, or for a small fee at any Clerk of Court's office. We hope to expand their scope and availability in the future.

JUVENILE CONCERNS

We also need to focus on the need for additional and more effective supervision of juveniles. Over the years, role models for some youth have sadly shifted from a scout leader to a gang leader. Albert Einstein admonished, "setting an example is not the main means of influencing another, it is the only means." In many cases the last chance to save a youth before permanent negative consequences set in, falls upon the courts and our court service workers. As my lake neighbor, hunter, and philosopher friend, Clarence, defines the issue, "in raising kids, we need to give it our best shot because that shot counts. The shot either hits or misses and you only get one shot. The consequences of that shot are permanent-both for the kids and for us." While juvenile probation increased in 2008–2009 in this state by 20% and adult probation by 14%, funds were not available to increase the number of qualified court services officers to supervise them.

COURTHOUSE SECURITY AND IMPROVEMENTS

Another area of concern is a lack of security at many of our courthouses. While several have adequate security, many others do not. Even in those courthouses that have elevators, many require that the judge, jurors, witnesses, criminal defendants, and the public use the same elevator as well as hallways and doors to enter the courtroom. In the past the UJS partnered with

counties through matching grants to upgrade security. At present, grant money has been reduced by half due to budget cutbacks. In the future we hope to once again be able to fund such matching grants.

The events of last Saturday in Tucson, Arizona underscore with blood the reality of this problem. On behalf of the Justices, I extend our sympathies to the family of the martyred Judge John Roll.

For several years, the UJS has been installing interfaced television (ITV) hookups in courthouses. This system allows two-way television communication between courthouses giving quicker access to judges for hearings and better security. It also saves money and travel time for judges, law enforcement, and for training and meetings of UJS staff. The system is also blizzard proof. To date we have installed ITV systems in approximately half of our courthouses. Due to the lack of funding we are not expanding the project to additional courthouses at this time. While the project is currently on hold, it is our goal to eventually connect every courthouse in the state to this system.

CSI: SOUTH DAKOTA

Increasingly trials involve the use of scientific principles. It is popularized in the media by television shows such as "CSI: Miami." Those of us in the judiciary, who avoided as many science classes as possible while completing our education, are now faced with the task of determining what evidence and witnesses are qualified to assist a jury by testifying on scientific methods. An example of science in the courtroom is the common use today of DNA evidence which prior to 1990 did not exist.

South Dakota was fortunate to send three judges to the Advanced Science and Technology Adjudication Resource Center (ASTAR) for advanced training in how to conduct trials which involve the use of scientific evidence. Judges Tucker, Myren and Jensen completed this course and brought its benefits back to South Dakota to share with our other judges. The cost of their participation in this program was minimal thus making it a judicial bargain. We are now preparing to send a second delegation of four circuit judges to this fine course. In addition, members of the ASTAR faculty came to South Dakota last April to share their knowledge with all of our judges.

THE UJS BUDGET

Returning to the economic situation for a moment, last year the UJS assisted state government in balancing its budget by cutting the UJS budget. As you know there are three branches of government--executive, legislative, and judicial. Yet the judicial budget is not 33% of the general fund; it is barely over two per cent. Nevertheless, after visiting with members of the Appropriations Committee, and other Legislative leaders, I agreed to a cut in UJS general funds of \$400,000. Since then, the UJS has been diligent in seeking out places where those cuts can be implemented without causing serious injury to the ability of the judiciary to continue to provide the level of service to the public it has come to expect and, in many facets, is mandated by the Constitution and various federal and state statutes. We also reverted over \$256,000 on June 30th, through further economizing. Those who work in the UJS are proud of what we feel is a

significant contribution to the

We have obligations which must be met no matter what the fiscal climate. We are mandated to promptly provide hearings after arrest and speedy trials to those who stand accused of crimes. The same demand for prompt hearings also applies to civil proceedings such as domestic protection orders. In addition, every criminal defendant is guaranteed by law the right to be tried by a jury of his or her peers in the county where the offense is alleged to have occurred within 180 days of the first appearance before a judicial officer. We are mandated by statute to provide these services to every county in the state, no matter its population and location. Certain public institutions which provide public safety and essential services cannot be cut and successfully maintain their operations. For example, we cannot run the penitentiaries five days a week, fire departments on alternate days or the public hospitals eight hours a day. Constitutionally mandated access to the courts and supervision of those in our custody fall in the same category.

I do come today offering some judicial bargains. We have proven that drug courts save taxpayers money over other alternatives while getting long term goals accomplished. Drug courts in this nation have a success rate of approximately 75%. Incarceration without treatment besides being significantly more expensive, has a success rate of zero. Addicts remain addicts. If we can continue with this 75% success rate, it tells us several things about drug court participation and its participants:

1. Drug use will be reduced by at least 75%.
2. Crime will be reduced by at least 75%.
3. Employment prospects will be increased by at least 75%. Workplace productivity will increase and accidents in the work- place will decrease.
4. If looking at the failure rate of 25%, consider that the "cure or success" rate for this program is considerably higher than the success rates for the treatment of diabetes, asthma and hypertension which are 40% to 60%.

As impressive as the national figure is of a 75% success rate, the Northern Hills Drug Court is justly proud of its success rate of 90%.

Nationally it is an established fact that for each dollar spent in drug court programs, ten dollars are saved in other costs to taxpayers from other government programs such as incarceration and welfare programs.

Perhaps one of the biggest bargains in state government is probation. Probation for first time offenders costs \$3.00 per day compared to the cost of incarceration which is \$63.69 per day. To put it another way, it costs 20 times more to send a person to prison than place them on probation. If you can place just three persons on probation instead of sending them to the penitentiary, you just paid the annual salary of their court service officer. Yet that officer probably carries a caseload of 125. Send that caseload of 125 to the penitentiary instead of being placed on probation, the annual bill is just under \$3,000,000. The alternative is you can put them on probation for an annual bill of \$145,292. For the first time, we now have statistics on the success of probation on a state-wide basis. We have nearly 5000 people on felony probation in South Dakota. I am pleased to report that of those, only seven percent on probation commit a

violation that gets them sent to the penitentiary. To put it another way, probation is succeeding in 93% of the cases where it is implemented. The prisons remain for those who deserve incarceration because of their acts and for the protection of the public.

I also call to your attention the fact that the judiciary is an instrument of the state that actually collects revenue and other funds. In the past fiscal year we collected \$39.2 million dollars. We returned the vast bulk of that amount to other units of government who also suffer from fiscal issues—the schools, counties, cities and the state—as well as other entities and parties. Examples are \$10,000,000 to the school districts, \$5,500,000 to the counties, and \$3,500,000 to law enforcement training. This amount includes \$670,725 in child support for needy parents who are also challenged with the task of making ends meet and \$3.4 million to restitution victims.

Sometimes in the pile of balance sheets and income projections I fear we lose track of the bottom line. To me it is not a dollar figure but the effect of that dollar figure. If the Unified Judicial System were to sustain substantial financial cuts, those cuts do not simply go away. The costs are merely transferred to others including law enforcement, schools, counties, cities, the Departments of Social Services and Corrections, the churches, and the private sector. None of these institutions are designed, nor have the experience, to provide the total response to society's issues that the judicial system of our state currently provides. Are we to allow the 5000 felons we currently have on probation to run loose or send them all to the penitentiary? We do not have enough prison cells or money for that.

All too often after crimes of senseless violence in our nation, the question is invariably asked how the signs of the perpetrator's intentions were missed or ignored. How could they fall through the cracks of society's safety net? My answer, in part, after 25 years of being a Judge is that it depends on how wide the cracks are in that safety net. As the oil filter commercial succinctly stated a few years back, "you can pay me now, or pay me later."

We must keep in mind that the constitution of this state is what has been described as our "Mother Law." The constitution mandates a balanced budget. The UJS recognizes that and has committed itself to participate to the best of its ability. However other provisions of the constitution give us direct commands. The Open Courts provision of the South Dakota Constitution mandates just that--the courts of this state shall always be available to our citizens for their legal claims.

There are many important on-going functions of the state such as economic development, preservation of our wildlife, and relief for the underprivileged. Yet, none of these are mentioned in the constitution--access to the courts is. Open Courts is not a suggestion, it is a mandate. It has been there since day one.

The importance the Framers attached to this right is expressed by where it is found. It is in our Bill of Rights right along with the right to be secure in our homes, the right to bear arms, freedom of speech, the press and the right to worship our God as we see fit. Open Courts is unqualified--it is an express grant to the people.

You are not guaranteed the right to access to the courts in the Federal Constitution but you are

guaranteed it in the South Dakota Constitution. That is our mandate and our obligation through good times and bad.

HAPPY BIRTHDAY TO THE CAPITOL

This past year we celebrated the 100th anniversary of this magnificent building. Going through the wonderful event, it struck me that we are one of the few states which still house all three branches of government, the executive, legislative, and judicial in a single capitol building. In my opinion that is a good way to ensure one branch of government does not become isolated from the others. All work together to fulfill their separate constitutional tasks. Our citizens have the opportunity to visit all three branches by traveling to this magnificent palace which does not house despots, dictators, or royalty. It houses the people's government. It exemplifies what was proclaimed by the 1930's populist slogan, "every man a king."

As part of the Capitol centennial celebration, a time capsule was sealed this past year. It will be opened in 100 years when hopefully this building still stands and enjoys a second centennial celebration. At the sealing of the capsule I thought of those who dedicated the building 100 years ago. The Master of Ceremonies at the dedication was Chief Justice Charles Whiting. I thought how astonished he would be to see the changes in how we conduct a judicial system 100 years later. I suspect were I allowed to attend the opening of the time capsule 100 years from now I would be even more astonished at the improvements and advancements that have occurred.

In 1801 as President John Adams prepared to leave the White House and the Presidency, he left a message in the White House for the incoming government headed by President-elect Thomas Jefferson. That presidential campaign still stands as one of the most vicious in American history. Yet Adam's farewell message to Jefferson as well as all future Presidents, and by implication, all future elected officials, including us, simply said, "I pray Heaven to bestow the best Blessing on this House and all that shall hereafter inhabit it. May none but honest and wise [persons] ever rule beneath this roof." May that message of President Adams apply equally to this people's house of government.

Respectfully submitted

David Gilbertson
Chief Justice