

State of the Judiciary
Chief Justice Christine M. Durham, Utah Supreme Court
Message to the Legislature
January 20, 2003, in Salt Lake City, Utah

President Mansell/Speaker Stephens, Members of the Senate/ House of Representatives, thank you for the invitation to speak to you today.

Although I have served as a judge for almost 25 years, I am new to the responsibilities of being the Chief Justice, and this is my first opportunity to speak to you in this setting. If you will indulge me for a moment, I would like to introduce myself. When we were still undergraduates in college, I married a man with the Wasatch mountains “in his bones,” as he likes to say, and we came to Salt Lake City after graduate school in 1973 to settle and raise our family. George, who is a pediatrician, concedes that 30 years is probably enough to eradicate the taint of my having been born in California. We have raised five children in this community, including one with special needs, all of whom are products of our public education system, and all of whom love the mountains. I have treasured the opportunity to serve on the Utah Supreme Court since 1982, after four years on the trial bench. I recently learned that one of my great-great grandfathers, Heber C. Kimball, was elected Chief Justice of the provisional Supreme Court contemplated by Utah’s pioneers in 1849, although my research has not disclosed whether he ever actually served. Nonetheless, that connection to the history of the court has made the opportunity to serve as Chief Justice even more meaningful for me.

I am completely passionate about my job, about the Utah court system, and about the administration of justice and the rule of law. I have enormous respect for our scheme of government, and for the people who serve in it. During the past few months I have been visiting each of the judicial districts in the state, to have lunch and conversation with many of you and the trial judges in your districts. From each meeting I have carried away a strong sense of the dedication and concern of the people who serve in our courts and in this body. While we do our work in very different spheres, we share a commitment to the welfare of the people of our state.

The single most significant challenge facing Utah’s court system, like all of state government, lies in maintaining the trust and confidence of the public we serve. Like other government institutions, we in the courts can no longer take for granted the understanding of and respect for our constitutional role that was a “given” in past eras. It is no longer sufficient merely to do our work; increasingly we must find ways to make the courts more accessible, more responsive, and more understandable, while at the same time preserving the core values and tasks that are our constitutional responsibility. Furthermore, I believe, we have obligations to explain those responsibilities to the public, to support and enhance public and community education about the role of the judicial branch and the significance of the rule of law. That is one reason I have been so supportive of restoring the place of civic education in the public schools, and why the courts, together with the bar and the Utah Law-related Education Project, have worked with the State Board of Education and its staff in those efforts.

In addition to enhancing public understanding of what we do, we are aware that, along with all of state government, we must expand our effectiveness at a time when resources are limited; we feel constantly the pressure to find ways to do more with less.

Utah's courts have responded to these challenges with creativity and hard work, and we are recognized nationally as one of the most innovative systems in the country. Our governance structure, in particular, serves us well in the management of the judicial branch. Utah's Judicial Council, which consists of judges from each court level, is the policy-making body for the administration of the courts, and makes the decisions about our budget and our operational needs. It receives input from boards of judges at each court level, and then sets the priorities for the system that are included each year in our budget requests to you.

The Council's job is hard in the best of times and very hard in hard times. In the recent past, like all parts of government, we have had to resolve competing interests in our system, preserve all of our essential functions, and try to find ways to increase our productivity and excellence in the context of significant losses in our budget. In ordinary times, I would not use this occasion to touch on budget-related issues; I would much rather spend it outlining for you our innovations and vision for the future. In light of the degree to which our state, like the rest of the nation, finds itself coping with reduced resources, however, I think it is important that I report briefly to you on the way in which the courts have been absorbing our share of the losses. We appreciate the discretion that you have allotted us to manage our resources, and we have tried to do so in a fashion that will minimize impacts on the public. The choices have been difficult. In the last 18 months, for example, from a workforce of 1200, we have lost 94 positions and curtailed numerous programs and services. We have been prudent, I believe, and have planned well, which has permitted us to accomplish most of the personnel cuts through attrition and hiring freezes (although we have had to terminate 17 employees for lack of funds), and by asking all of our people to work a little harder, with no expectation of pay increases, bonuses, or new resources. Thus far, as I said, we have worked hard to make reductions in areas that are least likely to affect the public. But some of the money has been saved in ways that are, ultimately, detrimental to public needs, such as the closure of courts in Murray and Roy. Although the facilities costs for those courts have been eliminated, so has the availability of court services close to the people in those communities. There are other examples: in the area of state supervision of seriously delinquent youth (designed to keep these young people from having to be committed to the Division of Youth Corrections), we had to eliminate almost twenty positions, resulting in decreased supervision and calls from concerned parents worried that their children were not being seen often enough; in Salt Lake, the juvenile courts had to eliminate their electronic monitoring program because we had to cut the staff person responsible for installing and monitoring the equipment; in Provo and Salt Lake, court funds used to pay for sex offender treatment for juveniles have had to be reduced. Perhaps most discouragingly, we have been able to serve far fewer children and parents in our juvenile drug courts than we - and you - had hoped.

Thus, we are experiencing loss of momentum in some of the very promising and innovative programs that the legislature has recognized and supported in the past. Of even greater concern to us, however, is the fact that we are now at the point where additional significant losses in our budget will inevitably require additional terminations of staff. In addition to the devastation to the people themselves, such losses will have great repercussions for our work. As many of you

know, personnel costs comprise approximately 80% of our budget; judges, court clerks, bailiffs and court security, information and technology staff, legal research assistants, clerical staff, and juvenile probation officers are the courts. We are constantly developing ways to make our people more effective. Our On-Line Court Assistance program, for example, is now making forms and procedures available electronically to persons seeking to pursue their own claims in divorce and landlord/tenant cases. By the end of this week, the system will be able to let people prepare their own paperwork for obtaining protective orders in domestic violence cases. In fact, people will be able to have assistance in doing so at any abuse shelter with access to the internet. Our appellate courts are beginning to explore electronic filing options. Our mediation and divorce education programs are helping to reduce use of expensive trial resources.

At the same time, some of our most effective and innovative programs, like “problem-solving” courts in the areas of drug and alcohol addiction, mental health, and domestic violence, actually require more time and personnel investment from our judges and staff than doing things the traditional way. Emerging evidence suggests that in the long run they save money, not to mention lives, in their impact on future crime and incarceration costs, but in the short run they need more attention than traditional adjudications and dispositions. I recently attended a drug court graduation ceremony in the courtroom of juvenile judge Kim Hornak. Two young fathers, whose parental rights to their small children had been jeopardized by neglect and criminal behavior related to drug abuse, were recognized for the completion of a full year of sobriety. As they spoke of the joy and the hope they had in returning to their families, they described their gratitude to the team of service providers who had been with them every step of the way. That team, put in place and closely supervised by Judge Hornak, included court personnel, juvenile probation officers, and counselors and social workers with treatment expertise working on contract with the courts. The dollar cost of their programs was a fraction of what the system would have to absorb if their parental rights had had to be permanently terminated, and their wives and children left adrift. And the human value of being given a second chance to be competent, healthy, parents is, of course, incalculable.

Utah, as you know, continues to grow and change, whatever the economy may be doing. Whereas in 1990, only 58,000 of our population consisted of people who were born in other countries, that figure grew to 158,000 by 2000. For us in the courts, that has implications for interpreter services and other access issues. Even more urgent, as we seek to enhance the trust and confidence of the public, is the degree to which we are perceived as being open, even-handed, and fair. Without public perception that the courts are fair, I don’t believe the courts can long exist; fairness is at the heart of our constitutional role. And yet, in a report issued last week, the Commission on Racial & Ethnic Fairness in the Criminal and Juvenile Justice system revealed that the larger justice system, which includes the courts but also law enforcement and corrections, has still ground to cover in making both fairness and the perception of fairness the hallmark of Utah’s justice system.

In a future perspective, another growing pressure on our system is the need for more comprehensive, better-funded, defense resources for indigent persons in criminal, especially capital cases, throughout the state. In an adversary system of justice, the courts cannot do our work without the help of well-trained and responsible counsel. Likewise, we urgently need the help of readily available, competent research assistance to deal with the ever-increasing

complexity of our work. I know how pressed for time, information, and instant expertise you are in your capacity as lawmakers. Trial judges, also, are desperate for research support in their work. At present, statewide, there are only 15 law clerks available to 95 trial judges for legal research and consultation (compared, for example, to the 2-3 law clerks assigned to each judge nationwide in the federal system). That circumstance doesn't just limit the capacity of our trial judges to do their best work: it also has a cumulative effect, I believe, in burdening the appellate system with occasional decisions reached in the absence of adequate time and resources in cases involving complex legal questions. This is a pressing problem we will continue to address. It is yet another example of the fact that people are our greatest resource and our greatest need.

May I close with some comments about the relationship between the judicial and legislative branches. President Mansell and Speaker Stephens have been generous and gracious with their time and willingness to speak with me and others about administrative matters and problems. Legislative leadership, likewise, has been welcoming to me in my new post, and I greatly appreciate opportunities to talk and share views. The many conversations I have had with you in your districts have been invaluable, and your staff is wonderful to work with.

There are natural tensions between our branches - they were created thoughtfully and deliberately by the framers of our constitutions. Next month will mark the 200th anniversary of John Marshall's landmark opinion in *Marbury v. Madison*, the case that established the constitutional principle of judicial review in the federal system. Ironically, many do not realize that the principle of judicial review was in place, and in fact specifically acknowledged in constitutional language, in many of the original states years before *Marbury*. Historically, then, this constitutional balance between legislatures and courts has been part of the fabric of government from the very beginning of this nation. It has always created tension, on the federal as well as the state level, between the legislatures, which have plenary power to make policy choices and law within the framework of the federal and state constitutions, and the courts, whose duty it is to interpret the meaning of constitutional language and resolve claims that challenge the constitutionality of the laws. I want to emphasize that when the courts do that assessment, they must be, and are in my experience, motivated only by honest convictions, informed by their study of constitutional law, about the content and meaning of constitutional language, and not by policy preferences or disagreements with legislative choices. Because legislators operate in a system that is by definition political and oriented to majority will and the art of compromise, there is sometimes a tendency to assume that judges are similarly motivated by political, personal or partisan preferences. We in this state's judiciary do not, and cannot, function that way; it would be a violation of our oaths of office, our professional values, and the law we serve. It is precisely because of our state's commitment to a neutral, impartial judiciary that we have evolved over the years the non-partisan, merit-based system of judicial selection, evaluation and retention that we have. There are other states where judges must raise campaign funds, accept donations from entities with major interests litigated in their courts, make promises about actions they will take on the bench, worry about the effect of each decision on their popularity and vote-getting capacity, and even seek support from partisan political sources. There have been appalling instances of scandal and corruption in some of those states, but more significant in my view, has been the tendency to degrade the courts from places for objective, fair decision-making to entities perceived as biased and purely political. Recent surveys show that a majority of people in states with elective systems have at least the perception that the

courts are less neutral and less objective because of election-related practices such as the acceptance of campaign funds from lawyers, law firms, and business entities. While we might like to think that courts either are or are not fair as a matter of objective reality, I believe we have both to be fair and to be perceived as fair to perform our constitutional role.

By contrast with systems in many other states, Utah has consistently moved in directions designed to avoid politicizing anything about the judiciary, to insulate the entire process of selection, retention, evaluation, and discipline of our judges from forces that could impinge on their neutrality in decision-making. I hope that we will always value that need for neutrality - it is the essence of fairness.

Not long ago, many of you joined forces with colleagues from the executive branch and judges to participate in the Dialogue for Freedom project sponsored by the Utah State Bar. We went into classrooms all over the state to engage students with the first principles of our government. I like to think that because of the divergent constitutional assignments given to the three branches of Utah's government, they are themselves constantly engaged in a dialogue - open, lively, sometimes fierce - about life in a free society. I hope that dialogue will increasingly be mutually respectful and marked by civility, even when it is most fierce. We cannot expect to earn the trust and confidence of the people if we do less.

I honor and respect your service to our state, and on behalf of the judicial branch express our best wishes to you in the session ahead.