

State of the Judiciary
Chief Justice Matthew B. Durrant, Utah Supreme Court
Message to the Legislature
January 17, 2023, in Salt Lake City, Utah

It is a privilege to report to you this afternoon on the state of our judiciary. The eagle-eyed among you will notice that our Court looks a little bit different. That's because over the course of the past year, two of our members have left the Court to rejoin private practice, Justice Thomas Lee and Justice Deno Himonas. They were excellent jurists and served the Court and the state with great distinction.

They have been replaced by two excellent jurists in their own right, Justice Diana Hagen and Justice Jill Pohlman. And thank you for your unanimous confirmation of these remarkable individuals.

These two, with the addition of Justice Petersen, make up our state's first female majority Supreme Court, which, for me, is quite a wonderful development and something the entire state can be proud of.

So those three justices make up the historic wing of our court. Justice Pearce and I constitute the old guy wing. And Justice Pearce, I'm sure, is not pleased to be lumped in with me as an old guy, but it does seem like an almost another lifetime ago that he was sworn in as a justice on our court.

I remember his ceremony well. I spoke, and he spoke. I was boring; he was interesting and hilarious, as is his custom. He's a masterful speaker.

And that evening the Pearces hosted a reception at their home. I was minding my own business in a corner when I saw a fellow making a beeline for me. He held his hand out and introduced himself; he said he was from California. Then he turned serious. He said, "Mr. Chief Justice, I have to say, I was quite disturbed by one part of your talk."

I said, "Really? I didn't think it was especially controversial."

He said, "Well, you claim that the Utah Supreme Court is as strong as any in the country. Do you really believe that?"

"As a matter of fact, I do," I said.

Then he said, "You think you're better than the California Supreme Court?"

I said, "I've never really seen it as a competition, and they are an excellent Supreme Court, but, yeah, I think we compare pretty favorably, even with the California Supreme Court. And with the addition of Justice Pearce now, I feel as confident as ever in making that statement."

\And he said, "Well, you know, the California Supreme Court has Justice Goodwin Liu." Goodwin Liu is a noted legal scholar. Then, he said, "I know John Pearce and he's a fine person, but John Pearce is no Goodwin Liu."

Well, I found this rather amusing and was eager to share it with John Pearce, who also found it quite amusing. But I think he probably found it a little less so when, for several months, I seldom missed an opportunity to compare him to Goodwin Liu. He'd make a point. I'd say, "Good point, John, but I can't help think Goodwin Liu would have made it so much better."

So, yes, I have an annoying personality, but I stand by my statement even more so than ever today. Here's my case. Here's my evidence.

Justice Pearce, however he may compare with Goodwin Liu, is off-the-charts brilliant. He writes not only in a persuasive and clear way, but he is the rarest of appellate judges. He writes opinions that are actually engaging and interesting. If you've only read my opinions, you probably think all judicial opinions are supposed to be boring. He's served with great distinction on our Court of Appeals before joining our Court and is a superb jurist.

Justice Paige Peterson cut her teeth prosecuting mobsters in the Southern District of New York, our most famous U.S. Attorney's Office. And then because, I suppose that wasn't scary enough, she went on to prosecute war criminals in The Hague. So, she is as delightful and kind human being as you'll ever meet, but she's also as tough as nails, a beautiful writer and a superb jurist.

Justice Diana Hagen was a celebrated prosecutor in the U.S. Attorney's Office here in Utah. She was responsible for some of Utah's most famous cases ever. Then she went to the Court of Appeals where she served with great distinction. She's a person of many talents. One that really stands out is that she is a remarkable oral advocate. You may wonder why that matters in an appellate judge. Well, we debate our cases. And I often sit in awe at her oral advocacy skills.

Justice Jill Pohlman is a self-confessed law nerd, and I think that's part of what makes her such a meticulous scholar. She has the superpower of being able to go right to the heart of even the most complicated issues and to bring order to the chaos of even the most complicated cases. She has a remarkable mind. So, those are my colleagues.

Now, as long as I'm bragging about the judges, let me just say our Court of Appeals is great. And I think our district and juvenile court judges in the state system are superb as well. I think they compare with any judges in the country. And I know that sounds like hometown cheerleading, but, in part, should be credited to this body.

In 1985, you passed and citizens approved a revision to the judicial article which included a couple of important things. One gave us a judicial council form of government which helps us, as a court system, to be very innovative and forward looking. And it gave us a nonpartisan selection process that is based exclusively on merit. That selection process has come to be as rigorous as any in the country.

As part of the process, applicants identify all the lawyers they've had cases with, all the lawyers they've had cases against, and the judges before whom they have appeared. Those individuals are sent surveys where they are asked to rate the judicial candidate. They do so on a confidential basis, so they can be just as brutal as they want, if they are so inclined. Bottom line is that unless a lawyer has developed a reputation for integrity, fair-mindedness, hard work, and legal acumen, he or she is not going to become a Utah State Court Judge.

As for the judicial council form of government, one of the benefits of that is our judiciary has become a national model--that is how the director of the National Center for State Courts has described us. Utah is the national and international model.

Okay. Now, I'd like to talk about the relationship between our two branches of government. We all know that we're seeing extraordinary levels of polarization in our society. And we've seen an increase in distrust of our institutions, including yours and mine.

Please just know this: I personally, and our judges, have an enormous respect for you, our state's elected policymakers, for you and for your constitutional role.

I also have a great deal of respect for your current leaders, President Adams and Speaker Wilson. They are dedicated to serving citizens and promoting good government. This is not a comment on politics. It is a comment on leadership. They serve with dignity, and I think their leadership is reflected in this body as a whole.

Now, there's a natural tension in our relationship because we are called upon to review your work. Our guiding principle is always your intent. You pass policy that is most often reflected in statute. We review those statutes to ascertain your intent. Usually, they are crystal clear. You have fine lawyers. You review them yourselves. But on occasion an ambiguity slips in. That's not a criticism. It could be said of our opinions as well. We often get the chance to go back and clarify something that we did not make clear initially.

When there is an ambiguity, it is not an open door for us to jump in and substitute our own policy preference for yours. You are elected by the people to be the policymakers for this state, not us. And so, in interpreting that ambiguity, our goal is to find your most likely intent.

Now, on occasion, not that often, but on occasion, statutes are challenged as unconstitutional. In other words, they are challenged on the ground that in passing them you have exceeded the limits of your authority as set by the people through the constitution.

Here again, a constitutional challenge is not an excuse for us to substitute our own personal preference over yours; it is merely to make our best judgment as to the statute's constitutionality.

Now, we know you are doing your best to pass constitutional statutes. You, like us, have taken an oath to support, obey, and defend the constitution. But on occasion, we will disagree. That's our role, and we cannot shirk it. It doesn't mean that we think the policy reflected in the statute is a bad one; we might completely agree with it, a statute we find unconstitutional, or we might disagree on a personal level with the statute that we find constitutional.

So, you will, no doubt, disagree with our opinions. You will, no doubt, on occasion, disagree with our interpretations of your intent or our assessment of a statute's constitutionality. That's to be expected. Just know that we are earnestly striving to obey our oath and to discharge the responsibilities that have devolved upon us.

And there's another aspect to our relationship, and it's a very cooperative one. You often pass statutes that assist us in better serving Utah's citizens, and we work together to bring about the policy objectives, your policy objectives, as reflected in statute.

A couple of quick examples. In 2019, you passed a statute and directed us to develop a process for creating automatic expungements of cases, in certain categories of cases, where individuals are eligible because they've gone crime free for a certain number of years. We've worked together to bring that about.

It's been a huge lift, a huge technological lift, but as of February of last year, we have started the process. There have now been over 200,000 automatic expungements. It's really a one-of-a-kind feature of our system.

You also passed a statute last year directing us to develop a process for deferred traffic prosecutions. Again, we worked cooperatively to develop a system for that, an algorithm. And so now we're in a position to make that program work. It allows people who have been cited with a traffic ticket to avoid going to court, pay the fine, and avoid going to court. And if they have no further traffic citations during a year, it's dropped from their record. So, thank you for helping us serve Utah's citizens and making justice more accessible to them.

Now, we also are going down the similar path with respect to regulatory reform. You have created a business regulatory sandbox where you're willing, on a targeted basis, to relax certain regulations in order to spur entrepreneurship and competition. We are engaged in a similar effort with respect to legal regulations.

We have, as I mentioned to you before, a severe access to justice gap in our country. I'm not talking about big court cases or even little court cases. I'm mostly talking about legal issues that pop up outside of court, kind of everyday-type things that we all encounter. An issue with a contract or with an insurance claim or with applying for disability, whatever it might be. Now, we have great lawyers in this state, and they are especially given to giving of their time freely to those who can't afford legal help; we call that "pro bono legal services," and they are to be commended. But we have learned, as has been said, we can't pro bono our way out of this huge access to justice gap.

Now, we have these regulations in place in the law in order to protect consumers. So, we're running this pilot project to see if we can find more ways to get legal help to people while still protecting consumers. We're doing that in a couple of ways.

One, we're allowing nonlawyers to practice law. An example of that is a sexual assault crisis counseling center down in Utah County. They have trained their counselors to give legal advice in assisting their clients to obtain protective orders or stalking injunctions.

They are smart people. They can learn the law in this narrow area. They are not lawyers; that takes three hard years of law school. And as I said, we've got great lawyers in this state. But they can be trained to give adequate, legal advice in that area.

Another example, Holy Cross Ministries provides debt counseling service. They have applied and trained their people to provide certain limited legal services in that context. Again, they are not full-blown lawyers, but in that area, they can be adequately trained.

That's one way we're trying to get more legal help to more people. The other way is we're trying to give lawyers more freedom in how they structure their law businesses. Under our current regulations, you cannot partner with a nonlawyer. Well, through the sandbox, they can. They can partner with a financial services firm, if they think that works for them in achieving efficiencies and better serving clients. They can partner with a technology firm. We'd love to see more technological innovation in the legal space. Think TurboTax writ large.

Now, we're also working hard to measure any harm to consumers. We require regular reporting. We have a robust complaint process that sandbox participants are required to make very clear to those people they serve, and we have an audit program as well.

Now, there are those who are critical of this, and I respect their views. These are big changes and they are unsettling. We are listening to that criticism. We've incorporated some of it. I anticipate we will incorporate more of it. It's something I'm very excited about.

We've approved 47 entities now. They've provided roughly 35,000 legal services to Utahans, with 24,000 discrete consumers.

Okay. I'm afraid we've gotten to the part of the speech that is uncomfortable, at least for me, and that's where I ask you for money. Here are our judicial council priorities.

We hope you will fund a salary increase for judges. It's been about six years since we've had a significant increase, increase over COLA. Last year, we specifically decided, as a judicial council, not to seek an increase because we felt it was so important that our judicial assistants receive pay raises. You graciously gave us that money and it's been very helpful to our judiciary.

So, this year we've made it our first priority. And we're facing an interesting phenomenon in the Salt Lake legal market. I'm sure many of you are familiar with this. We've seen more and more large, international law firms or national law firms create satellite offices in Salt Lake.

There are a number of reasons for that. Part of it is your fault because we have a great economy, a well-managed state. Also, we've got a beautiful state. And we've got great lawyers and two superb law schools.

And with the now high level of comfort that people feel in communicating remotely in the wake of the pandemic, many people, many businesses, including law firms, have realized, "Hey, we can serve our big coastal clients right here in this beautiful place." And we've got a ready, willing, and able workforce, and we can attract others because it is such a great place to live. So, it's caught on like wildfire and salaries have gone through the roof.

Now, that's great for attorneys, not so great for the judiciary, because we are competing for these top lawyers. Now will we ever be able to pay as much as these private firms pay? Not even close. It's just not doable. But people are willing to sacrifice to be judges, make a financial sacrifice to be judges. It's a great job. There's a high level of psychic income. You have a sense of service. You have a sense of contribution, a sense of being involved in a noble effort, a noble mission.

So, we're only going to get people who are willing to make a sacrifice, but there's a limit to that willingness, and it's just a simple matter of economics that the more we can pay, the more applicants we can attract and the more judges we can retain.

We've lost some great people in our judiciary to private practice. I think this will only get worse if we don't see a significant pay raise. We're having a lot of difficulty attracting people because of -- in part because of what salaries have done. We've seen in some cases half the applicants we used to see. So, we hope you will see fit to give us a pay raise, provide money for a pay raise.

The Judicial and Elected Compensation Commission has graciously recommended a 10 percent pay increase. We're very appreciative of that, but I have to tell you: I think that to really move the needle in a significant way, it probably ought to be something more in the way of 15 to 20 percent range. I leave that to your wisdom.

Request No. 2, we need an additional juvenile court judge in the Fourth District. We have five judges doing the work, by our calculation, of 6.8 judges.

And we'd like you to fund an attorney to revise and create legal forms. We have thousands of users, many of them pro se, of the legal forms we provide. It's an important service that we provide.

We'd also like you to fund a domestic violence program coordinator. The importance of that is obvious.

We're also requesting funding for a tribal outreach coordinator.

And we'd like a coordinator for our online dispute resolution program.

We're also requesting funding for our software platforms.

And finally, we're asking for additional funding to lease additional space in Heber. We just have one courtroom there. We all know how much Wasatch County is growing; we'd like additional courtroom space.

Okay. Those are our requests. I recognize you may not be able to fund all of these, but I hope you'll see fit to come close.

Let me just conclude by saying thank you for your service. I know that you do it at considerable financial and time sacrifice. And I know you do it for Utah citizens. As a citizen, I thank you.

May you have a wonderfully productive session. Thank you.