

State of the Judiciary 2001: *Serving the People of Wisconsin*
Chief Justice Shirley S. Abrahamson, Wisconsin Supreme Court
Message to the Wisconsin Judicial Conference
October 24, 2001, in Delavan, Wisconsin

Welcome to Delavan and the 2001 Wisconsin Judicial Conference. Our thanks to the program chair, Kitty Brennan, Milwaukee County Circuit Court Judge, as well as the conference planning committee. They have worked hard with the staff of the Office of Judicial Education to develop what promises to be an excellent program.

As you know, it is a tradition at the annual Judicial Conference to note the changes that have occurred within the judicial family. We express sorrow at the passing of the following judges, who served the people of the state of Wisconsin long and well:

John Ahlgrimm, Racine Co., served 1962-1995
Jack Aulik, Dane Co., served 1986-1997
Robert Curley, Milwaukee Co., served 1960-1983
Alexander Grant, Brown Co., served 1982-1990
Harry Gundersen, Burnett Co., served 1956-1990
Ernest Keppler, Sheboygan Co., served 1979-1985
Joseph Schultz, Dodge Co., served 1960-1994
Maurice Spracker, Milwaukee Co., served 1968-1975
Elliot Walstead, Milwaukee Co., served 1964-1978

Together these judges gave 140 years of service to the people of Wisconsin. Please join me for a moment of silence in their memory.

While we express sadness at losing colleagues, there is joy in welcoming new colleagues. These are the state's new judges:

Paul Lundsten, Court of Appeals
Thomas Lindsey, Bayfield Co.
Kevin Martens, Milwaukee Co.
David Miron, Marinette Co.
Gregory Potter, Wood Co.
Edward Vlack, St. Croix Co.
Joseph Wall, Milwaukee Co.

In August, several justices and I met many of the new circuit court judges at the Judicial College. The judges' class of 2001 displayed excellent legal and judicial skills—and they are lots of fun, too. And continuing a practice begun five years ago, the Supreme Court justices had a very enjoyable breakfast this morning with the new judges.

To the new judges, on behalf of all of us, I say, "Welcome. May your judicial careers be rewarding to you and may you serve the people of Wisconsin well."

There is much work to be done by all of us. The 2000 statistics for case filings and dispositions

in the circuit courts, court of appeals, and Supreme Court are available on the court system website. These statistics are a measure of the quantity of our work. But this is a time to measure quality—in ourselves and in the institution we serve—and to consider the contribution we make to the larger community we help shape.

Over the years I have spoken to you about challenges the court system faces and reported to you about accomplishments. This year is different.

It is fitting today, just six weeks after September 11, to speak about the fundamental role of the judicial branch and the administration of justice in a democracy. The judicial function offers society peaceful settlement of disputes. The judiciary's role is indispensable—in good times and bad, in times of peace and tranquility, and in times of international and national crisis and state financial difficulty.

Moreover, the judicial function is indisputably a government function. Like law enforcement, fire protection, and the military, only government can provide a judicial system with the integrity, independence, and credibility to resolve disagreements and disputes. Whether through trials by jury or by the court, or through settlements or court-attached alternative dispute resolution, judges help society resolve disputes, large and small, involving important life issues: families and children, death, personal injury and health care, crime and punishment, education, money, property, and individual rights and responsibilities.

Independence is the hallmark of the judicial branch in every democratic government. The structures of democratic systems across the world differ in their executive and legislative branches with presidents, prime ministers, congresses, and parliaments. But the judiciary in all democratic systems is an indispensable constant: a separate co-equal branch of government, independent of the other two branches in the discharge of its case-deciding function. Nations around the world look to the federal and state judges in the United States for guidance as each attempts to establish a trustworthy judicial system, an indispensable component of a democratic, free government.

Judicial independence, at its most basic level, rests on the requirement and expectation that judges decide cases fairly and impartially—according to the facts and the law—and that judges be insulated from pressure, however subtle or indirect, from whatever source, to do otherwise. A truly independent judiciary preserves the rule of law, the very value critical to a democracy.

A truly independent judiciary gives the homeless the same protections under the law as the wealthy. It gives those accused of common street crimes the same constitutional protections as those accused of financial fraud. It decides when the majority prevails and when the minority—any minority—stands protected against popular sentiment by the federal and state constitutions. It protects us all against the violation of anyone's civil rights and guaranteed liberties. It protects every individual, every business, every association, regardless of the power or volume of its voice in the political arena.

The law must be applied fairly and impartially—across the board, irrespective of the identity of the plaintiff or the name of the defendant or the nature of the cause. The courts' even and

independent application of the laws assures that everyone—regardless of race, religion, gender, economic status, or political connection—has the promise of equal protection. The integrity of our legal system requires no less.

Our society values judicial independence not because it protects lawyers and judges from accountability—which it should not—but because it protects the integrity of the judicial process for all citizens—which it must. Judicial independence protects not only the litigants but all of the people in this state, because we are all affected, directly or indirectly, by court decisions.

That is the theory, in any event, but this is an appropriate time to ask: Does the theory work? The answer is yes. Consider this: The Wisconsin Supreme Court held in 1859 that indigent persons accused of a crime have a right to counsel at government expense, more than 100 years before the United States Supreme Court recognized the same right in *Gideon v. Wainwright*. The Wisconsin Supreme Court declared the fugitive slave law unconstitutional, contrary to the decision of the United States Supreme Court. The Wisconsin Supreme Court, like United States Supreme Court Chief Justice Taney, declared trial by military courts during the Civil War an unconstitutional violation of the U.S. constitutional guarantee of the writ of habeas corpus. And in the court of appeals and the trial courts of this state, every day, judges weigh rights and obligations based on the law and the facts in a process grounded in two constitutions and principles traceable not just to Philadelphia and Runnymede but to Rome and Greece 2000 years ago.

Why is there judicial independence? Because without impartial decision making, there can only be strife and chaos. The rule of law is a critical civilizing force in every free society. The judiciary stands between those ready to cut down the protections of the law—with intentions good or ill—and those laws essential to what the Wisconsin constitution refers to as our "inherent rights."

This is a particularly good time to remember our heritage and recall the fundamental purpose of law. I recently went back to read a favorite passage from Robert Bolt's play, *A Man for All Seasons*. This play is about law and the struggle between the English King, Henry VIII, and his counselor, Thomas More, who believed the law applied to everyone, even the king. Thomas More is assailed by his son-in-law, William Roper, with the charge that he, More, would give even the devil the benefit of law. And More responds yes, he would indeed give the devil the benefit of the law.

MORE asks of Roper: What would you do? Cut a great road through the law to get after the Devil?

ROPER responds: I'd cut down every law in England to [get after the Devil]!

MORE asks: And when the last law was down, and the Devil turned around on you—where would you hide, Roper, the laws all being flat? ... This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down ... d'you really think you could stand upright in the winds that would blow then? ... MORE concludes: Yes, I'd give the Devil the benefit of law, for my own safety's sake.

To Thomas More, the law alone is uniform, to be applied evenly to all alike, angel and devil, sinner and saint. With uniform application of the law, we all are protected. Without uniform

application of the law, no one is protected.

And to apply the law, the judicial system must be ready to act in all of the cases brought to it: The small claims case, the fender-bender case, the child in need of protection and services, the robbery. These cases share the docket with the multi-million dollar medical malpractice, contract, and product liability cases. As Alexander Hamilton recognized, the state courts are the nation's preeminent instruments for the "ordinary administration of criminal and civil justice." The courts are what Hamilton called the "great cement of society." And the state courts are the crucible in that process. More than 90% of all of the judicial business of this country is in state rather than federal courts.

In 1840 Justice Joseph Story wrote the classic statement about the need for an independent judiciary. No one has said it better since. Story wrote:

"Where there is no judiciary department to interpret, pronounce and execute the laws, to decide controversies, to punish offences, and to enforce rights, the Government must either perish from its own weakness, or the other departments of Governments must usurp powers for the purpose of commanding obedience, to the utter extinction of civil and political liberty."

Who ensures the independence of the judicial branch? Who ensures that the great cement of society remains strong and fortified? That answer lies in the state constitution itself and the role it establishes for the courts as the final arbiter of the meaning of the constitution.

The Wisconsin constitution vests judicial power in a unified court system and expressly provides that the state Supreme Court shall have superintending and administrative authority over all courts. The chief justice is the administrative head of the judicial system, exercising this administrative authority with the full seven-member court.

Courts inherently possess the powers necessary to fulfill their constitutional mandate. The American system of separation of powers necessarily requires a degree of autonomy for each branch of government in the conduct of its own affairs while it, quite properly, envisions cooperation and interdependence among them.

The judicial branch protects and promotes the courts' ability to resolve disputes fairly, effectively, and efficiently. To this end, the Wisconsin Supreme Court has repeatedly exercised its administrative powers. For example, the Wisconsin Supreme Court has ordered the retention of a court janitor in the face of an executive branch effort to dismiss him. The Wisconsin Supreme Court has ordered a trial court to remain in an existing courthouse when the county government ordered a move to inadequate facilities. The Wisconsin Supreme Court has recognized its authority to order the release of state funds to procure an automated legal research system for the courts.

Government today has new challenges, when the routine ones were more than enough to occupy government in an uncertain economy. These are difficult times.

I am concerned, as you all are, about the judiciary's ability in years of fiscal pressure to perform its constitutional obligations as a co-equal, independent, and impartial branch of government. At

some point, neglecting the needs of the judicial branch may endanger judicial independence and the ability to provide a fair, effective, efficient judicial system.

As you know, the state budget became law on September 1, 2001. One observer compared this summer's budget process to riding a roller coaster—exciting for many, distressing for some, tiring for all. As the budget process moved along, the judiciary requested, the Department of Administration cut, the legislature modified, and the Governor approved in part and disapproved in part. It is axiomatic that the legislature and the Governor have, at least in the first instance, the constitutional responsibility and obligation to make decisions about raising and appropriating funds in our democratic society.

The court system's budgets, including the director of state courts office, the state law library, the circuit courts, the court of appeals, and the Supreme Court, were cut by 4% across the board. Others in government incurred a permanent 5% cut. This month some of the court system budgets were required to take an additional 1.55% cut. These cuts are a particularly difficult challenge for us since salaries, fringe benefits, and other fixed unavoidable costs comprise more than 98% of the budgets at each of the three levels of the court.

The judicial branch's resources are not adequate. Yet the state's financial resources are severely strained. The economy is progressing more slowly than anticipated. The Governor has warned his cabinet that additional cuts may be needed in this biennium. What is to be done?

The Supreme Court is sensitive, as are all the courts, to the fiscal problems of the state and county, and we, like others, are doing our best in this fiscal difficulty to reduce expenditures. The court system has, as you know, taken a number of steps to reduce expenditures wherever possible—reducing book purchases, decreasing the use of reserve judges and per diem court reporters, eliminating reimbursement for judges' travel outside the state, and limiting travel expenses within the state. Reductions can be and are being made, but at some point the quality of justice will suffer. We may be moving toward that point.

The interpreter initiative, our only new initiative in the budget, enjoyed bipartisan support in the legislature. A two-year project position to establish a program to assure qualified court interpreters was eliminated. We must continue our efforts to improve the quality of interpreters. Fairness is difficult to achieve when an individual litigant or witness does not speak, hear, or understand the English language and a qualified interpreter is not available.

The circuit courts are reducing the use of reserve judges and per diem reporters to save money. An efficient and effective court system is difficult to maintain when we cannot pay for a reserve judge to decide cases in the event of congestion in the courts or to fill in for a sick judge. An efficient and effective system is difficult to achieve when we cannot fund sufficient court reporters for each court proceeding. A court cannot function without a judge and a court reporter.

The district attorneys' and public defenders' requests for resources for additional positions have been denied. An efficient and effective system is difficult to achieve if the ranks of prosecutors and defense counsel alike are thin, and these lawyers cannot fulfill their responsibility to the state, to their clients, or to the courts.

While we are reducing expenditures, we are vigilant in our responsibility under the Wisconsin Constitution to administer the justice system and to provide effective, efficient, impartial courts to resolve the disputes of the people of the state. We must carefully and continually evaluate whether efforts to reduce expenditures jeopardize our ability to do what the constitution requires us to do.

The Supreme Court has the constitutional responsibility for the operation of the judicial branch. We are accountable, ultimately, to the 5 million people of this state. We serve them.

Judicial independence ultimately rests on the public's willingness to support it. The public's willingness to support judicial independence, in turn, depends on public trust and confidence. Public trust and confidence in the Wisconsin courts remains high, and we are working to maintain that trust and confidence. Wisconsin has been recognized as having one of the best public outreach programs in the country. We constantly seek public input in the court system through our nationally acclaimed volunteer programs and citizen participation on boards and committees.

We shall continue to work not only with the public but also with the executive and legislative branches for the good of the people whom we all serve. The three branches are at the same time independent and, as equals, interdependent. We have worked successfully with the executive branch in sharing computer technology and know-how.

We have joined with the legislature in several undertakings. Legislators and judges participate together in orientations for their respective new members. The judiciary continues to share information with the legislature about the effect of legislative proposals on the operation of the court system. Most recently, the Wisconsin Legislative Council and our judicial education office, along with the Council of State Governments, sponsored the first seminar in the country for legislators and judges and their staffs on statutory interpretation. Other groups across the country are now working from this model.

We also have established cooperative ventures with local communities, civic organizations, and government entities to develop innovative solutions to shortcomings in the system and the state's financial limitations. A current cooperative project, one extremely timely, is the statewide courthouse security training project that involves sheriffs, court system employees, the technical college system, and the Office of Justice Assistance.

We shall continue to partner with others to improve the administration of justice. These partnerships allow for better understanding between partners, the pooling of resources, and opportunities to seek resources outside the state.

Let me conclude by speaking of the season. I prepared this speech in the beautifully renovated and restored Supreme Court chambers in the State Capitol on spectacular Wisconsin fall days. The Capitol square was filled with the sounds and sights of people, dogs, cars, cheerleaders for Badger football, ferrets, Frisbees, and the farmers market. On warm sunny Sunday mornings, the Capitol itself was quiet. When I stood in just the right place in the Second Floor East Wing

where all the chambers are located, I could catch a glimpse of Lake Mendota or Lake Monona.

The trees' autumn colors were bright and variegated. It was a wondrous sight. But in the midst of this season of beauty and tranquility, we are facing another season. Storm clouds are gathering across the world, across the nation, and across this state. These storm clouds pose challenges to all of us, in all aspects of our lives, and to the operation of government at all levels, including the state courts.

We have faced challenges, serious challenges, before. The people of this state, the government of this state, and the court system of this state have a great history and tradition. We are strong. I have no doubt that we will meet these challenges successfully, working together. We who live in Wisconsin know that autumn turns to winter, but as cold as the winter may be, there is always the promise of spring to come.

The judiciary will meet the challenges by performing its historic function of peaceful resolution of disputes with equal justice for all. We will perform our historic role, as we always have, in traditional ways and by having the courage to adopt new traditions.

I have often said that the judges of this state constitute one of the best judiciaries in the country. I say so again today: The judges of this state constitute one of the best judiciaries in the country.

We shall continue our efforts to maintain the judicial system envisioned by the framers of the Wisconsin constitution—efficiently and practically, to be sure, but without compromising that system's independence or integrity. That may call for difficult decisions in the months ahead. Some of the difficult decisions might not be universally popular. But ironic though it may seem, we are not elected to make popular decisions—just wise ones.

The government and people of Wisconsin depend on our resolve in this endeavor. We cannot and shall not fail.