State of the Judiciary
Chief Justice Richard F. Neely, West Virginia Supreme Court
Message to the State Bar Meeting
Summer 1980

Any State of the Judiciary Report naturally divides itself into three parts, namely: The Supreme Court of Appeals; the Circuit Courts; and, the Magistrate Courts. Since we have had the Supreme Court and the Circuit Courts with us for over a hundred years in roughly their current form, I plan to touch upon them very briefly so that I may devote my principal attention to the Magistrate Courts which are still in an embryonic condition.

Case Load Explosion

Our case loads are bulging in almost every jurisdiction. The work load of the Supreme Court has more than doubled in the past three years but it is a fair statement to say that we brought this condition upon ourselves. Obviously the present Supreme Court is busier, more aggressive, and more activist, perhaps, than it has ever been in our history. I think that it is important in my review of the State of the Judiciary to separate judicial policy from judicial mechanics. It would be an understatement to say that no one is completely satisfied with the policy which emanates from the Supreme Court all of the time; the W. Va. Reports are legion with my dissents in the last three years and I know that many of you have been vocal critics of some of the directions which the Supreme Court has taken. In my capacity as a Justice of the Supreme Court I am obviously very much concerned with our policy choices; however, I was not invited to present this report as a Justice of the Court but rather as Chief Justice, and in that capacity I am concerned exclusively with mechanics. In the past calendar year the Supreme Court of Appeals disposed of 236 cases either by order or full written opinion and heard 927 applications for either appeals or original process. Of this number the Court granted 252 appeals and 184 original petitions. This compares with 99 cases disposed of in 1976 and 787 applications in that same year of which 103 appeals and 96 original petitions were granted. Consequently in 1980 the Supreme Court of Appeals is disposing of approximately 138.38 percent more cases than they were as recently as 1976 and this is reflected in the comparatively dramatic changes which have been made in Supreme Court procedure. There have been complaints voiced by members of the Bar for whom I have surpassing respect regarding the abbreviation of oral arguments before our Court. Furthermore, other eminent members of the Bar have been concerned about the proliferation of per curiam opinions which the Court now uses in the disposition of routine issues.

Before I proceed to defend what might at first blush appear to be indefensible, ungentlemanly, and inconsiderate actions on the part of the Supreme Court I should like to point out that the Supreme Court is unanimously opposed to the creation of an intermediate court of appeals of any type in the State of West Virginia. While the Judicial Reorganization Amendment of 1974 gives the Legislature authority to create intermediate courts of appeal, the Supreme Court is violently opposed to the creation of any such court in the foreseeable future. We are con- fronted, therefore, with three alternatives: first, to deny review to many cases which have meritorious assignments of error because the Court is over-worked; second, create an intermediate court of appeals with automatic rights of review; or, third, modify our procedures to permit us to review

all meritorious cases. Obviously it would be a travesty if palpable injustices were ignored by a court merely because it were too lazy to hear the case and write an opinion. Similarly enormous hardship would be worked upon litigants if this State were to create an intermediate level of appellate courts under circumstances where the work load does not guarantee that for the great majority of litigation those courts will be the. final resting place. Obviously states like New York, California, Illinois, and other jurisdictions with ten times the population of West Virginia have no recourse but to use intermediate appellate courts; however, in those jurisdictions the highest state court must limit itself to major policy questions and conflicts among the various intermediate courts.

That emphatically would not be the case in West Virginia and there is the substantial likelihood that the intermediate appellate court would be wrong as frequently as the trial courts. In states where intermediate appellate courts are elected they are usually the least capable courts in the entire system because their members are like majors in the army, namely they are too big to command anything little and too little to command anything big. The result is that political hacks who could not get elected at the county or district level because their incompetence is too well known, would be able to run successfully in a ten or fifteen county circuit. The Supreme Court is usually sufficiently well regarded that outright hacks are crucified in the press, but intermediate judges are almost always elected without serious public scrutiny with the primary criterion of success being their capacity to eat rubber chicken.

The Supreme Court has elected option three, namely a change in our own procedures which permits us to handle our increased case load. Those of you who practice before the Supreme Court on a regular basis cannot help but have observed that now the judges have read the briefs before oral argument and primarily avail themselves of the oral argument ask questions of counsel concerning either factual or legal points which were not made clear in the written presentation. Oral argument is particularly useful when the factual issues are complicated and the lawyers can lead the judges through testimony to demonstrate exactly where or how particular issues were proven or developed in the lower court. I do not personally believe that complex legal arguments lend themselves as well to oral presentation as they do to written presentation. There is, quite frankly, nothing more ludicrous than an oral argument in a tax case where there are six or seven statutes and regulations all of which must be read together with microscopic attention to very detailed language. Consequently, the Supreme Court has adopted an internal procedure of reading briefs and records on Monday, hearing oral argument on Tuesday, and deciding the case on Wednesday unless there is some extraordinary problem which prompts one judge to move that the case be held over a week.

Judicial Delay

Unfortunately deciding a case and writing a good opinion which gives guidance to the Bar in future cases are two entirely different things and the delay in appellate decisions stems primarily from the mechanical difficulty of producing polished prose. Some judges write comparatively quickly and enjoy that activity while others final writing in agony and produce written opinions with the same facility that a woman gives birth. It is primarily for this reason that the Court has adopted a policy of using per curiam opinions in cases which present no issues of substantial precedential value. Even with per curiam opinions the judges write fully fifty percent more

signed opinions than were written in 1976. The value of the per curiam opinion over the signed opinion is that it can be sloppy and ill conceived without causing embarrassment to one's grandchildren when they go to law school. Since what is mostly required in routine litigation is a correct decision rather than a great deal of legal scholarship, this procedure is far preferable to its alternatives.

After eight years as a judge I have concluded that the quality of any judicial decision is seldom a positive function of the amount of time that the issue is under deliberation. The notion that legal proceedings must be slow in order to be just is consummate nonsense; judicial proceedings are slow because of either human or mechanical failure. I do know, however, that justice in its totality is always a negative function of delay and it is for that reason that I so adamantly oppose the proliferation of levels of review with an intermediate court of appeals. Current court procedures are already intolerably long. In this regard I am proud to say that the circuit courts of West Virginia probably have the best record of any state in the union with regard to docket delay. With one or two exceptions the Legislature has provided us with an adequate number of circuit judges and there are few places in West Virginia where cases which are mature for trial cannot be tried within ninety days. It is quite another matter, however, when we start talking about the appellate procedure and the time necessary to receive a final judgment from the Supreme Court

The Legislature has provided an eight month appeal period in both civil and criminal cases which was originally predicated upon the difficulty of preparing a record for appeal purposes. I find this automatic eight month delay an abomination, which we have attempted to correct through our new Rule 4 (A) which permits a petition for appeal without a transcript. While this is a great boon to those with meritorious assignments of error, it unfortunately does not cure the problem of dilatory tactics on the part of professional defendants who are not encouraged by our requirement that an economical appeal application under Rule 4 (A) must be brought in 90 days. At the heart of the ap- peal period delay as well as much pretrial delay during discovery, is the difficulty in securing transcripts. Consequently the Supreme Court of Appeals has inaugurated a pilot program in the Circuit Court of Kanawha County to experiment with computer- aided transcripts. I have just entered into a contract with Baron Data Corporation of California to provide computers to court reporters in Kanawha County which will permit them to use steno machines with individualized shorthand programs where the computer translates their stenographic notes into full English text. This experiment will begin in the next two months in Kanawha County and if it is successful we shall provide these machines to every circuit court in West Virginia. At that time all court reporters who intend to make a career in the West Virginia Judicial System will be required to become qualified at our expense in their operation. It is my fondest dream that within five years we will be able to reduce the appeal time in this State from eight months to two months and that in conjunction with transcript reporting, these machines will be available on some reasonable basis to free-lance court reporters who will be able to employ them in pretrial depositions. I adamantly refuse to be defeated by the complexities of the 20th century, bureaucratic morasses, and abject negativism. I covenant with you here that while every other state in the Union becomes bogged down with clogged dockets, inefficient procedures, and wasteful, expensive rules, we here in West Virginia will create a court structure which will be able to handle routine litigation in less than six months from the date of filing to the date of final order from the Supreme Court of Appeals. Contrary to all the excuses of the professional

bureaucrats from the staff of the American Judicature Society to that of the National Center for State Courts, speed is what gets you justice.

I have one final observation regarding delay in the circuit courts in the solution of which I would ask your cooperation. In my judgment the new procedure for disqualifying judges has inspired many of the younger and less experienced members of the Bar to use this technique to forum shop and as a tactical device to further their clients' cases. I do not criticize any member of the Bar for using any legal device within his grasp in furtherance of his client's case; obviously, the purpose of a lawyer is to do everything for his client which the client would do himself if the client knew the lawyer, I would urge a certain self-restraint with regard to recusal motions because as every student of elementary physics knows, to every action there is an equal and opposite reaction. Failure to maintain self-discipline will almost certainly foment pressures for some system of restraints and this pressure is already building to critical levels among our trial judiciary. I am not suggesting that the Supreme Court will take steps to curtail or restrict the use of the motion to recuse as long as abuses are infrequent and originate primarily among the young, eager, and inexperienced.

However, I would point out that the decision to grant a recusal hearing is mine and mine alone to make and if I continue to get ill-founded and unjustified petitions for disqualification I shall become increasingly stonehearted about ordering hearings in these matters. While the administrative problems of ordering hearings are comparatively simple in multi-judge circuits, there is a real burden when we must send a judge to another county to hear a frivolous motion; his own work is interrupted and nothing is gained from the vain exercise other than unjustifiable delay and inordinate expense.

In one recent case I sustained the circuit judge hearing the disqualification motion when he granted the motion based upon the appearance of bias rather than bias itself. I deliberated for a long time over the disqualification of the particular circuit judge originally assigned the case who had indicated no bias whatsoever towards the defendant and sustained the judge who conducted the hearing on disqualification primarily because I believed that the counsel for the defendant had generated such bad will as a result of their own efforts at disqualification that that fact alone might cause the judge to be ill disposed towards the defendant. It would be a great service to the system if the more experienced members of the Bar would instruct this year's graduating class that they will be practicing before the same judges for at least fifteen years and that judges, like elephants, have long memories with regard to abusive treatment.

The Most Important Courts- The Magistrate Courts

This brings me, then, to the central focus of my remarks today, namely the Magistrate courts. It is my belief that the Magistrate Court is by far the most important court in the State of West Virginia. Let me repeat that so that you will know that I am engaging in no unintentional hyperbole. THE MAGISTRATE COURT IS THE MOST IMPORTANT COURT IN THE STATE OF WEST VIRGINIA. The Magistrate courts have experienced a sky-rocketing increase in case load, and last year, for the first time, there were more than three hundred thousand cases handled in one manner or another in our Magistrate courts. This means that ap- proximately one out of every six West Virginians had business of one kind or another to transact in our

Magistrate Court System in 1979, and this fact alone is why I consider this court to be the first priority of the system. The Magistrate court is probably the only court which the average West Virginian will ever see.

With regard to the Magistrate system there is the proverbial good news and bad news. On the good news side the general quality of the Magistrate today, compared with the justices of the peace of yesterday, is striking and significant. The two offices, I believe it is safe to say, are approximately one light-year removed from one another. The typical Magistrate of today is younger, better educated, and more highly motivated to public service than the J. P. of the past, who often was a one-gallus, tobacco chewing, ventricose, rag-tag-and-bobtail caricature of himself. For example, the average educational attainment of the typical justice of the peace of twenty years ago was somewhere between the sixth and eighth grade. Fewer than seven percent of our J. P.'s of the late Fifties had even been exposed to a college education.

By contrast, today we find that approximately eighty-one percent of our Magistrates have at least some college training, with more than forty-five percent holding degrees. Education does not, of course, equate with wisdom, but it is fair to say that our expectations for a well-educated Magistrate can and should be higher than those for a poorly-educated J. P. in years gone by.

Magistrates also tend to show a greater interest in public service, and in the law itself, than did the J. P.'s. Harking back twenty years, most J. P.'s candidly conceded that their primary interest in holding the job was the income which it generated-income often gained with comparatively little effort and with minimal knowledge of the law. The Magistrate of today seems more attuned to the call to a vocation which he or she perceives as having a genuine and direct benefit to the public.

Unfortunately, many of the mechanical problems in the Magistrate Courts are com- pounded by other agencies of government over whom we have limited or no control, and I am thinking specifically of a critical problem with regard to the service of Magistrate process in many counties which has had the effect of grinding the entire judicial process to a screeching halt. I in tend to propose legislation to the next session of the Legislature in this regard since this is one area of government where throwing money and people at the problem will solve it.

The elimination of the iniquitous fee system has had a rather substantial, untoward effect upon the operation of the Magistrate Courts. While the fee system was grossly unfair, it did accomplish one valuable public purpose; namely it forced judges to decide cases so that they would attract business. A salaried minor judiciary, constantly reminded that they are real judges, cannot help but adopt the vices as well as virtues of other judges. One of the great vices of judges is laziness and this quality is nowhere more evident than in the Magistrate courts. It makes very little difference how well qualified, how honest, or how Solomon-like a judicial officer is if he won't work.

Perhaps the greatest hodge-podge of problems exists right here in Kanawha County. Despite having more than twice as many Magistrates as almost any other county, an awesome backlog of cases has been allowed to develop. Despite the fact that three or four of the ten Magistrates elected in this County are good, intelligent, hard-working public servants, we have conditions of

chaos in the Magistrate Clerk's office. Despite admonitory actions by both the Supreme Court and Chief Judge Thomas McHugh of the Thirteenth Circuit, the situation threatens to get worse instead of better.

It is estimated that there is a backlog of between 18,000 and 20,000 cases in Kanawha County alone, and tracking just where these cases are, and when they might ever see the light of day, is a task of Herculean proportion. We are attempting to deal with the problem; however, the Legislature has limited, both numbers and salary-the amount of assistance we can provide when a logjam like this develops. As lawyers, I believe you can see the implications of this massive buildup of cases and can understand the concern of the Supreme Court in its role of ultimate overseer of the entire Judicial System.

A Blueprint to Lessen Delay in the Magistrate Courts

In addition to the monumental problem of insufficient supporting staff for service of process, the Legislature has allocated Magistrates to the various counties on the basis of population alone. We are finding that the case load per Magistrate does not necessarily follow the dictates of the Legislature. For example, the busiest case loads per Magistrate in 1979 were in Raleigh, Putnam, Mercer, Logan, and Kanawha Counties-in that descending order. This does not correspond to the largest populations by any means. Cabell, our second-largest county, ranked fifteenth in case load, for example. The Legislature responded to this problem in part this year by creating new Magistrates for Raleigh County and Putnam County which would ease the strain in those localities.

However, I feel that pressure is going to develop in the future for assignment of Magistrates on the basis of both case load and population. Just as the case load is overly burdensome in the five counties which I just mentioned, there is hardly enough work to keep two Magistrates busy, even on a part-time basis, in such counties as Wirt, which had only 751 cases in 1979; or Gilmer, which had only 900; or Pendleton, which had a mere 1130 cases.

It is important to remember that the majority of the work of a Magistrate is administrative and not judicial. Judges and bureaucrats boo and hiss when I talk about much of the work of the courts being administrative, but I know that you as practicing lawyers understand exactly what I am talking about. Notwithstanding all the constitutional safeguards which uniformly apply to every crime from first degree murder to spitting on the sidewalk, traffic cases are overwhelmingly administrative. Similarly, evictions for non- payment of rent, collections of bad checks, and collection of unpaid debts are essentially routine, uncontested matters. Most of the emphasis in the Magistrate Court must be upon paper flow, record keeping, service of process and other management--as opposed to judicial-techniques. I have devoted almost 50 of my administrative time as Chief Justice to detailed investigations of methods of improving the administration of the Magistrate Courts. I have contacted the National Center for State Courts and enlisted their help in devising new computerized techniques for handling paper flow, record-keeping, and traffic citation processing. Last year the West Virginia House of Delegates defeated by 57 to 41 a joint resolution proposing a constitutional amendment to remove the Court's budget-making authority. This demonstrated a substantial vote of confidence with regard to the efficiency with which the Judiciary has ad- ministered its funds. With this vote of confidence in

hand, it is my intention to buy any equipment necessary to assist our Magistrate Court personnel.

Justice-A Function of Judicial Competence and Energy

The people, in their infinite wisdom, manage to elect a fair number of utter clods to the Office of Magistrate. These errata of the electorate range from the pitiable soul struggling with the problem of acute alcoholism, to the simon-pure, 24-karat, certifiable incompetent, to the avaricious, outright crook.

By fair means or foul, we have managed to purge our Magistrate Court System of several of these besmirched public officials in the last year. It is my unpleasant duty, however, to advise you that there remains a select group of Magistrates whose intellectual capacities are exhausted by finding their way to their offices each morning. Their nescience is stunning, their performance totally lackluster, and their impact on the commonweal deleterious. With new elections of our second class of Magistrates on the horizon this fall, we have little in the way of tools or weapons to ensure that the newer Magistrates will not be truly second-class.

The Bar Should Enter the Political Arena

I must call upon you, therefore, to help solve the most critical problem facing the judiciary, namely the elimination of the lazy and incompetent by recruitment and election of qualified Magistrate Court Judges. I must confess utter shock and consternation at the remarkable lack of political influence which is enjoyed by the Bar at either the county or the State level in West Virginia. It is frequently pointed out that the Bar stands in low repute among the citizenry as a whole but I hardly find that a shocking revelation since everyone stands in low repute among the citizenry as a whole. When, for example, did you last hear someone comment upon the remarkable craftsmanship displayed by the local purveyor of automobile repair services, or the local plumber, or even the local doctor? Teachers are almost universally criticized by everyone who is not a teacher himself and even factory workers are blamed for the dramatic decline in American productivity. I think it is time for the legal profession to resume the role of leadership which it has had in this Country since its birth.

I am in favor of the Bar Association creating the biggest political machine for the election of judges that has ever been seen anywhere on the face of the earth, and I do this in full recognition of the fact that if I had had to run for the Supreme Court of Appeals in 1972 at either a local or statewide Bar meeting I would have run twelfth out of a field of six. Obviously for my own mental health I must conclude that the general low esteem with which I was held by the Bar at that time demonstrated a deficiency of judgment on the part of the Bar; nonetheless, giving myself every benefit of the doubt, I can only say that that is the exception which proves the rule. Normally when a sizable majority of the members of the Bar believe that a candidate for judicial office is an outright fool, the man is indeed an outright fool. As I look back on my own election to the Court in 1972 knowing what I know now, I'm not sure that even I would have voted for me.

By and large, the only people who are aware of the quality of performance of Magistrates are the lawyers who must practice in Magistrate Courts every day. Furthermore, while the population at

large may not take seriously the recommendation of lawyers on every subject under the sun, they will indeed take seriously the recommendation of lawyers on things touching the Judiciary. I recognize that politics is politics and that being on the losing side of a Judicial race can be hazardous to one's professional health in the rough and tumble practice of law where it is necessary to win cases before often capricious trial judges. In an article which I wrote for a recent issue of the State Bar Journal, I pointed out that it is possible for the Bar Association to delegate significant political functions to lawyers who do not practice in courts in exactly the same way that Congress delegates the regulation of the economy to the Federal Reserve Board. The American political system has devised highly sophisticated methods of making, unpopular or dangerous decisions without jeopardizing anyone's job security.

Certainly there will not be general agreement at the Bar regarding choices between qualified candidates but it would appear to me that the integrity of the Magistrate Court System is so crucial to the efficiency of day-to- day practice that a system of compromise and unified action could be worked out in every county of the State, by which the Bar Association or one of its committees could strongly endorse a slate of qualified candidates for Magistrate Court. In some counties such as Marion or Grant it would obviously be necessary only to endorse in the primary since in those counties the primary election is for all intents and purposes the election. In counties where both the Republican and Democratic parties routinely elect office holders it might be necessary to endorse candidates on both sides of the ticket or devise a nonpartisan system in which both Democrats and Republicans are evaluated on their merits and endorsed irrespective of party affiliation. I am not interested in the niceties of political or partisan fairness; I am interested in a competent minor judiciary and this should be accomplished according to the real facts of political life in the counties, which will obviously be as diverse as the counties themselves.

In every county of the State there are lawyers who are experienced in politics and who know how to win an election. Winning local elections is some function of popularity in the county on a very personal basis, but it is also some function of technology and know-how, and most of all, money. It is inconceivable to me that a bar association which would dedicate itself to the election of good Magistrates in its own county could not achieve a 75% success rate primarily through the sharing of sophisticated knowledge about how to win elections. I estimate that roughly 25% of our Magistrates are outstanding, that the majority are commitment but that a substantial minority should quickly be replaced. Active bar participation can reduce this last category to less than 10% and increase the number of truly outstanding Magistrates to 50%.

Preeminently politics is some function of financial support. Where lawyers have little political influence it is usually because they are too cheap to participate in the process. While the race is not always to the swiftest nor the fight to the strongest, that's the way the smart money bets. Consequently meaningful support of a minor judiciary involves digging down into pockets and coming up with real and not nominal cash money for qualified candidates, either to buy media exposure or to haul voters to the polls. There is nothing immoral about participating in a political machine since that is what democracy is all about. There is no point having a good Bar endorsement if there is not sufficient money to advertise that fact on radio, television, and in the newspapers, and there is no reason why the good guys should be unrepresented while the bad guys pay all the scrapings and leavings to drive their families to the polls to vote an

organizational slate. The way good guys win is by making sure that when a person is handed a slate, it's the "good guy" slate!

No institution is capable of policing itself. The theoretical proposition that the "people" police the Judiciary by electing judges to office every four, eight, or twelve years is nonsense-it is a myth. The great enemy of the truth is very often not the lie-deliberate, contrived, dishonest-but the myth-persistent, persuasive and unrealistic. The reason that we have clods and know-nothings in Judicial Office where they can do substantial damage to everyone's faith in the law is that a pervasive philosophy of noninvolvement exists among the only organized group which is capable of intelligently evaluating candidates for Judicial Office.

A Plea from the Bench

I do believe that we can have a first-class minor Judiciary. I promise you that the Supreme Court will bring to the minor Judiciary the finest technology and our most dedicated lobbying efforts to provide the necessary supporting staff. From you, however, we need dedicated, intelligent commitment to making the political process work the way it is supposed to work. Government of the people, for the people, and by the people just does not work when there are no people out there contributing money, formulating issues, and evaluating personnel.

I have always been very proud to be a member of this Bar Association. When I was just entering public life Judge Harper Meredith advised me that regardless of what office I achieved I should always remember that I am a lawyer first. I have, indeed, always remembered that. My remarks concerning political participation are not intended as a criticism but as a plea for help. The Supreme Court and the administrative staff cannot do this thing alone. We need the Bar to create an institution which will continue after I am gone to elect good judges, criticize them intelligently, and make them perform energetically.