

STATE OF THE JUDICIARY MESSAGE

JANUARY 2007

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CHIEF JUSTICE

Governor Rounds, Lt. Governor Daugaard, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, employees of the Unified Judicial System and all citizens of the State of South Dakota:

This year once again it is my privilege and pleasure as Chief Justice of the South Dakota Supreme Court to present to you both an oral and a written report on the state of the South Dakota Judiciary. I am pleased to report to you that the Unified Judicial System is strong and working well to meet the challenges that face us.

This past year presented a greater number of challenges for the Judicial System of South Dakota than is the norm. I would like to thank Justice Sabers, Konenkamp, Zinter and Meierhenry and all those who are part of the Unified Judicial System for their dedicated efforts to see that these challenges were successfully met.

THE 2006 ELECTION - THE PEOPLE SPEAK

We have just come through a retention election for all members of the South Dakota Supreme Court. A pundit has said that the Supreme Court grades the papers of the circuit judges when an appeal occurs. This election was an opportunity for the voters to grade the papers of the Supreme Court. We passed.

A bright spot in the election process is that this state did not fall prey to the waive of electioneering that is sweeping through many states' judicial elections. In one Midwestern state in 2004, nine million dollars was spent on a race for a single state supreme court seat. It is a hard sell to convince the public that the nine million dollars was contributed to the candidates by concerned citizens who were interested only in good government.

In contrast all five Justices of the South Dakota Supreme Court who ran in the 2006 retention election did not raise or spend any funds for that purpose. We all simply ran on our judicial records and let the people decide whether we should be retained in office for another term.

There has been a troublesome trend to try to get judges to commit to certain polices or causes during the course of a judicial campaign. It is interesting that at the same time we held our general election, baseball held its World Series. How would

you feel as a baseball fan if the umpire announced prior to the game that because he was from the American League and like its players, he would give the American League pitchers double the size strike zone that he would give the National League pitchers. So much for the concept that the game was fair and that the best team would win.

This past November the citizens of the state soundly defeated proposed Amendment E, commonly known as "JAIL for Judges." In an election which featured controversial, far-reaching ballot issues such as abortion, taxes, gambling and gay marriage, JAIL proposed the most fundamental and radical change in the way government serves its citizens in South Dakota. As the Rapid City Journal editorialized, "Amendment E stands on a premise that is a lie. The premise of Amendment E is: Judges have judicial immunity, therefore judges are corrupt." JAIL would have severely damaged the ability of this state's judicial system to fairly and effectively function. Had it passed, the ripple effects on jurors, victims of crime who testified as witnesses, public boards and commissions and those who wished to do business in this state or live here would have been incalculable. As United States Supreme Court Justice Sandra Day O'Connor observed, "[a]lthough the amendment's supporters claim they seek a 'judicial accountability initiative law' (JAIL), they aspire to something far more sinister - judicial intimidation."

I wish to thank Governor Rounds, Lt. Governor Daugaard, our Congressional Delegation, this Legislature and other public officials for recognizing the risks of this proposal and taking a public stand against it. I know when all 105 members of this body voted for a resolution last year that publicly opposed JAIL, some of you, as well as members of your families, were subject to ridicule and verbal abuse. Nevertheless, not a single one of you waivered. To borrow a phrase from Winston Churchill, "this was your finest hour."

The public was educated as to the catastrophic results of JAIL by an excellent campaign led by Tom Barnett, other officials of the State Bar, and "Electrical" Bob Miller. Literally hundreds of citizens joined in the battle against this ill-advised proposal. It was heartening to see the groundswell of all aspects of our society who refused to let their judicial system be so irreparably damaged. Such unanimity is unprecedented in this state.

While we face such problems as JAIL from time-to-time, they pale in comparison to the problems that confronted the new United States after the victory in the Revolutionary War. The new national government was all but helpless. Anarchy appeared to be the wave of the future. In the alternative there was a great fear that some form of English tyranny would re-assert itself. Either way the rule of law would be lost. In a last ditch attempt to avoid both fates, a Constitutional Convention met in the summer of 1787. When at long-last the Constitution was finished, an elderly Philadelphia lady asked delegate Benjamin Franklin what type of government the proposed Constitution would create. In light of JAIL and other such proposals,

Franklin's response is still good advice to us today. He said, "a Republic Madam, if we can keep it."

THE FAMILY OF SOUTH DAKOTANS

A major focus of my prior addresses to you has been how the family relates to the judicial system. While the traditional definition of a "family" is parents and children, the definition can be expanded to include all citizens of South Dakota. Today I would like to focus on this larger family - all of us who call South Dakota home.

One of our faithful family members has fallen ill. Our friend and fellow public servant Senator Tim Johnson has walked through the valley of the shadow of death. However, with Devine's healing help, he will return to us in the near future completely healed.

Although I have known him for decades, I got to know the measure of this man when I was diagnosed with prostrate cancer. Within two hours of learning of it, he was on the phone to me with encouragement and optimism as he had been through the same disease. His courage and his resolve to continue to serve the public despite that bout with cancer were an inspiration to us all. I am confident he will come through again.

On December 6, 2006, he wrote me a letter. I did not receive it until a few days ago. I assume the delay was because it was on his desk when he became ill and his staff later ran across it. At the bottom of the letter, he penned me a hand-written note, "David my PSA is 0 so we need to hang in there healthy together." Yes, my friend Tim, with God's help, we will all do that.

Many of our family members have been gone for awhile. They have been defending us in far away places. Thankfully, most have returned safely home to us. Several months ago I had a conversation with Governor Rounds and General Gorman about these individuals. Some are returning home in need of assistance from the rest of the members of the South Dakota family. If a returning veteran is in court on a civil or criminal matter, the cause of the problem may have deeper roots. Once the problem is identified the judge, working with others, can assist to rectify it. As Lincoln said toward the end of the horrific Civil War, "we must care for him who bore the wounds of battle, his widow and his orphan."

METHAMPHETAMINE ADDICTION IN SOUTH DAKOTA

All too many of our younger family members have fallen prey to the addiction of drugs - especially methamphetamine. In the past few years I have shared with you some of the startling statistics on how bad the problem really is. This addiction cannot be cured by simply locking people up. When they are released they are still addicts

and once again commence their downward spiral. Incarceration by itself is about as successful at curing meth as it would be at curing cancer.

There is no doubt that meth destroys lives. Every year of meth use ages the brain an equivalent of ten normal years. It leads to dementia and senility in users decades before those would occur by natural causes. Meth is a poison that if taken for a sufficient period of time comes with a guarantee: a guarantee of ravaging the body and ultimately death. It also has untold consequences for family members of the addict, especially the children. If for no other reason than the humanity of it, the courts, along with agencies of this state, should work to eradicate this curse upon our land. We should not pass by on the other side of the road like the priest and the Levite in the parable of the Good Samaritan.

Even if you put the Good Samaritan considerations aside, there are sound financial reasons for dealing with the issue. It is nearly impossible for a person to remain a meth addict and not get caught in a serious violation of the law. Thus, we are faced with incarceration in prison at the cost of \$18,184.30 per addict per year. All too many of these addicts are young women. The force of the addiction is so strong that many give birth to children while using meth during their pregnancies. These children are born with a wide range of birth defects. It is estimated that with their individual medical and educational needs, the care required for meth babies and children costs the state's taxpayers tens of thousands of dollars per year per child. One addicted mother had her five children taken away from her. The judge who presided over this matter told me because of the children's special needs due to their mother's drug abuse, those five children cost the taxpayers \$258,737 per year for their care. If the meth addict is in prison, presumably their children, even if not meth babies, will become the charges of the Department of Social Services. Each child in the foster care of DSS costs \$5,000 to \$10,000 per year. In 2003 there were 57 children placed with DSS due to meth issues. That number increased to 110 in 2004 and ballooned to 183 in 2005.

Finally, meth addicts in prison are obviously not working in our communities. They contribute nothing of a positive nature to their community, nor do they pay any taxes.

Every state in the country, except South Dakota, has attempted to overcome the meth problem by a diversion program called a drug court. People who plead guilty to felony meth use and meet certain criteria are involved in a lengthy intensive drug rehabilitation program. Either every other state in the country, each of which possess a drug court, knows something about dealing with meth that we do not, or, we by ourselves know something they do not.

I recently visited with a criminal defense attorney from the Northern Black Hills. He told me of a person he represented who had spent ten years in South Dakota's penitentiary for meth use. At that time drug treatment was not available to

him. Within less than a week of his release, after serving his ten years, he was again on meth because his body was still addicted to the drug. Not surprisingly he was again caught by law enforcement. When the addict told his sentencing judge that he could not wait to use meth when he got out of prison after ten years, the judge commented, "that must be one amazing drug." Yes, in a most despicable way, it is a most amazing drug.

As an alternative to this type of situation, a drug court attempts to keep the addict in the home, employed and the family intact. The long term goal is to keep the addict off meth through an intensive program that takes twelve to twenty-four months. That is achieved through cooperation of prosecutors, defense counsel, drug counselors, probation officers and frequent meetings with the sentencing judge. A program which the UJS studied in Wyoming has a success rate of 62 percent. The alternative of merely locking up the addict has a success rate of zero.

I will be asking this Legislature to fund a pilot drug program in the Northern Black Hills. The preliminary planning has been completed. Judge Jerome Eckrich has agreed to commit a significant amount of his time to this program in order to make it a success. Since meth is a state-wide problem, we hope to expand the pilot to other areas of the state if the pilot proves to be as successful as the rest of the nation found it to be. Last year I told you that Judge Glen Severson of Sioux Falls estimated that 75 percent of the felony cases he sees are the result of meth addiction. This year I asked Judge Jeff Davis the same question and he responded that if anything, the 75 percent figure is low for Rapid City's felony docket.

I wish to emphasize that this is not a "hugs for thugs" program or a "get out of jail free" card. Significant restrictions are placed on the probationers. If they fail the program they face imprisonment. It is also only for addicts - the dealers go to prison as they have in the past. One study indicated that for every dollar spent on drug courts ten dollars of public expenditures are saved.

EQUAL JUSTICE IN SOUTH DAKOTA

We are also moving forward in the area of cooperation with tribal governments. For too long many attorneys have avoided appearing in tribal courts because they did not know the mechanics of how to do so. This year the Unified Judicial System underwrote an updated version of the Tribal Courts Handbook by Professor Frank Pommersheim of the University of South Dakota School of Law which provides that vital information. It is posted on the UJS Web page at www.sdjudicial.com to allow free access to it by anyone and to allow easy future updating.

Last year I spoke to you about the report from our Equal Justice Commission. That Commission, you will remember, was created by our Court to investigate perceptions of unfairness in our state judicial system and to recommend solutions to correct those perceptions. I am pleased to tell you that we have begun to follow the

recommendations of the Commission. We have stepped up training for judges and court personnel in cultural awareness and minority concerns. In our capacity as the final authority for the admission of lawyers to practice law in South Dakota, we have changed the testing requirements for new admittees to the State Bar. Now, in addition to being tested on other legal subjects, people taking the South Dakota bar exam will also answer a question on Indian Law. We think this is an important subject for South Dakota lawyers to know, given that there are nine tribal entities within our state, and a substantial number of our citizens are of Native American heritage. South Dakota lawyers must be conversant with the host of special laws pertaining to Native Americans.

In the area of adult and juvenile corrections we are following other recommendations from the Commission by amending the way we collect background data on the people we process. We want to better measure the degree to which minorities are represented in our system. We are also taking positive steps to encourage minority employment within the Unified Judicial System. To some reasonable degree, we think the people in our system should reflect the diversity of the people it serves.

The report of the Equal Justice Commission identified the perception of lack of access to the courts by the less fortunate in our state to be a significant problem. In cooperation with the State Bar, the UJS is working on two projects to rectify this problem and ensure access to the courts for more of our citizens. The State Bar, with our encouragement, is developing an organized program of donated time by the lawyers of this state to assist those who cannot pay for their services. The UJS is also working on a project to make forms available so people can represent themselves in less complex legal matters such as a default divorce or child support. These types of programs have worked successfully in other states and there is no reason they cannot work here. When finalized, the forms will be made available to the public on the easily accessible UJS website.

The Commission report is a milestone in identifying other problems within our legal system and proposing courses of action to address them. It contains many other recommendations we are following that time does not permit me to talk about. As the prophet Amos declared over three thousand years ago, "let justice roll down like waters." Suffice it to say, we are working on creating a permanent Equal Justice Commission so that we can continue the never ending task of ensuring fairness and justice for all. As my friend, Chief Justice Randall Shepard of Indiana is fond of saying, "good enough - isn't good enough."

ATTORNEYS IN RURAL SOUTH DAKOTA

Most of the time when I bring up a subject for your consideration it is because I have a proposal to address it or hopefully progress to report. Such is not the case with the next topic. However it is a cause for grave concern and should be openly discussed.

As I drive from courthouse to courthouse it is becoming painfully obvious that in all too many of our smaller counties the supply of local attorneys is virtually non-existent, or heading in that direction. A generation ago many of these counties had several flourishing law practices. Time has taken its toll with death or retirement and has provided no replacements. In the 1970s we, as a state, had to face the fact that we had a crisis on our hands with the lack of medical care in rural areas. A similar crisis in the legal area is not far off unless events change.

South Dakota has enough lawyers. However, according to the State Bar 33 percent of all lawyers have a post office address in Minnehaha County. If you add in Pennington County, that number increases to 50 percent. From time-to-time there is discussion about whether courthouses in rural areas should remain open. As far as the courts are concerned, however, the real focus should be on the availability of legal services in these areas, not on whether an empty building with the sign "courthouse" on the front door is open or locked.

DISASTER PREPAREDNESS AND SOUTH DAKOTA COURTS

It has become very obvious that we as a judicial system must look at our ability to respond to natural and man-made disasters. Last year the Corson County Courthouse was destroyed by arson. The Thanksgiving weekend blizzard of 2005 closed many courthouses for days. We could be facing pandemics or other problems with long-term consequences. We view with concern what happened in Louisiana where a good portion of the state's judicial system was not able to function for a significant period of time despite valiant attempts to do so.

The UJS is conducting an internal study to determine how best to plan and react to such disasters. We are also working with the other branches of state government in a cooperative effort towards the same goal.

I am pleased to report to you that our Interactive Television Program, a two-way television system, is an unqualified success. When we commenced our pilot project several years ago, we never envisioned that one of its potential beneficial uses would be in cases of pandemics and quarantines. It will allow a quarantined area access to other areas of the state if a judge or legal services are needed.

This year I will be requesting that the Legislature pass a bill which will allow the Supreme Court to extend the period for statutes of limitation and certain other deadlines in the legal process because of a disaster. At present if a case is thrown out of court for failure to meet one of these mandatory deadlines, the judiciary possesses no authority to rectify the situation even if the delay was unavoidable due to a disaster.

AN EDUCATED SOUTH DAKOTA CITIZENRY

Courts solve problems and resolve society's disputes. Yet courts cannot do so without public education and support. There has been major emphasis in recent years on improving math and science education in our public schools. These are obviously important subjects. Becoming lost in the shuffle, however, is a working knowledge of our governmental system by those students who one day will be our citizen electorate. A 2006 poll found that less than one percent of those responding could identify the five protected constitutional rights - freedom of religion, speech, press, assembly and the right to petition the government. On the other hand 20 percent could name all five family members of the cartoon family of Homer and Bart Simpson. Twenty-one percent thought the right to own a pet was guaranteed in the Bill of Rights and 17 percent thought the Constitution guaranteed the right to drive a car. Obviously we need to stress how our democratic form of government works to those who one day will be called upon to run it or determine its future direction with their votes. Once again, "good enough - isn't good enough."

We must do better because some already do. As an example, Ms. Marletta Eich teaches second graders in Madison. After instructing her students on the fundamentals of how our system of government works, she has her second graders conduct their own project on how bills are passed and become law. As many of you Legislators who have been here for awhile know, they correspond with public officials by letter and computer and many actually visit this Capitol during the Legislative Session. The questions and correspondence I receive from them indicate that although only second graders, they have an amazing understanding of our governmental system. Ms. Eich is a teacher who does more than the minimum to successfully address problems and educate children.

Another example is the third grade class of St. Joseph's School in Pierre. Its teachers, Carolyn Guhin and Molly Fulton, brought their students to our courtroom to ask me a "few questions" about the judicial system. An hour later they were still asking questions. The quality of their questions indicated for third graders, they had an exceptional understanding of how our judicial system works.

Every time I drive through the town of Blunt, I think of a man named Mentor Graham who died there as an old man in the late 1800s. Graham's profession was that of a teacher. In his younger years Graham was asked for help by a young man in his early 20s who had a keen mind, told a lot of humorous stories, but only had a year of formal education. Graham, who was already attending to his normal duties with his students, agreed to privately tutor this young adult in the evenings. Graham did not have to do it, but he made that extra effort. Graham must have done a good job because that young man would later mature to where he would pen phrases such as a "government of the people, by the people, for the people, shall not perish from this earth." Yes, Mentor Graham went the extra mile for a friend who ultimately became our beloved President Abraham Lincoln. What a different world we might live in if

Graham had merely put in his time with his regular students and not bothered to go beyond that for those that needed his help. "Good enough - isn't good enough."

To better educate our public, the South Dakota Supreme Court carries its oral arguments live on the Internet. The arguments are also archived for public Internet access after they are held. The opinions of our Court are posted on our Web page, www.sdjudicial.com, within twenty-four hours of issuance. They can be accessed for free. In addition, our arguments are covered by television, radio and the print media.

This fall we held our October Term of Court at the Washington Pavilion in Sioux Falls. The public was invited to attend. We also sent invitations to all the high schools within a hundred miles of Sioux Falls. This was a success. The crowds, consisting mainly of high school students, numbered in the hundreds for each of the three days of oral arguments.

CONCLUSION

Our family of citizens which comprise the State of South Dakota should all use our best efforts to improve our state and move it forward. Included in that is a judiciary that meets the people's needs. There will always be needs for improvement and change as our society changes. However these types of shortcomings are significantly different than simply ignoring a problem or a portion of our people. As the great United States Supreme Court Justice, Oliver Wendel Holmes Jr., observed, "even a dog distinguishes between being stumbled over and being kicked."

Last year I began a project of taking my family videos and transferring them from VHS to DVD. They began in the early 1980s when my oldest daughter was a toddler. Interspersed with the shots of my children are television programs they watched. What fascinated me were the commercials during these programs. They touted that to be truly happy, one must have the latest 1982 car, VCR, clothes, appliances and about everything else. It strikes me that all these 1982 "necessities" now grace our landfills and junkyards. Yet my children in the videos were a wonderful reminder that families endure. They do age but future generations come along. In the end that is our true legacy and our true greatness. May the family that is all South Dakotans continue to prosper and overcome our challenges as we have since 1889.