

**STATE OF THE JUDICIARY MESSAGE  
JANUARY 2009**

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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:*

After years of hard work, study by many, and approval by the voters, the Unified Judicial System came into existence in 1975 pursuant to a constitutional amendment. This amendment established the basic framework for our judicial system of today. A lot has happened since 1975. While important judicial work was being done then which met the needs of our citizens, times have changed. Today, it would be easier for the justices, judges and the staff of the Unified Judicial System to simply sit in courthouses, decide disputes, and send the litigants on their way with a decision. The role of the judiciary in a modern society, however, demands more than ivory tower justice.

For the past several years, I have spoken to this Legislature about those factors which have required the UJS to become proactive in how it accomplishes its constitutional and statutory tasks. This year it is my purpose to delineate and discuss in a more organized manner all the major factors facing the UJS.

The first factor, and in my opinion the most important, is the disintegration of what we knew to be a family back in 1975. I am not alone in this view. A few years ago when all the judges of this state were polled, they unanimously chose

disintegration of the family as the number one factor which has affected the environment in which the UJS does its work.

In 1975 most juveniles came into court with two parents. Now it is not uncommon for juveniles to come to court without parents simply because none can be located. In these situations, problems will not be solved at home and parental discipline will not be applied because there are no parents. This requires the UJS, through its various probation programs, to attempt to correct juveniles' mistakes and return them to the right path before they become another statistic in a state-financed institution. There are obvious reasons for doing so. From a human standpoint, this saves juveniles from wasting their lives. It is also a matter of simple economics. It is cheaper to use probation services than place a juvenile in a state-financed institution. It is also cheaper to end trips to the courthouse at the first outing before they become an endless merry-go-round. There are all too many instances which demand institutionalization, but for lesser offenses non-institutional supervision by court services is often the better alternative. Where is the line drawn? That is the tough question the trial judge must answer.

The second factor facing the UJS is the alarming increase in domestic violence. Each year when I give this message to you, without fail I report yet another rise in the instances of domestic violence. I have no way of knowing whether all of this is a real increase or whether the numbers are influenced by the fact it is now socially acceptable for victims to report domestic violence. Victims no longer hang their heads and hide their injuries in silent humiliation. While we

have not succeeded in eradicating domestic violence, we do continue to educate the public that these acts are criminal acts. We must once and for all end the sorry state that a victim is victimized twice - once by the perpetrator and a second time by an indifferent judicial system.

In 1975 the only legal recourse for a victim of domestic violence was a divorce or criminal prosecution for assault. No matter how brutal the act, the law did not allow for the prosecution of rape if the attacker and the victim were married. Now the Legislature has enacted laws which allow the court to more promptly intervene and protect the victim of domestic violence as well as members of the victim's family. I talk to judges who have an entire day's docket of nothing other than one case of domestic abuse after another. While personalities play an obvious role, so do other underlying causes such as mental illness, substance abuse, and poverty. Often, to end the repeated cycle of trips to the courthouse, the judge must become proactive and order counseling for the perpetrator and help for other members of the family.

The third factor which has vastly changed South Dakota is drug abuse. This is the twenty-first century version of the biblical disease of leprosy. When I was a trial judge from 1986 to 1995, virtually every felon I saw in court was due to alcohol abuse. Now in 2009, the circuit judges are telling me at least 75 percent of the felony caseload in places such as Rapid City and Sioux Falls is drug related. This is not just 75 percent of drug felonies but 75 percent of all felonies. People either commit felonies to get high or are high when they commit felonies. It may be too

simplistic to say that if we solve the drug and alcohol problem in South Dakota we also solve the crime problem. However, those who commit a felony as an intelligent choice free from the influences of alcohol and drugs are few and far between.

Wouldn't it be a pleasant problem for this Legislature to have to decide what to do with empty prisons because they are no longer needed for their original purpose?

For the past several years I have advocated the use of drug courts and other treatment programs to solve the underlying problems that cause people to commit crimes rather than just to lock them up, to release them, and to lock them up again for yet another crime which seems to be a revolving door. As I told you a couple of years ago, incarcerating people addicted to methamphetamine without treating them is as successful at eliminating that addiction as treating cancer by incarceration. A successful treatment program gets those addicts who have committed a criminal offense the tools to rid themselves of the addiction. They can then become useful citizens in society who hold jobs, raise their families properly and are taxpayers rather than government expenses.

Last spring I received a report from our Northern Hills Drug Court on one 23- year-old convicted drug felon who, but for that program, would be in the penitentiary:

*One participant was accepted into college and begins school on March 5. We are very proud of her!!! She is kind of scared because she has not gone to school sober since middle school. We give her all the encouragement we can.*

This drug felon has now completed the first year of college with an impressive GPA of 3.85. Instead of looking forward to a parole board hearing she may be looking forward to graduating from college as a Phi Beta Kappa. The child of another drug court participant commented that it was nice to see her mother "be a mom" for the first time.

Alcohol treatment programs have been around for a long time. We know which types of alcohol treatment programs work and which do not. In comparison we are in the infancy of drug treatment programs. Drugs which are manufactured in illegal drug labs are a new curse. I doubt when the UJS was created in 1975 that meth even existed as a street drug.

A successful treatment program seeks to avoid a second generation of people troubled with disabilities by seeing to it that mothers give birth to healthy babies rather than meth babies. Meth babies often are born with birth defects which, in all too many cases, are significant and permanent. They may be in need of governmental assistance for the rest of their lives. As these meth babies grow older into adulthood, what kind of parenting skills will they possess?

At this point I should make a strong distinction between drug addicts and drug dealers. Since 1975 the number of people in South Dakota who are willing to exploit the weakness of others for profit by selling addicting drugs has exploded. For justifiable reasons, the Legislature has seen fit to authorize significant criminal sentences for drug dealers. Their treatment in the judicial system is an entirely

different matter than the reformation of those individuals whom the dealers have lured into addiction all for the sake of making a profit.

Three years ago I proposed to you the concept of a drug court. I told you I thought it would work. During the past two years when the drug court became operational, I told you it appeared to be working. Now with three successful graduations and the continuing success of our other participants, I am now pleased to simply say, "it works." How well does it work? There have been, of course, humanitarian gains. In terms of cold hard cash, however, the National Institute on Drug Abuse has determined that every dollar invested in drug treatment programs results in a savings of twelve dollars in crime and health care costs.

The disintegration of the family, the increase in domestic violence, and the alarming increase in drug use give rise to poverty, which is the fourth factor facing the UJS. It is obvious that poverty existed in 1975, but perhaps it is more visible now or at least we are more aware of it. Who in 1975 heard a vocabulary in this state which included the term "dumpster-divers?"

While other agencies of this state deal directly with job services, the UJS all too often finds it necessary to break the cycle of poverty, violence, and drug addiction which leads to repeated trips to the courthouse. Our court services officers, in addition to their regular caseload, must attempt to get the person a job or job training where necessary.

At this point you may think portions of my message concerning the increasing problems of societal and family dysfunction are dreary at best and that

you long for the "good-old days" of 1975. Obviously we cannot turn back the clock. However, I am convinced that without proactive participation by the UJS to solve these problems, things would be a whole lot worse.

The fifth factor we face is the change in population dynamics. While many counties retain a relatively stable population base or experience some decline, we have counties which have undergone what could be described as a population explosion. I have yet to hear a serious argument that expansion and growth for South Dakota is undesirable. It is necessary to avoid out-migration of our citizens, especially those whom we have recently educated at taxpayer expense and are our future. Yet an increase in population brings with it an increase in demands upon the court system.

A recent example is the City of Aberdeen. With three new major industries it may enjoy up to 1,300 new jobs. While we would like to think all will go splendidly for Aberdeen, history teaches us that will not always be the case. Because of this population expansion, in future years with the probable increase in court caseload, it may become necessary to seek an additional court services officer.

Along with a shift in overall population, the availability of attorneys within South Dakota has changed. Thirty-five percent of all licensed attorneys in South Dakota reside in Minnehaha County. To put it another way, two-thirds of all attorneys in South Dakota are found in just three of our 66 counties, Minnehaha, Pennington, and Hughes.

On the other hand, we now have two counties in this state without a single attorney. Fourteen counties only have one licensed attorney. Seven counties have only two licensed attorneys. Many of these rural attorneys are approaching retirement. The likelihood of replacing these attorneys is remote.

The Chief Justice and Presiding Circuit Judges have the authority to assign judges to cover every county in the state. Without attorneys available, however, the issue of whether the courthouse door is locked or open and a judge is present really does not matter much. The real and sad truth is that we are heading toward a state that will not provide justice for all no matter the location. We are heading for a state which contains islands of justice in a sea of empty rural courthouses.

A sixth factor affecting how the UJS does its business is technology. In 1975 the height of technology was an IBM Selectric typewriter. Pencils and paper accomplished most office tasks. To "compute" meant to add a column of figures with a manual adding machine. For many years the UJS has taken advantage of advancements in technology. This has allowed us to do more work with fewer employees than would have been otherwise required. It has allowed us to keep rural courthouses open while dealing with the ever increasing caseloads in urban areas. It has made our system more "unified" in operation as well as in name.

Technology has not been limited to just support tasks. We are engaged in an on-going program of video conferencing which allows hearings to be held with the judge, attorneys, and parties participating from various locations throughout the state. It is an excellent way to save on windshield time and taxpayer expense.

This is especially beneficial to rural courthouses that do not have a resident circuit judge on site. It is also blizzard-proof.

In many ways, the use of technology in the court system is only limited by our imagination. I recently received the following letter from one of our circuit judges: I thought you might be interested in another use for the Interactive Television Network. I had an arraignment, plea and sentencing hearing yesterday in Bison. The defendant is deaf and communicates through sign language. There are no deaf interpreters in Perkins County or the area that we could find. We employed one from Rapid City that we have previously used in Belle Fourche. Rather than having her drive all the way to Bison, she appeared on ITV from the Pennington County courthouse. I was in Bison with the defendant and positioned her and myself so we could both see the interpreter. The interpreter could see the defendant through her monitor. It worked very well.

Changes in technology are on-going. Experts say that court systems are headed to a point where they will become totally paperless. A few jurisdictions have almost met this goal. Because the UJS is a court system of general jurisdiction -- meaning we take all types of cases brought before us -- a goal of being a paperless court system is a ways off.

In 1975 the issue of cameras in courtroom was basically a technology issue. Most broadcasting needed to be done in a television studio. Courtrooms were not television studios and the two did not mix. With advances in technology, the issue

is no longer whether cameras can function in a courtroom setting, but to what extent, if any, cameras are appropriate in the courtroom.

Last year this Legislature repealed its prohibition on cameras in the trial courts of this state. Supreme Court rules, however, continue to prohibit the practice. The Supreme Court created a committee to research the subject. All groups that are components of the judicial process are represented on this committee. It is looking at how other jurisdictions are dealing with the issue and will make recommendations to the Supreme Court. Because there are 49 other states, numerous territories and a federal court system, the committee has a major undertaking to review what is being done elsewhere. The Supreme Court is interested in a thorough report, not a quick one. Upon receipt of that report the Supreme Court will consider whether to modify the current system.

The UJS has dedicated judges and support staff who are committed to overcoming these modern day problems. Judging is a demanding profession. To paraphrase President Reagan, on a good day anyone can be a judge -- but there are not that many good days. In reality there are more challenges than problems and this state was built on overcoming challenges of all sorts. Had we not as a state identified and successfully overcome these challenges, today the norm would be as it was in 1889: Dakota Territory with individual hopes for 160 acres and mule. Later, "The Greatest Generation" overcame a depression, Dust Bowl, and World War II. Today, our Dust Bowls and Hitlers come out of a meth lab, poverty and the disintegration of the family. We have identified the challenges. We are attempting

to solve them. Therefore, in the words of the leader of the "Greatest Generation," "the only thing we have to fear is fear itself."

This Legislature has the responsibility of funding the operation of the three branches of state government. Any time a new program is proposed, no matter how meritorious it is, it comes with the prospect it may become yet another fixture on the landscape of our government with permanent funding requirements. As a specific example, will that apply to our drug treatment programs? I have no crystal ball to give you an accurate estimate. There is a possibility that drug addiction will be overcome through public education and other methods which will make the drug program unnecessary since we will not have any addicts to treat. That does not appear likely in the foreseeable future. Another prospect, perhaps more likely, is advances in medical science. I have heard of proposals that one day drug addiction will be successfully treated with a pill the same way we treat high blood pressure or high cholesterol today.

Since 1975 the UJS would have remained a paper document except for the dedication of its judges and employees. Although the UJS has 545 full time employees, it is not one entity, but rather 545 individuals who are dedicated to getting the job done. While time does not permit me to recognize all of those who excel in our system, I would like to recognize two who have made exceptional contributions to our judicial system and this State.

Justice Richard W. Sabers retired this month. He served on the South Dakota Supreme Court for over 22 years. Since the creation of the Unified Judicial

System in 1975, this is the longest tenure in the history of the Court. He participated in all of the momentous legal questions of this age in South Dakota. His legal scholarship is found in literally hundreds of opinions he authored and many more in which he participated. He also provided leadership in the advancement of numerous administrative functions within the UJS. The Justices set the operational policy for the UJS and he spent the time and effort to make sure the policy was implemented in the best possible manner.

Last year our State Court Administrator, D. J. Hanson, retired. Many of you know him from his legislative activities. His was a tough job requiring tough decisions. Yet from the top to the bottom of the UJS and throughout state government, D.J. was admired for the way he undertook his tasks. He never forgot that while the UJS has its headquarters in the State Capitol, we also have 64 county courthouses. He was never happier than when he was visiting our employees in those urban and rural courthouses. This also gave him a unique perspective on how to administer the UJS.

The Justices appointed Patricia Duggan, the former Circuit Administrator of the Third Judicial Circuit to replace D.J. Hanson as State Court Administrator. Like D.J., Ms. Duggan is a people-oriented person who you will get to know and like. We are confident that she will serve in her new position with distinction.

Today if you want to travel virtually anywhere, you can simply dial up a detailed map on the Internet and it will tell you how to get there. One cannot say the same for the future. While we have general guides such as our constitution,

statutes, experiences, and common sense, they do not provide a detailed guide which guarantees success. I am reminded of Kierkegaard's admonition, "Life can only be understood backward; but it must be lived forward."

A lot has happened to the South Dakota judiciary since 1975. It is so easy to look at our accomplishments and be well satisfied with where we are and what we have. However an attitude like this is perfect embalming fluid for the future.

We must move forward to meet the judicial needs of the citizens of this state. In 1975 the UJS began its mission with 37 circuit judges. Thirty-four years later we attempt to deal with current societal needs with only 39 circuit judges. Of our seven judicial circuits, five have the needed number of judges to timely do the job. The same cannot be said, however, for the Second Judicial Circuit which serves Minnehaha and Lincoln Counties and the Seventh Judicial Circuit which serves Pennington County and the southern Black Hills. Our statistics tell us that the Second Circuit and the Seventh Circuit need several additional judges each to be fully staffed. The Presiding Circuit Judges in both circuits say while the need for more judges is great and immediate, they can make do for the foreseeable future if each circuit is granted one additional circuit judge. I will be asking this Legislature to consider this request. Those of you who represent these areas and those who merely visit them are aware of the population explosions and other social dynamics that have taken place and will continue into the future. Fields which existed there 20 years ago and which produced only crops and no litigation or crime have given way to people who do.

The UJS is fully aware that the ability of our citizens to fund state government is not endless. With full realization of the economic times in which we currently find ourselves, the UJS budget request is limited to those new requests which we consider essential for the continuing successful operation of our system for the benefit of our citizens.

South Dakotans have never been enamored with self-pity. When problems arise, we simply get together and do our best to address and overcome them. Last year this wonderful Capitol building turned 100 years old. Obviously those who planned and built it with horses and block and tackle had a great faith in our long-term future. They had full confidence that those of us who were to come after them would follow in their footsteps and work for a better state for all. At the laying of the cornerstone in 1908, General Beadle declared, "The future of South Dakota is in its own hands. With the laying of this cornerstone we introduce a new age. The test is upon us. We must make good." In the same vein, 100 years later it is our on-going duty not to disappoint.

It is not my purpose today to dredge up heaps of past and present problems. However, I am a firm believer in Santayana's classic observation, "those who ignore the lessons of history are doomed to repeat them." Yet, I am by nature an optimist. Were this not the case I would have long ago found something else to do with my time other than undertaking the duties of Chief Justice. As President John F. Kennedy noted in his Inaugural Address: "With a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we

love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own."

South Dakota has been known as the "Sunshine State." Our state flag features "the state seal surrounded by a golden blazing sun in a field of sky blue." In reality, the sun is not stationary. It rises and sets. To me that sun is rising on South Dakota, not setting. I firmly believe the best is yet to come.