

2010

STATE OF THE JUDICIARY

BARTON R. VOIGT, CHIEF JUSTICE

Delivered Before a Joint Session of the

Wyoming State Legislature

State Capitol Building

February 8, 2010

Mr. Speaker, Mr. President, Governor and Mrs. Freudenthal, members of the 60th Legislature, elected officials, fellow judges, friends and fellow citizens, first thing I've got to do is break off from my prepared remarks and mention something. The Governor sort of reminded me of it offhand. As you're all well aware by now I'm not by nature a public speaker, and you've suffered through this several times now, but luckily for all of you about three weeks ago, my wife and I and the Governor and the First Lady, let's see -- where is Representative Quarberg -- at least, and some other people in the audience were all fortunate to attend an event in Thermopolis, and I learned something about public speaking at that event. And one of the things I learned is that you really cannot get your point across in less than an hour and a half. That works best if they're starting at about, what, 8:30 at night. I will try to make the best of it. I know it won't work quite as well here at noon, but I'm going to try to follow what I learned there today.

The other things I'm going to try to say that's not in my prepared remarks, don't hold this against me, I have here a letter dated January 11,

2010 from the President of the Senate and Speaker of the House inviting me to come here and do this. I don't just come over here.

So this will be my last appearance before you as Chief Justice. I was going to hesitate there and wait to see if Senator Nicholas said, "Thank God," but he didn't, so I'll go on. At any rate, my term expires at the end of June and by the next time around here there will be someone else doing this. And I leave the post with mixed emotions. I would like to tell you that I miss all the day-to-day decision making and trauma and all the decisions that's made up so much of my life over the last four years, but the truth is I really am not going to miss all of those things that took up so much of my last four years. And when I wrote this I didn't realize my son was going to be here, but I'll go ahead and say this anyway. You elected officials and Governor and the Legislature, I'm sure you know exactly what I mean: I'm going to miss this kind of like the way you miss your kids when they go off to college.

The other thing I wanted to tell you before I got into my remarks is that I probably should be in a little more awe of a body that can make it snow every time you come to town. People who are in charge

of the weather are probably more important than what I have given you credit all this time. But as I was walking over this morning in the snow, it reminded me of a couple of things. You know how you get all those e-mails with 20 things in them, and some of them are funny and some of them aren't? Well, one of them was purportedly an e-mail full of Jeff Foxworthy quotes, "You may live in Wyoming if..." And I'm not going to read through the whole list for you. My favorite one was if you carry jumper cables in the trunk of your car and your girlfriend knows how to use them, you probably live in Wyoming. I thought that was the best one.

But I have one of my own, that I made up, my family is sick of hearing it. If you remember October when it snowed so bad, mine is if you use your lawn mower and your snow blower on the same day, you may live in Wyoming. There was one other one has nothing to do with the weather, and I will go ahead and throw it out there and that's only because I have it written down and it was you may live in Wyoming if you measure distance by time, and that is, "How far is it to Thermop?" "Oh, I don't know, about five hours." And that's measuring it by time. Work in the weather by saying, "Unless it is snowing, and then it is three

hours to Casper and then you stay there."

I will get into some real remarks now, and I will remind you that I've got a little bit different task than what the Governor has. His is called the State of the State and this is called the State of Judiciary, and so I asked myself for a change not what do I want to tell you but what is it that you might actually want to hear about the judiciary. And I concluded that you probably wanted to know two things, and that is what we have been doing and what we plan to do in the judiciary.

I will start out with a few matters that seem to be a little mundane maybe, but they're important to us. I will start out with some rules.

As you know, we operate largely by court rules: What the lawyers have to do, what we have to do, what everybody has to do is by court rules. And this will come as a surprise to a lot of the judges and my law clerks up there, but I'm sort of a rule-oriented guy and my goal was to make the court rules volume equal at least three volumes of the statutes before I was done, and I only got to two, but I've been trying.

So here's some of the things we have been

doing: The rules of the Judicial Nominating Commission were amended to rid them of some antiquated provisions and to make the confidentiality sections more clear. In reaction to last session's replacement of the drug court statutes, we also adopted a set of rules governing judicial participation in court-supervised treatment programs. And that was not nearly as easy as it sounds, given the vast difference of opinion throughout the judiciary about treatment courts and the proper role of judges therein.

After a lengthy study of the new National Model Code of Judicial Conduct, we adopted that very important set of guidelines with a few amendments to fit Wyoming statutes.

Now, this next one is interesting. We also adopted two sets of rules governing access to court records and redaction of confidential information from court records. Now, in our innocence -- and I should say in my innocence because this has mostly all been my fault, or apparent ignorance -- we thought these rules would be welcome because of the increasing risk of identity theft and the potential harassment of individuals identified in court records, both due largely to the ever-expanding Internet and electronic access to information.

The rules were intended to prevent access to personal information, particularly Social Security numbers, bank account numbers and other financial information, dates of birth, home addresses. All of that seemed to us to be a worthy goal.

But we took -- I took quite a shellacking in the newspapers. I received a thumbs-down in the Casper paper for that legislation. And we received what I consider a moderately libelous editorial in the Cheyenne newspaper. What looked to us like protecting our citizens was described in the Cheyenne newspaper as, and I quote, "protecting participants in the legal process rather than serving the owners of the court system, the taxpayers of the state," unquote.

The latter-mentioned newspaper also opined that the rules, and I again quote, "...showed just how far removed the justices are from the people of this state." Once again, I said that's my fault.

Apparently from our ivory tower across the street there that you helped us build -- thank you -- we failed to see that the citizens of the state wanted to have that personal information made public.

So inasmuch as this is the citizens legislature, we're going to start rectifying that here today. I thought perhaps that if you would each send

me a letter revealing your Social Security numbers, your bank account numbers, your date of birth, your home address, we will list them on our website and we will start fixing this problem that we created with those rules. Maybe we can regain some of our relationship with the people of the state. I feel better already. I think this will lead to a great editorial in tomorrow's paper.

Next I will mention some of the things that we started to fix but haven't yet gotten there, and I tell you because these things are on the horizon and you will be hearing about them in upcoming sessions along the way.

You are already familiar with the concept of electronic citations. You funded that program last year, and then you reneged when the economy went south and we're going to start all over again. But it will be back soon, and I think it will be again sponsored jointly with the highway patrol.

Perhaps less interesting but just as important on a daily basis within the judiciary are the following. These are the things I was talking about that we deal with on a daily basis.

Number one, we need a branchwide employee Internet use policy, Steven;

Two, we need a branchwide electronic data archives policy;

Three, we need branchwide video appearance rules;

Four, we need branchwide standardized rules governing allocation of payments received in criminal cases;

Five, we need to address the antiquated and often misused position of district court commissioners;

Six, we need to assess the role of court reporters and the potential use of digital recording;

Seven, we continually need to assess the number and location of judges and magistrates;

Eight, we need court interpreter standards and a regular fund from which to pay for interpreter services;

Nine, we need to do a cost/benefit analysis of the judicial peremptory challenge rule, which rule allows either party in a civil case to remove the sitting judge without cause and requires the State to pay the travel cost of the replacement judge;

And ten -- and I see the clerks of district court lurking up there making sure I don't do anything wrong. This is true. This is on my plate. It is on

somebody else's plate. We have to decide under Rule 77(d) of the Wyoming Rules of Civil Procedure who pays the postage when a clerk of court mails out copies of the judge's orders. I didn't put that first, but it is on the list. Should make it pretty obvious why I'm going to miss this job.

I did very quickly want to mention some caseload statistics to you just in case you're curious: Total circuit court filings increased from 175,613 in Fiscal Year 2008 to 184,435 in Fiscal Year 2009. As usual, most of those cases are traffic citations.

In the district court, the number of total filings rose from 17,444 to 18,512. That latter number coincidentally is almost exactly the same as it was in Fiscal Year 2007. In both courts civil filings are up while criminal filings are down.

In the Supreme Court we saw a slight decrease in appellate filings down to 263 from 281 last year. I'm pretty sure -- in fact I'm almost positive that that's because the law is being made much more clear year by year, Governor, to make it easier for everyone to know what there is so there's no reason to appeal.

The real reason that I give you those

statistics is to just let you know there's no immediate need at this moment for judicial resource changes within the state that we know of. There may be some specific areas that you will be asked to consider in the future, but not right now.

Before I discuss a couple of legislative items, I want to tell you about recent personnel changes. No doubt you're aware that longtime District Judge Ed Grant retired from his post here in Cheyenne and was replaced by Circuit Judge Tom Campbell. For most of my career Ed Grant has been the heart and soul of the district bench. There has never been anyone quite like Ed Grant in the tell-it-like-it-is-category. No offense, Judge Campbell, but I'm afraid Ed might be irreplaceable.

Judge Campbell's appointment to the district bench required the Judicial Nominating Commission to gear right back up for another nomination process. In August the commission met to consider applicants for Judge Campbell's vacant circuit court position and sent three names to the Governor. In September the Governor named local Cheyenne attorney Catherine Rogers to fill that spot, and she took the bench in November.

Getting a little closer to home for those of

especially at Supreme Court was the retirement of our court administrator Holly Hansen. Holly worked for the State of Wyoming for 30 years, 10 years with the Legislative Service Office, and 20 years with the court. She was court administrator for 11 years.

Her value to the Judiciary and the people of Wyoming was incalculable. She seemed to know everything about every court, every judge, and every clerk, not to mention every legislator. She taught me all about interbranch cooperation. For instance, I no longer use the word "demand" or the word "idiots" when I come to the Joint Appropriations Committee. Those of you who know Holly know how much we miss her in that regard.

Panic would have set in in the court except for one thing -- actually I should say except for two people. On staff we already had Deputy Court Administrator Joann Odendahl who has been with the court for 11 years and worked in the Executive branch for 17 years before that. In addition, we had as our program coordinator Ronda Munger. Ronda had been with the court for 13 years. Given all I just said about Holly, we made a seamless transition by naming Joann as court administrator and Rhoda as deputy court administrator. Now the Chief Justice is in name the

administrator of the Judicial branch, but you could probably rest assured that not only me but nobody else could really keep up with all of that stuff and we don't exercise much of that authority without conferring with those people. And we're going to continue in that regard in good hands with Joann and Ronda. Any of you who have worked with either of them know how lucky we are in that regard.

Before I yield the floor, there are six additional matters to which I wish to draw your attention. First a House bill is going to come before you, the purpose of which is to include court security officers in the definition of peace officers as that term appears in Sections 6-1-104 and 7-2-101 of the statutes.

This bill will give our court security officer the authority to make arrests, and it will include the court security officer in the statute prohibiting interference with a peace officer. This change is essential for the safety and effective operation of that office.

The second matter of particular importance to the Judiciary is the funding contained in our budget request to continue the Uniform District Court Case Management System Project. You will recall that

during the last session you funded the initial implementation of this project, and we are now well into that process.

With the funds already allocated, the tactical plans in place, data conversion from the different case management systems has been accomplished, data standardization is being developed. Pilot projects in Sweetwater County and Uinta County are planned to begin operations this month and special juvenile data handling is being created. Without continued funding, however, this project will come to a standstill, and the district courts will be left with a partially operational case management system.

Electronic filing, the electronic transfer of cases from one court to another and electronic recordkeeping are all still out there. Now, we have said to the district court clerks that, "We are from Cheyenne, and we're here to help you." Please do not make that a hollow promise. That's why they're all up there.

I want to quote what one district court clerk said to me about the process they're going through in this. This is a quote: "The clerks of district court, along with the Supreme Court and other agencies, are working together with great unity to

help make the uniform computer system a success." Now, I went to the trouble to quote that clerk because I wanted to make sure that you knew how much things have changed in the Judiciary. If you are at all familiar with the system, you are aware that such cooperation was not always there in the past.

The third matter requiring explanation comes before you as an exception budget request, but it is really just an historical oddity that these funds have not always resided in our budget. About a year ago, we became aware that many of our circuit court judges, rather personally handling the judicial duties involved in the treatment courts, were delegating those responsibilities to hourly court magistrates. We had not been aware of the extent of that practice because we were not being asked to pay the magistrates, so nothing showed up in our records.

When we decided that we needed to assess what the cost of the hourly magistrates was to the state, we learned to our astonishment and our embarrassment that they were being paid out of the treatment court program budgets, basically under contracts with the Department of Health.

That simply is not right. For one thing, judges should never receive compensation from outside

the Judicial branch for the performance of their judicial duties. It can lead to many things, all of them bad, the worst of which might be confused loyalties.

Second, the true cost of the state's judicial services is not accurately reflected if part of that cost is hidden in an Executive branch budget.

Consequently, this is not a request for new funds. It is simply a request that the funds used to pay hourly circuit court magistrates be housed in the appropriate location. We cannot police the use of hourly magistrates and the true cost of judicial services is not shown in our budget if the magistrates are being paid contractually by another entity.

Fourth, you will be asked to adopt legislation creating a statewide legal services program. Some background: In December 2008 the Wyoming Supreme Court, in cooperation with the Wyoming State Bar, and on the recommendation of the Board of Judicial Policy Administration, created the Wyoming Access to Justice Commission.

The Commission was charged with identifying strategies to address the civil legal needs of low and moderate income people in Wyoming. 2009 the Commission studied the issue, held five public

meetings around the state and concluded that Wyoming should fund a statewide program of legal services.

The proposed legislation will create a program funded through a \$10 filing fee similar to the court automation fee. Wyoming cannot continue to rely upon federal funding for legal services. We believe the Commission has made the case for funding the program as an obligation of this state towards its least fortunate citizens. So we ask for your aye vote on that bill.

Fifth, two House bills, 37 and 00 -- and Resolution 004 will be presented to you asking you to place before the voters the issue of removing the state constitution's mandatory judicial retirement age of 70 years. Interestingly enough, that provision applies only to Supreme Court justices and district court judges, both of whom are constitutional offices, but does not apply to circuit court judges. So when you passed the statute, you didn't put that 70 years in there.

As the law now exists, men and women still strong of mind and body, possessed of many years of training and experience, training and experience that you paid for, must retire for no reason other than they have reached an arbitrary age. There is no

reason that voters in retention elections should not be the ones who decide who does and who does not remain on the bench.

My sixth and -- I love this word -- my penultimate remarks -- I had to look that up -- will be about some serious problems facing the judiciary, not just here in Wyoming but nationwide. As background, let me quote what Thomas Jefferson wrote to Thomas Paine in 1789: "I consider trial by jury as the only anger ever yet imagined by man by which a government can be held to the principles of its constitution."

In the same year he wrote to Abbe Arnoux as follows: "In the form of juries, the people determine all controverted matters of fact, leaving, thus, as little as possible merely the law of the case the decision of the judges."

Those quotations fairly describe the intentions of the Founding Fathers when they recognized the almost sacred right of the jury trial in the structure of the American government.

Well, how does that sacred right look today? Commentators have begun to describe something called the, quote, disappearing jury trial. Fewer and fewer civil trials are being held across the country in both

the federal and state courts. Expense and untimeliness are the chief culprits. Ironically, these ailments have largely been self-induced.

Over the years, in an effort to simplify procedure and to place trial focus on identified issues, thereby speeding things up and supposedly making the system more user friendly, we, meaning the judicial system, replaced the old stulpified code pleading with the notice pleading. We standardized operation by the adoption of one-size-fits-all rules and procedure, and we developed a pretrial discovery process meaning to eliminate the element of surprise to jury trials.

A recent study by the Institute for the Advancement of the American Legal System housed at the University of Denver produced the following conclusions: 1, notice pleading is too vague and it leads to too much pretrial discovery;

2, pretrial discovery has become an end in itself, and it no longer promotes just, speedy and inexpensive determination of actions; and

3, procedural rules should be specialized to promote the natural development of particular types of cases.

In short, the civil jury trial system is

broken.

Now, why am I telling you these things? Because Wyoming is not immune. We have the same pleading issues and the same discovery abuse as does every state, and we have the same problem with the disappearing jury trial.

One local district judge here in Cheyenne told me about a month ago that in the past five years he has presided over about 20 criminal jury trials but only two civil jury trials. That is here in Cheyenne. That's one of our metropolises.

It is my belief that if we are going to maintain the judiciary as a legitimate third branch of government, if we are going to fulfill the Founding Fathers' vision of the sacred role of the jury trial, we have got to address some these issues.

What good is a right to trial by jury if no one can afford a jury trial and it takes three years to get in front of the jury? What good are rules of procedure and discovery if they turn a simple divorce case into a financial and psychological nightmare? Why are mediation and arbitration so popular? Why would anyone prefer to get his justice from some tribunal held in the back room of a Holiday Inn rather than from the courts? Because we are too slow and we

are too expensive

Now the biggest challenge to the judiciary in the near future may be facing and conquering these problems. I am not now asking you to do anything. I bring this to your attention because it is a necessary comment upon the state of the judiciary. It is my sincere hope that Chief Justices in the future will have better things to report in this regard as we in the judiciary take the initiative to tackle the problem.

Sorry about the sermon, but it is my last shot at the bully pulpit, and I wanted to use it here to that advantage.

Now, to finish up, I am going to confuse those of you who know me well by admitting here in conclusion that I am not by nature an optimist. It is easy for me to doubt. It is easy for me to find fault. It is easy for me to question the motives of others. I have never won the Miss Congeniality contest in the annual Bar poll. I never even come close.

I say all that because I want you all to know how sincere I am when I echo the words that Chief Justice Hill said four years ago: "I now have the best job anyone could ever hope to have." I want to

thank the people of Wyoming for giving me this opportunity to serve them.

Now, beyond that, I want to tell you, the members of this body, the Legislature, what a pleasure it has been dealing with the body of distinguished men and women who are here. You have not always agreed with the Court. You have not always given the Court what it wanted. Yet there has never been any doubt in my mind as to your good faith, your commitment to what is best for the people of Wyoming. And I want to personally thank you for that. Thank you.