State of the Judiciary

Chief Justice Nathan B. Coats

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Madam Speaker Becker, Senate President Garcia, distinguished members of the Senate and House of Representatives:

My thanks for your generous invitation for a co-ordinate branch of the government to address you in this chamber. This has become a very worthwhile and meaningful tradition in the state, and I would like to express both the appreciation of the judicial branch and my personal hope that the tradition continues long into the future.

Let me begin by introducing my fellow justices, who have also come to represent the branch today. Although we make all important decisions en banc, or as a whole court, with each justice having equal voting power, after the Chief Justice we measure seniority by longevity on the court. In order of seniority, then, my colleagues are Justice Monica Marquez; Justice Brian Boatright; Justice Will Hood; Justice Rich Gabriel; and since we last appeared in this chamber for a State of the Judiciary address, our newest members, Justice Melissa Hart; and Justice Carlos Samour.

I would also like to introduce the State Court Administrator, Chris Ryan, whom I have asked to sit with the court today. And finally, I am pleased to introduce my wife, Dean Emerita of the Sturm College of Law at DU, Mary Ricketson . . . and my daughter, currently a deputy district attorney at my old office in Denver, Johanna Coats.

The Chief Justice of the Supreme Court in this jurisdiction actually wears two very distinctly different hats. Although the Chief has an important leadership role in the organization and conduct of the business of the court, the position of Chief Justice can best be described as "first among equals." The Chief has equal, but no more than equal, voting power with the other members of the court. Unlike the United States Supreme Court, where the Chief Justice is nominated by the President and confirmed by the Senate into the specific slot of Chief, the Chief Justice of the Colorado Supreme Court is selected by and serves at the pleasure of the court itself.

In addition, however, Article VI, section 5 of the state constitution also specifies that the Chief Justice selected by a majority of the court "shall be the executive head of the judicial system" of the state. It is in that latter capacity, as the chief executive officer of the judicial branch of government, that I address you today.

In thanking you for the invitation to speak, I referred to us as coordinate branches of government, and I would like to explain what I understand to be the coordinate nature of our relationship. Although we are very expressly and purposefully organized in the constitution as separate but co-equal branches of government, we are not only co-equal branches, but in fact we share what might be described as a symbiotic, or cooperative, relationship. In an important sense, each

depends on the other. The roles assigned to each of us, although different, are necessarily cooperative, both being essential to the fulfillment of the core obligations of government.

As limited by the constitution, the fundamental law from which each of our branches derives its powers and authority, and apart from that portion of the legislative power of government that you have willingly delegated to the executive, in the form of the administration, this body is clearly the law giver with regard to matters concerning the governance of the state generally. You indisputably set policy for the state, and enact that policy into governing law, to be carried out and enforced by the executive branch.

The power of the judiciary, on the other hand, is largely limited, except for supervising its own operations and the practice of law, to making judgments about the nature and effect of policy choices already made by others. With regard to the laws enacted by you, our role in the system is limited to determining what you meant in enacting those laws, how you intended them to apply in individual cases, and that they do not conflict with the constitution. Similarly, where you have left it to others to arrange their own affairs, whether by contract, lease, will, or any other legally enforceable arrangement, it is the role of the judiciary to determine what those parties intended. The core function of the judiciary is therefore to provide appropriate forums, a fair process, and neutral and impartial decision-makers, schooled at interpreting the law according to well-established principles, which permit your constituents to resolve their grievances and order their important affairs, with the force of law.

Included within your function – the legislative function of government – is, of course, both the power and duty to raise and allocate the resources necessary for the functioning of state government, regardless of the particular branch exercising governmental power. Both the executive and judicial branches are dependent upon you for the resources required for them to fulfill their constitutional obligations. It is therefore both natural and proper for us to regularly report to you how we are fulfilling those obligations and offer our professional assessment of the resources we need to continue to do so.

Although I am now well into my 19th year serving as a justice on the supreme court, and I have, for more than the last 40 years, been an advocate, close court-watcher, and participant in the boards, committees, and other organs established by the supreme court to assist with the conduct of its business and supervisory obligations, I measure my responsibilities as Chief only in months. I am quite proud of the accomplishments of the branch I now have the honor to lead, and with your indulgence, I would like to give you a brief overview of what I am finding. As you might well imagine, over the 40 years I have served the judicial branch, it has grown along with the state whose people it serves.

We now have 64 counties in the state, the last being Broomfield, which was created just over 20 years ago. For about the last half-century, the counties of the state have been organized into 22 judicial districts. The district courts are the trial courts of general jurisdiction, meaning they can hear both civil and criminal cases of all kinds, while the county courts are limited to deciding the

less serious criminal offenses, or misdemeanors, and certain civil cases with lesser amounts in controversy. Each county and judicial district must have at least one judge, but of course in light of growing populations and case filings, the vast majority have many more. Counting some 40 magistrates, who are authorized to perform only limited judicial tasks, along with the county and district court judges, the total number of judicial officers in the state now approaches 400.

In 1969, this legislative body created an intermediate appellate court, the court of appeals. At that time, the court of appeals was comprised of 7 judges, with limited authority, to help deal with the burgeoning backlog of trial court judgments awaiting appellate review. Since that time, you have continuously expanded the authority of the court of appeals to include the review of all but very select kinds of cases – like cases involving water rights – and to keep pace with ever increasing demand, you have correspondingly increased the size of that court to 22 judges.

The ultimate legal authority with regard to matters of state law, however, rests with the 7-member state supreme court. In one form or another, the supreme court has authority over virtually every kind of legal dispute that can arise in state, over all lower courts of the state, as well as over the practice of law in the state. While the court of appeals has become the workhorse of appellate review in the state, now resolving some 2,300 appeals a year, the Colorado Supreme Court, like the United States Supreme Court, has become largely a court of discretionary review, which means that for the most part we choose the cases we will decide based on how important they are and how broadly our decision will impact other cases throughout the state, rather than just correct errors in individual cases. While the Colorado Supreme Court, like the United States Supreme Court in federal system, therefore fully resolves, by published opinion, a lot fewer cases than the court of appeals, it nevertheless has to evaluate in detail some 1,100 petitions for review each year, just to pick the ones that will likely have the biggest impact.

In addition to the 1969 creation of the modern court of appeals, several other initiatives, taking effect roughly around the same time, radically altered the nature of the judiciary in this state and its relationship to the state legislature, and they did so in ways that are critical to a complete understanding of the current state of the judicial branch.

With regard to the method of selecting state judges, and therefore the very nature and make-up of the judging profession in this state, an amendment to the state constitution in 1966 created a kind of merit selection system, in which applications for judicial openings are reviewed by independent commissions in each judicial district - or by a separate statewide commission for openings on the appellate courts. The members of the nominating commissions are chosen according to a constitutionally established formula, to include both lawyers and non-lawyers and a balance of political party affiliation. Each nominating commission is chaired by a justice of the supreme court, who serves as a non-voting member. The ultimate selection of judges by the governor is then limited to a short list of two or three qualified applicants, forwarded to him by the appropriate commission.

While perhaps no system of selection involving human beings can be entirely objective, and the selection process in this jurisdiction was clearly designed to account for very diverse views in the community concerning the appropriate credentials for being a judge, after chairing commissions all over the state for going on 20 years, that have been responsible for sending names to the governor for some 75 judgeships, I can truthfully say that I have never witnessed overtly partisan, or party, politics to be a factor in any judicial selection. Since the adoption of our merit selection system, more and more legal scholars, judges, and political figures throughout the country have touted it, and more and more states have adopted some version of it.

In addition to the make-up of the judiciary of the state, the organization and funding of the judicial branch also underwent a big change during roughly this same period. In 1970, after years of debate, the general assembly pretty much assumed the role of funding the state judicial system - apart from providing the courthouses themselves, that is - and in particular, funding a centralized support mechanism to assist the supreme court in administering that judicial system. In commenting on the value of this system of state financing several years later, former Chief Justice Pringle was quoted as saying, "State funding makes it possible to budget on a system wide basis, makes it possible to shift personnel, as well as judges, on a temporary basis when workloads require, permits economies of scale, facilitates the overall development of a management information system, makes it possible to meet unusual emergencies, and makes greater operational efficiency possible through control of resources and the development of cost and caseload data that show meaningful comparisons among courts and among different kinds of cases."

To satisfy the vast array of legal needs of the people of this state and the need to fairly and appropriately hear and finally resolve their grievances, the branch now operates 410 courtrooms throughout the state. And while the responsibility for financing the physical structures housing those courtrooms remains with the individual counties, for nearly the last half-century it has therefore been the statutory responsibility of the state to furnish those courtrooms and fund the judges and necessary supporting staff, now accounting for some 3,800 full time equivalent positions, with a budget approaching $600M.

I must pause here for a brief aside on this body's provision of funding for courthouses themselves.

Although the individual counties remain responsible for providing courthouses for their own county and district courts, since 2014 this body has also provided additional funding to assist with construction and remodeling of court facilities in areas of the state incapable of doing so by themselves. In that regard, allow me a word of thanks to you and praise for the joint efforts of the judicial and county officials in the 12th judicial district in bringing on line just this past September a much needed, modern courthouse in Alamosa, now housing one county and four district court courtrooms. Supplemental funds from the state were instrumental in finding a funding solution for that facility. Similarly, assistance from the state through the underfunded facilities fund is making possible a new courthouse to the replace the 1904 facility in Walsenburg,

the dire condition of which my predecessor, Chief Justice Nancy Rice, described so colorfully in this chamber several years ago.

Through efficiencies involving computer and other technological advances, as well as the centralization of a host of administrative and support functions, we have managed to free up judicial officers from many of the collateral, but time-consuming tasks, that once diverted them from their core function: sitting in judgment of actual cases and controversies. But at some point, the need for more well-trained, impartial judges simply cannot be got around.

To assist you in the rational allocation of scarce resources among competing interests, we have for more than 20 years now measured need much more precisely than older methods of simply extrapolating from general metrics like population growth and changes in overall case filings. By collecting data on the time actually spent on different duties and different kinds of cases, we have been able to provide you with figures – in the form of empirical, weighted caseload studies - more precisely demonstrating demand, which you have relied on to increase the number of judges in the state a number of times since then. In fact, since 2000, you have regularly credited these calculations to increase the number of district court judges statewide. In the past, we have generally not made any request until the demand was beyond dispute; and so in 2001, for example, you agreed and approved an increase of 25 district court judges, and again in 2007, another 32, to meet the burgeoning demand in each instance.

Using this same system of measurement, the branch is now prepared to represent to you that we are currently operating with about 77% of the district court judges actually needed in the state. I am happy to report that a bill has already been introduced in the Senate to increase the number of district court judgeships by 15, precisely allocated throughout the state according to greatest need, which would bring that 77% figure to about 82% of actual demand. While not completely offsetting existing need, members of both our branches who have looked at the demand consider this figure both realistic and sufficient to prevent serious shortages in the immediate term. At this time, may I offer my special thanks to Senators Lee and Gardner, and Representatives Herod and Carver for sponsoring this much needed measure.

The need for more impartial decision-makers is being driven largely from two directions: the first is the easily measured jump in felony case filings throughout the state in recent years; the second is perhaps more subtle and has more to do with the expanding role of the judicial branch, alongside the legislative and executive branches, in addressing the broader societal problems giving rise to this increasing need for legal services.

With regard to the first, for various reasons, which may be the subject of debate, felony filings in this state in the last five years have climbed by more than 40%. Our data indicate that this trend is statewide, not limited to filing practices in any particular districts. Lest someone leap to the conclusion that this represents a problem for criminal cases alone, it would be well to take stock of the impact this startling explosion is having on the availability of judge time on every other aspect of our judicial system. As the result of both constitutional and statutory provisions

designed to protect the rights of those charged with committing crimes, criminal cases cannot be delayed for lack of available courtroom time, in the same way as almost all other legal matters, unpleasant as that reality may seem. The immediate and undesirable effect of this surge in criminal demand is therefore to starve virtually every other aspect of the justice system of much needed resources and cause often extremely harmful delay in the resolution of pressing, non-criminal legal problems. The state is replete with examples of Chief Judges having to reassign their judges from handling civil cases of various kinds to handling criminal cases; and in districts where different case types are typically handled in a single court, judges are not infrequently having to simply allocate more of their available courtroom time for their criminal docket, making less available for pending civil cases. Not only are civil cases being crowded off the docket, but in some places criminal matters are having to be handled in a way that impacts logistical and security concerns. In Denver, for example, criminal matters are regularly being handled in courtrooms that would otherwise be devoted to civil matters, despite the fact that those courtrooms operate out of the City and County Building, which lacks the logistical and security advantages for which the new Lindsay-Flanigan criminal facility was specifically designed.

Few legal matters are more emotional and anxiety provoking than family law matters involving the dissolution of marriages; decisions about the custody, parenting time, and financial support of the children; and the division of marital property. Quite apart from the breakup of marriages, however, the plight of abused or dependent and neglected children is among the most urgent problems needing timely resolution by the courts. And yet the delay resulting from a lack of available judge time greatly elevates the anxiety level of adults and children alike in these situations, and prolongs uncertainty concerning the permanency of child placement, reducing the likelihood of satisfactory outcomes for many children.

But there are any number of examples of hardship suffered by very ordinary people when they are unable to get a timely resolution of important legal matters affecting their lives, relationships, property, or finances. Whether the matter needing legal attention is large or small, delay caused by backlog can be terribly significant for the people actually involved. Delay caused by backlog and a lack of available judicial decision-makers adversely affects not only the contractual arrangements of large commercial enterprises but of small businesses and consumers as well; not only property disputes among large corporations involving, for example, valuable mineral or water rights, but perhaps even more so among small farmers or homeowners needing some degree of certainty concerning their financial arrangements; not only the devolution of large estates of wealthy decedents but also pressing questions of guardianship of the elderly or infirm and the distribution of even modest assets among the survivors of non-wealthy decedents; and not only wrongful death actions and substantial monetary claims for debilitating personal injuries but even common insurance disputes over property damage or the medical costs of injuries that are ordinary enough but nevertheless beyond the means of the damaged parties.

In addition to sheer volume, however, the need for more judges and specialized support staff is also being driven by both the changing nature of the people typically appearing in court and the

changing role of the judiciary in helping to solve the more fundamental societal problems leading these people to court in the first place. Not so long ago, a debate raged in the judicial community about the appropriateness of involving the courts too directly in treatment and rehabilitation. At least in this state, I believe that time is largely past.

The judicial department in general, and the district courts in particular, are increasingly involved in innovative approaches to dealing with societal problems that go beyond, and are often the cause of, criminal or other anti-social behavior – problems like poverty, addiction, and mental illness. One specific example of an approach that is particularly demanding of judge time is the ever-expanding use of what has come to be referred as "problem-solving courts." Problem-solving courts can take many forms and be directed at a wide array of different social ills – like drug or alcohol dependency courts – or specific classes of defendants – like veterans' courts. But the approach they share is close monitoring, with regular reappearances of participating criminal defendants, by judicial officers themselves rather than only by probation officers or treatment providers, with the objective of immediate step by step increases of rewards and punishments, for compliance or non-compliance, with judicial directives. The increasing demand for these kinds of courts reflects their success with regard to rehabilitation and reducing recidivism, but in order to be successful they require extensive courtroom supervision and place additional demands on judge and staff time. While these approaches appear to be extremely beneficial for the individuals involved and for society in general, and they are clearly much less costly overall than simply imposing punitive sentences, their immediate impact on judge-intensive supervision, and therefore the need for more judges, is great.

Even in more traditional courtroom proceedings, however, the increasing numbers of folks appearing without legal assistance of any kind is taking a toll on judge time. Each year, fully 75% of the parties appearing before judges in domestic relations cases throughout the state are not represented by counsel. While judges cannot act as lawyers for self-represented parties, basic fairness requires more lengthy explanations about the proceedings and available options, greatly slowing down even what might otherwise be the most perfunctory formalities. The judicial branch continues to work on a number of initiatives with the practicing bar and the other two branches to provide greater access to justice, including the use of Sherlocks, or Self-Represented Litigant Coordinators, in courthouses all over the state, as a way of assisting pro se litigants and saving valuable judge time.

Finally, let me briefly mention the expanding role of the probation department. In line with these other initiatives, the probation department is being asked to supervise higher and higher risk individuals, requiring greater and greater supervision for the protection of the public. While actual numbers of supervisees may not have dramatically increased, the staff-hours involved in providing this alternative to incarceration are therefore steadily and predictably increasing. Colorado probation is by far the largest single sentencing option in Colorado. The active probation population in probation is more than 80,000 people. Our average daily population is

about 4 times the number of inmates in department of corrections custody, nearly 9 times the size of the parole population and over 20 times the size of community corrections.

In this state, the probation function continues to reside within the supervision of the judicial branch of government, and it has proven to be one of the most cost-effective ways of supervising and rehabilitating many individuals convicted of crimes. For adults, the annual cost per person is just over $1,500 compared to $6,000 for someone on parole, nearly $9,000 in community corrections, and over $38,000 in prison.

As long as sentencing courts have available to them probation as an effective alternative means of rehabilitation and reducing recidivism, rather than much more costly and less effective incapacitation by incarceration, the community will benefit. But because probation is a function of the judicial branch of government in this state, funds cannot merely be shifted within the executive branch's department of corrections from one form of supervision to another, but must be separately appropriated for the judicial branch.

Let me close by saying that if it were not already apparent, let me reemphasize how pleased I have been with what I have discovered since taking on the responsibility for overseeing the judicial system in this state, and just how proud I am of the department. We have a highly skilled, impartial, and dedicated corps of judges in this state, intent on providing, to the best of their ability, the kind of justice the people of this state deserve. After working closely now for some time with the State Court Administrator I have every confidence that he is equally intent upon ensuring that all those under his supervision do all they can to assist the judges of this state in having sufficient time and resources to perform their core function of acting as neutral decision-makers for the benefit of the people of the state.

While the burden ultimately falls on you, as legislators, to wisely allocate the resources of the state, I can assure you that under my watch, the judiciary will continue to provide you with the most reliable and helpful data we can to assist with that task.

Thank you once more for the opportunity to address you today.