

*...to administer justice according
to law equally to all people.*



2011 State of the Judiciary

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Introduction

Good Morning. Thank you, Speaker Paulsen and President Kibbie for inviting me to address this Assembly today concerning the condition of Iowa's third branch of government. Before I begin this annual report, however, I want to invite all of you to join members of the judicial branch and me for a reception downstairs in our historic courtroom immediately following my remarks.

Seventeen decades have come and gone since Iowa became a territory, then a state, and our tripartite constitutional form of government was created by our forefathers to lead Iowans with hope and confidence into an uncertain future. The hope then, as it remains today, was this government would allow each decade to move forward to a brighter future for all Iowans. The pursuit of this hope is collectively told by the many cases that have emerged from our courthouses over the decades—cases that have become pieces of the mosaic of today's understanding of justice and equality promised by our forefathers in our constitution. These celebrated stories tell the history of our struggles to achieve our promised goals, and are familiar to many. But, other stories, not as grand and recognized, but just as important, tell why our judicial system has worked so well to serve Iowans. Let me just briefly tell you one such story.

Last fall I stopped by the Winneshiek County Clerk of Court office. I met with the clerk of court and her three-person staff, including Kim Glock. Kim told me he began working in the office in 1983, and has considered it to be an honor to be a part of Iowa's system of justice. Over the years, he observed the duties of the office have skyrocketed, and the number of cases to process have soared. Yet, the number of employees in the office has remained the same as today. This has required the staff to regularly come to work early, work late into the day, and spend time at the

office on weekends. Now, don't get me wrong, his words were not spoken to complain. He only feared the crushing workload might lead to mistakes. His concern was not for himself, but for the people who use and depend on the courts and for the system of justice itself.

In truth, this simple story can likely be found in every courthouse across Iowa. Our employees—from judges, magistrates, court reporters, juvenile court offices, clerks, court attendants, law clerks, administrators, to other staff—believe in what they do and do it well. As with Kim Glock, they are honored to serve the public, and they do their work in a way that could not honor the people's system of justice more.

The story of our ability to deliver justice to Iowans over the decades—the story of our people—shows our job will be done regardless of the cards we are dealt. But, there is no doubt our mission, more and more, is becoming harder and harder to achieve. I too fear, as Kim Glock does, that the deep cuts in our resources are beginning to cause damage to our system of justice. Let me explain beginning with what I observe to be a decline in access to justice.

Access to Justice

Iowans cannot have the hope of justice without having access to justice. The grim reality is that more and more Iowans with legal problems are forced to wait too long for their day in court. These problems are troublesome to litigants and shake people's confidence in our government. These problems result from a decade of fiscal austerity coupled with Iowans' growing demands for court services.

This situation is not new. It has been raised in the past. Thankfully, you and the governor responded to our concerns last year and provided sufficient funds to prevent further cuts, layoffs, and furloughs. For this action, we are grateful. Like a thumb in the dike, however, this action was

merely a temporary fix. It did not halt the continued erosion of court services. The situation grows worse day-by-day.

For example, in the past year, the number of clerk of court offices forced to operate on a part-time basis increased from 26 to 30. Staff reductions are so severe that at times some of these offices must close for business without notice due to unanticipated employee absence. The remaining clerk of court offices operate a full day, but are closed to the public for four hours a week to give employees periods of uninterrupted time to pare down the backlog of work. In addition, it has become increasingly difficult for our juvenile court officers to give troubled children the close, personal attention they need. Also, judicial rulings are delayed because of a lack of clerical support and court reporters.

I will briefly review how we arrived at this critical juncture.

From 2001 through 2009, in response to the state's fiscal problems, the judicial branch like most components of state government had to cut its budget. During those years, the judicial branch cut its budget five times—and each time the cuts were deep. Unlike many state agencies, nearly all of our operating costs are for people—employees and judges. This means that budget cuts almost always require further reductions in our workforce. The end result: our staffing levels have dropped a staggering 17% in the last decade.

Today, Iowa's court system operates with a smaller workforce than it had in 1987. In contrast, over the same period, the total number of legal actions brought by Iowans and Iowa businesses has nearly doubled. In short, Iowa's courts are overrun with work, and Iowans are paying the price with reduced access to justice.

Our ability to deliver court services and resolve litigation to the extent that we do is a tribute to the strong work ethic and indomitable spirit of our judges, magistrates, and court staff.

Unfortunately, the admirable efforts of our judges and employees cannot totally shield Iowans from the effects of the past decade of budget cuts.

EDMS and Civil Justice Reform

As we struggle with these obstacles, we continue to move forward by finding innovative ways to improve access to justice.

We are testing a system for electronic filing and retrieval of documents. This system, which we call EDMS, expands access to justice beyond the courthouse walls. It enables litigants, lawyers, and others to file and access court records online, at anytime, night and day. It saves Iowans the cost and inconvenience of traveling to the courthouse to conduct their business. It gives judges access to records as soon as they are filed. If everything goes as planned and we have sufficient resources to move ahead, we should have EDMS fully implemented in five or six years.

In addition, a statewide task force is now studying measures that will allow civil cases to proceed faster and at less expense to litigants. Our Civil Justice Reform Task Force is studying innovations such as dedicated business courts, reforms of discovery procedures, expansion of alternate dispute resolution services, and other potential improvements. We hope to have a road map for civil justice reform and innovation later this year.

We want to provide a legal system that responds to the changing needs of society and the demands of a modern age. In the long run, EDMS and civil justice reform will change how we do our jobs and greatly improve Iowans' access to justice. But these changes alone will not give Iowans all the access to justice and court services they need. These changes will never fill the shoes of court employees who are essential for the effective administration of justice throughout Iowa. At the end of the day, justice requires a personal touch and judgment calls that cannot be attained from a computer terminal, a new procedure, or an Internet connection.

Reasons to Bolster Court Funding

We understand the state's continuing fiscal difficulties and appreciate the tough budget decisions you must make again this year. Even so, there are many reasons to bolster court services through this difficult time.

The recession has placed additional demands on our courts. In the past three years, mortgage foreclosure cases filed in Iowa have increased 17%, debt collection cases have increased 15%, child-in-need-of-assistance cases have increased 23%, and adult civil commitment cases have increased 19%. These legal actions may have a life-altering effect on the Iowans involved. This is not the time to give them ration cards for justice.

In addition, our work has grown in the past few years as a direct result of cuts in services for treating abused and neglected children and troubled youths. The following observations of Juvenile Court Officer Paul Thompson of Marshall County best describe this situation:

“The front end kids are no longer being served, or if they are, not as well. We . . . get these kids later when their problems are more firmly entrenched. . . . The schools and the police look to us for help and we are unable to provide much assistance due to the lack of manpower and funds. Due to funding problems, kids sit in detention or shelter way too long while waiting for appropriate residential treatment. . . . [I]t seems like we are having less success when they come back from placement. The system is certainly broken . . . [and] the long term effects will show up years down the road.”

Similarly, Iowa's fragmented and underfunded mental health system places greater demands on the courts. Because treatment facilities and services are scattered and scarce, court staff in many counties often spend hours on the telephone trying to locate a placement for a person who has been involuntarily committed. These problems coupled with the growth in our civil commitment caseload and our staff reductions call for more resources.

Iowa's economic health provides a third reason for you to provide funds to reinforce court services. Studies in Florida and California suggest that a well-funded court system contributes to the economic well-being of communities. Widespread case delays and closed offices will add to the cost of doing business in this state and add to the uncertainties that inhibit business expansion. A vibrant business community requires a vibrant, fair court system.

We appreciate the continued need for all of government, including the judicial branch, to "share the pain." However, the courts are already stretched painfully thin. I hope we can all agree that Iowans deserve more access to justice than they have now. Our fiscal year 2012 budget request reflects a modest three-year plan to improve Iowans' access to justice. We ask you to give it serious consideration.

I have not detailed the fiscal concerns presented to Iowa's courts as I would, perhaps, under different circumstances, because we now face a challenge of a different nature. I am compelled to address this challenge with you this morning because it threatens to undermine the checks and balances that protect the constitutional rights of all Iowans.

Varnum

When the Iowa Supreme Court decided the *Varnum v. Brien* case on April 3, 2009, we understood it would receive great attention and be subject to much scrutiny. We worked hard to author a written decision to fully explain our reasoning to all Iowans, and we understand how Iowans could reach differing opinions about this decision. In many ways, the public discourse following any court decision on such a major constitutional question of civil rights is what was expected, if not demanded, by our constitution. This time period is what ultimately gives shape to tomorrow's understanding, and can help differences of opinion to merge. This discourse is not new for Iowa, although I doubt it has ever been so strong. Our court has, many times in the past,

decided cases involving civil rights that were quite controversial at the time. Yet, over time, those cases have become a celebrated part of our proud and rich Iowa history of equality for all.

I know not how this debate will end, but I do know our constitution will continue to show us the way, as borne out by our history. The constitutional work of the court on this matter is complete, and the history will be written, one way or the other, by your hand, and ultimately the hand of the people of Iowa. But, to help move forward to write this history, I want to address certain misunderstandings about the role of the court in our government. This discussion is done not just to defend our grand system of justice from misunderstandings that threaten to weaken its very fabric and strength, but it is done also with hope my remarks will help redirect the discourse down the path contemplated by our constitution to help reach the bright and proud future I know we all want.

First, I hope to help us move forward by addressing the concerns some Iowans have about our system for selecting judges.

Merit Selection Fosters Fair and Impartial Courts

Iowa has the best method in the nation to select its judges. This method—known as merit selection—must be maintained today to permit us to move forward to a better future. Let me first briefly explain how the system operates.

Iowa's merit selection system was adopted in 1962 through a constitutional amendment for the purpose of minimizing the influence of politics on the selection of our judges. It works by using an independent commission to screen applicants for judicial office and provide a slate of best-qualified applicants to the governor, who then makes the appointment from this list of nominees. There are local commissions to nominate district judges, and there is a state commission to

nominate supreme court justices and judges of the court of appeals. My focus this morning will be on the state commission.

The 15-member State Judicial Nominating Commission is composed of a chair, who is the senior justice of the supreme court other than the chief justice, seven nonlawyer commissioners appointed by the governor and confirmed by the Iowa Senate, and seven lawyer commissioners elected by lawyers licensed to practice law in Iowa. Importantly, the Iowa Constitution requires that all commission members be chosen “without regard to political affiliation.” Likewise, the law specifically requires the commissioners to choose nominees “without regard to political affiliation.”

I understand the nonpartisan nature of the state commission has been questioned at times, most notably when the political makeup of the membership shifts to a majority of Democrats or a majority of Republicans. This shift does occur over time, but it is much less likely the result of the selection of lawyers to the commission, than nonlawyers. Lawyer members are selected by a statewide vote of all practicing lawyers in the state by a ballot that does not name the political party affiliation of the slate of candidates. Lawyers are selected entirely through a nonpartisan election process. The nonlawyers on the commission are selected by the governor, but even if governors may predominantly appoint members to the commission that share his or her party affiliation, this does not mean the appointments are based on party affiliation. I believe this body came to the same understanding in 1986 when Democrats in this chamber were troubled by the apparent Republican dominance of the commission and proposed legislation to require political balance on all the judicial commissions. This approach was rejected, and the selection process remains as it has been for nearly 50 years.

The more important point is that the political affiliation of a commissioner as a Democrat or Republican does not compromise the ability of that person to be dedicated and conscientious about selecting the best and most qualified individuals to serve as judges in our state. Commissioners are

Iowans from all walks of life, who care deeply about good government and maintaining Iowa's fair and impartial courts. Over the years, Iowans who have served as commissioners have faithfully fulfilled their duties to the people of Iowa. They have focused on selecting the most qualified nominees. I have had the privilege of serving as the chair of the commission in recent years, and I have seen Democrats, Republicans, and Independents work together to fulfill their duty again and again in nominating the best candidates for vacancies on the appellate courts.

Don Decker, a Ft. Dodge businessman and long-time Republican, who served on the state judicial nominating commission in the mid-1990s, recently told me that, when it came to selecting a slate of nominees for a judicial position, he "rooted for the home team" but always voted for the most qualified applicants regardless of their party affiliation. This honest assessment captures the reason our process has worked so well for so long.

In the final analysis, what really matters is the commitment of each commissioner *and* the governor to the spirit of merit selection and the goal of maintaining Iowa's fair and impartial courts. Importantly, the selection system has been a true success. For the past decade, surveys conducted for the United States Chamber of Commerce have consistently ranked Iowa judges as among the most fair and impartial in the country. Last year, Iowa's judges ranked fourth in the nation. In addition, recent academic studies show that the Iowa Supreme Court has grown to be one of the most influential state supreme courts in the country. These studies rank Iowa fourth in the nation in occasions when other supreme courts rely on our decisions to make their decisions. Our fair and impartial courts are a model of good government, which I am confident all Iowans want. Yet, as we move forward, we should not resist changes in the system that would help reinforce public confidence in it.

Building Public Confidence in Commissions: Enhancements

I believe public confidence in the merit selection system can be enhanced if the nominating commission is made more transparent. The court is pleased the state judicial nominating commission has decided to allow the public to observe its interviews of applicants later this month. This is a positive step.

In addition to opening interviews to the public, we recommend that the state and district nominating commissions: adopt uniform rules of procedure, adopt a code of ethics, and adopt procedures for the release of more information to the public. Shining more light on the nominating process will show that the commissions do indeed operate as designed, by selecting nominees based upon their professional qualifications and without regard to politics or affiliations.

Now I turn to another misunderstanding relating to the function of the courts. Two important principles governing the role of courts are the subject of this misunderstanding. The first is the idea that judges, like politicians, should make decisions according to public opinion or consistent with “the will of the majority.”

Principle #1: Courts Serve the People by Serving the Rule of Law

In our government, courts are legal institutions—not political institutions. When a person comes before a judge, that person expects the judge to be neutral and to render a ruling based upon the proven facts of the case and applicable legal principles—not based upon public opinion. Public opinion often shifts. The will of the people followed by courts is the will expressed in our law as constrained by the written principles in the constitution. If this were any other way, “why have a constitution?” When asked, judges must apply these principles according to law, equally to all. This principle is captured in the judicial oath of office. It is also written into our code of ethics, modeled after national standards, that all judges must make decisions without being “swayed by public clamor

or fear of criticism.” If it were otherwise, the rule of law would surely be compromised, as would our constitution.

Unlike our political institutions, courts serve the law, not the interests of constituents. Courts serve the law, not the demands of special interest groups. Courts serve the law, not the electorate’s reaction to a particular decision. By serving the rule of law, courts protect the civil, political, economic, and social rights of all citizens. Chief Justice William Rehnquist called the independence that allows judges to serve the law “the crown jewel of our system of justice.” I hope we can go forward with the same understanding.

Principle #2: Upholding the Constitution is the Most Important Role of Courts

The next principle I wish to address is the authority and duty of courts to uphold the constitution by declaring statutes or parts of statutes invalid if found to violate the constitution. Iowa’s constitution declares that all laws contrary to the constitution are void. Clearly, our founders anticipated the possibility that the legislature could, at times, approve laws that might conflict with the constitution. Yet, at all times, they made it clear that the words used in the constitution to define our rights constrain all laws that follow.

Upholding the constitution is the most important function of courts. The duty of courts to review the constitutionality of laws is known as judicial review and is one of our most basic responsibilities. Judicial review has been recognized as the responsibility of courts in this country for well over two hundred years. This duty has been well documented and has played an important role in our country throughout its history.

Alexander Hamilton was one of three authors of The Federalist Papers, which is considered one of the best explanations of the Constitution and the intent of its framers. In one of the essays, Federalist 78, written in the 1780s to help Americans understand the new proposed constitution,

Hamilton wrote: “[T]he courts were designed to be an intermediate body *between the people and the legislature, . . . to keep the latter within the limits assigned to their authority.* The interpretation of the laws is within the proper and peculiar province of courts.”

Any question about the power of courts to review the constitutionality of a statute was promptly settled in 1803 by the United States Supreme Court. In the landmark case *Marbury vs. Madison*, the Court found a portion of a federal law, the Judiciary Act of 1789, unconstitutional, and thus, invalid. As Chief Justice John Marshall explained in *Marbury*: “It is emphatically the province of the judicial [branch] to say what the law is” Marshall referred to judicial review as “the *essence* of judicial duty.”

The same principle holds true in Iowa. In 1849, the Iowa Supreme Court issued its first decision that protected the constitutional rights of an Iowan by invalidating a statute enacted by the legislature. In this case, the court stated it was “a settled principle” in this country that courts have the power, “as a matter of right and duty, to declare every act of the legislature made in violation of the constitution, or any provision of it, null and void.” This is the very duty the court exercised in the *Varnum* decision.

Judicial review is so commonplace that, since 1846, litigants in Iowa in roughly 1000 cases have asked the Iowa Supreme Court to protect their constitutional rights by invalidating a state law. During this same time, the court has declared acts of the legislature unconstitutional in over 150 cases. Unlike the *Varnum* decision, however, most of these court decisions have received little attention. But, that lack of attention does not diminish the strength and importance of the principle at stake.

Federal court cases exercising judicial review also provide good examples of the important and accepted role of judicial review because they typically attract more public attention. For instance, most of you have probably heard of the 1954 U.S. Supreme Court case, *Brown v. Board of*

Education, in which the Court struck down state-sanctioned segregated schools as a violation of the equal protection clause. You may also be familiar with the more recent U.S Supreme Court case known as *Citizens United* in which the Court invalidated a federal campaign finance law to protect the first amendment rights of corporations. In both cases, the Court found that particular acts of the legislative branch violated the Constitution, and these acts were voided by the Court. In both cases, the Court performed its duty under the Constitution.

In short, historical evidence and legal precedents support the authority of courts to invalidate statutes that violate the constitution. I hope my remarks this morning will lead to a more accurate and complete understanding of the court's proper constitutional role.

This point brings me to another misconception about the courts: the notion that the court should suspend its ruling to give the legislature time to act on an unconstitutional statute.

As far back as 1883, the Iowa Supreme Court made it clear that even unpopular rulings could not simply be suspended in time to await any future legislative action. In its decision, the court said that, if courts could be coerced by popular majorities to disregard the constitution any point in time, "constitutions would become mere ropes of sand and there would be an end of . . . constitutional freedom."

Promoting Understanding about the Work of Courts

Lastly, it is my hope that we can move forward with a shared commitment for a greater understanding of our courts and their important role in maintaining our democracy. This understanding can best be achieved by making our courts even more transparent. I am confident the more people of Iowa see their court system operate, the more the public will view the court system with confidence.

In truth, courts adopted an openness standard long before the word “transparency” surfaced in our lexicon. As a general proposition, our courthouse doors and hearings have always been open to the public. Judges have always taken the time to explain court decisions in writing. Yet, the circumstances of the last few months have shown that this is the time to expand our openness even more.

Iowa has been a leader in making the work of courts more transparent. Iowa was one of the first jurisdictions in the country to allow cameras into courtrooms. More recently, we have developed a judicial branch website to help inform the public of our work. This website even allows schools, service groups, and others to make online requests for justices and judges to come into your communities to speak. The website is user friendly, informative, and has been named one of the best court websites in the nation. It is also used for us to receive input on proposed changes in the rules governing court procedures. Up until a year ago, the website also provided a video cast of supreme court proceedings, but this procedure was a victim of the budget cuts. Nevertheless, we can do more to open the work of the courts to the people.

So today I’m pleased to announce the Iowa Supreme Court plans to hold some of its oral arguments in communities across Iowa. This will allow interested citizens an opportunity to watch the court proceedings, and the proceedings can be used as a teaching tool for our youth. We will also consider other ways to open our work to the public, and we look forward to maintaining a court system that Iowans will always view with confidence and respect.

In the end, we all need to get to know each other better. If we can do this, we will understand each other better and will be able to forge a brighter future for all of us.

Conclusion: Let Us Go Forward with a New Understanding

So, let us go forward with a new understanding—a new understanding of the courts and a new understanding of the direction that will lead to a better and brighter future, for all Iowans. Let us go forward to continue to write our history through the stories of the people of Iowa in a way that our children and their children will look back on with pride, the same pride with which we look back on today at the work of those who have preceded us. Let us go forward with the courage found in our past and the courage of the convictions of our constitution. Let us go forward with greater openness, not only in the way we all do our work, but in what we know and understand today about each other and the world around us. Let us also go forward with a new understanding that rhetoric does have meaning, and with an understanding that rhetoric must therefore be responsible.

I began my remarks by mentioning stories of our past and those of today—one story that explains the strength of our judicial operation, and those celebrated stories that operate to create our greatness. All of these stories define our past, empower us today, and give us promise for tomorrow. So, let me end by asking all branches of government, and all people, to go forward, together, to transform the promise given to us into our proud legacy. The story that is not yet told is our story. Let us go forward to write our untold story with a greater understanding of ourselves, and all Iowans.