

STATE OF THE JUDICIARY

**Delivered by the Honorable Lawton R. Nuss
Chief Justice of the Kansas Supreme Court
At a Joint Session of the Legislature
Tuesday, February 15, 2011**

Speaker O'Neal, President Morris, distinguished members of the House and Senate, honored guests, and my fellow Kansans. Thank you for the opportunity to address you in this magnificent chamber as I report on the State of the Judiciary in Kansas. Mr. Speaker, I also thank you for inviting my judicial colleagues who are with me today: the justices on the Supreme Court and the judges on the Court of Appeals.

Three days ago marked the 202nd birthday of Abraham Lincoln. Exactly two weeks before that marked the 150th birthday of Kansas as a state. Lincoln, and Kansas, are forever intertwined. Historians have declared that both the admission of Kansas to the Union as a free state in January 1861, and the inauguration of Lincoln in March, heavily contributed to the start of the Civil War in April. Because Lincoln's leadership during the Civil War has led to his being called one of our greatest presidents, it can certainly be argued that Kansas played a substantial role in Lincoln's greatness.

Why do I mention Lincoln? Because as I look around this chamber at the leaders of Kansas, I see something of Lincoln everywhere. As president, Lincoln was the head of the executive branch of government — in which a number of you have served. Before he was president, he was an elected representative in Illinois and in Washington, D. C. These are obviously parts of the legislative branch of government — in which most of you serve.

And before he was president, Lincoln was a lawyer. He argued more than 300 cases to the Illinois Supreme Court. During a 9-year period, he himself filled in as a substitute trial judge. It is clear Lincoln was deeply involved in the judicial branch of government.

In short, Lincoln was essentially a mixture of all three branches. His unique experiences and the viewpoints he developed in each branch contributed to his ability to lead his country and, eventually, to save it. I don't know of the existence of such a triple combination in just one person sitting in this chamber right now. Therefore, it is especially important for all of us here — members of the different branches of Kansas

government — to combine our unique experiences and perspectives to work for the benefit of those whom ALL of us serve: the people of Kansas.

I saw a wonderful example of this "work for the people of Kansas" last spring when the Supreme Court had closed all Kansas state courts and sent employees home without pay for lack of money, for the first time in Kansas history. Legislators then asked me, "Exactly how much money will it take to keep Kansas courts open in FY 2011?" I consulted my colleagues and advisors; we tightened our belts — again — and told you precisely how much, in a short letter. Writing and then hand delivering such a letter to all 165 legislators may also have been a "for the first time in Kansas history." To your everlasting credit, for which all Kansans should be grateful, you agreed to provide these funds.

I realize that was not an easy decision during hard economic times, for in order to tell us "yes," you had to tell many others, "no." I appreciate the courage it took to make that decision. Thanks to you, our courts have been open ever since, and Kansans' access to justice has continued without interruption. On behalf of our 250 judges and 1600 non-judge employees in the Kansas judicial branch, I publicly thank you for that decision.

Now, here we all are again, in the 2011 legislative session, where economic times are not just hard: they are harder. And where hundreds of requests, if not outright demands, are made upon you for slices of the shrinking Kansas monetary pie. The judicial branch of government is included among those groups requesting funds.

I am not going to argue today that the judicial branch is worthier than the others, nor am I going to argue that we are "entitled" to a bigger or a better slice than the others. To paraphrase a character in Shakespeare's *Julius Caesar*, "I speak not to disprove what [has been spoken by another]. But here I am to speak, what *I* do know."

Let me start by acknowledging many have said that Kansas government needs to be reduced to performing only its "core functions." I express no opinion about the wisdom of that goal. But in the words of Shakespeare, let me speak "what I do know."

I do know — that if we talk about the core functions of government in America, then it makes sense that we start with the Declaration of Independence. Our founders' document expresses the most basic of "core functions of government." It starts with the familiar language that Lincoln called the "ancient fabric," words many of us know by heart:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

What may not be so familiar to all of us is the language that directly follows:

"That to *secure these rights*, Governments are instituted among Men . . ."

I do know — that our founders declared that King George had strayed from the core functions of securing these rights and had at times denied their exercise. Some of our founders' complaints included:

"[The king] has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers [and] . . .

"[The King has] depriv[ed] us in many cases, of the benefits of Trial by Jury."

I do know — that when our founders constructed their own government in 1787 to secure the people's rights of life, liberty, and the pursuit of happiness, they created the judicial branch in the United States Constitution. In reaction to King George's obstructions to the administration of justice, they established "judiciary powers" in Article III. In further reaction to the king's deprivations, they expressly guaranteed the right to a speedy trial by jury and other rights in the Bill of Rights which was approved by the people in 1791.

And I do know — that if we talk about the core functions of *Kansas* government, then it likewise makes sense that we start with the *Kansas* Constitution. As with the U.S. Constitution, in 1861 our *Kansas* founders created our judicial branch of government, establishing judiciary powers in our own Article III to enable the administration of justice. As with the U. S. Bill of Rights, our founders guaranteed numerous rights, including the one for a speedy trial by jury. In their own circle back to the Declaration of Independence, *Kansas* founders declared in the first section of their Bill of Rights: "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness."

As a result, I respectfully suggest to you that the judicial branch was created to perform some of the *original* functions of *Kansas* government. Your *Kansas* judges and their staffs have proudly been performing these original governmental functions — like the administration of justice — for the last 150 years.

With that background, let me turn now to more specifics about the "State of the Judiciary of Kansas."

Like you, we in the judicial branch have been well aware of the condition of the Kansas economy. For example, when you had asked how much money was required to keep courts open, you also asked us to "be realistic." At that time we had been maintaining a hiring freeze for 18 months. We had been doing so because about 97 % of our judicial branch budget is for salaries; therefore much of our significant cost-cutting *unfortunately* comes at the expense of our personnel. And, as a result, it comes at the expense of our ability to serve Kansas residents and to keep their confidence. As one news service said it so well just last week, "The emaciation of the court system undermines not only access to justice, but also the public's belief in the justice system."

Despite our hiring freeze — the longest in the history of our judicial branch — we agreed that for all of FY 2011, we would maintain 75-80 vacancies, about 5% of our nonjudicial workforce. Some may say, "So what? That's just standard business. When customer orders are down you send workers home." I suggest that is not a great analogy. Because our customer orders are not down. Kansas children are still being sexually victimized; Kansas citizens are still getting injured or killed; and our business owners' contracts are still being breached. They all need justice in undiminished numbers; they all still need us to perform this core function of government.

During the 2010 legislative session, besides examining the need to keep courts open, you also had the opportunity to look at other judicial branch matters. You received a lengthy report from your Legislative Post Audit's study of the judicial branch. Among other suggestions, that study proposed that reducing the 31 judicial districts to 13, or even to seven, could save \$6-8 million. These proposed reductions in districts would come with accompanying reductions in numbers and relocations of many judges and employees.

We agreed with two fundamental suggestions in your Legislative Post Audit: (1) the absolute need for a Blue Ribbon Commission to study the operations of the judicial branch, and (2) the absolute need for a "weighted case load study" to be funded by the Legislature. We recognize that sheer numbers of cases do not tell the full story of judicial and staff workloads. A valid study must take into account the driving time for judges in multi-county districts and the complexity of certain cases. For example, a trial for first-degree murder takes longer than one for simple theft. In other words, we need to compare apples to apples.

After the Legislature adjourned last spring without implementing any of the Legislative Post Audit suggestions, our Supreme Court examined this landscape. We concluded that the Legislative Post Audit's suggestion to change our number and size of judicial districts, just like legislative apportionment of political districts, should not be done hastily. Perhaps for the first time in Kansas history (or at least in quite awhile), we decided to be proactive instead of merely reacting.

We decided to do some long-range planning. We decided we would try to be more efficient; to make the best use of taxpayer money; and hopefully to even save some money. So we started with your Legislative Post Audit study recommendation: we first looked at a weighted case load study. We learned that such a study had first been recommended in Kansas in 1944 — 67 years ago — and had been recommended many times since. But no legislative funding has ever been authorized. Nevertheless, in August of 2010, we signed a contract with the National Center for State Courts for a weighted caseload study of judges and staff workloads. Just as Kansas became the 34th state of the Union while Lincoln was becoming president, we became the 34th state to have a weighted caseload study performed.

Next, we obtained the support of our judges and employees. Perhaps for the first time in Kansas history, justices left Topeka and participated in meetings with our folks in communities across the state. Their cooperation was important because during this study, everyone, every day, will record tasks and the time spent to perform them.

Next, we appointed two Kansas committees to help the National Center: one committee of 14 judges, and one of 14 staff members. We took care to make committee appointments representative of the wide diversity of Kansas communities and judicial districts. The committees have held many meetings to date, including the planning for, and conducting of, training for all our study participants. The National Center offered to train everyone — 250 judges and 1600 non-judge personnel. I am proud to say that our committees said, "No thanks. The National Center will train the 28 committee members, and we then will train our colleagues." Though this took more judge and staff time, the result is a better product.

The study began two weeks ago. The National Center suggested a 30-day data collection period. Again, I am proud to say our committees said, "No thanks. If one 30-day period is good, then two 30-day periods are better." So later this spring, although it will take more judge and staff time, we will conduct a second data collection, and we will have a better product.

The purpose of this huge study is to measure all workloads as accurately as possible. It will help us identify the best practices among our judges and staff and will help us implement those best practices across Kansas. It will also help the Supreme Court on staffing decisions. The findings may be substantial: during the last fiscal year, Kansas courts handled 500,000 cases, or roughly one for every five Kansas residents.

In all candor, it is not easy getting 250 judges to agree to do anything, much less the same thing. But they are doing the study. And so are our 1600 employees. They are all doing it because they care. And because they care, they want accurate information. They realize it may be another 67 years before it is done again. They know they are making history.

In the meantime, several months ago the Supreme Court appointed a Blue Ribbon Commission of 24 members. Here, we were also following the recommendation of your Legislative Post Audit study. This Commission will consider the results of the weighted case load study and will also review the operations of the judicial branch. It is authorized to consider issues like the number of court locations needed to provide Kansans access to justice (we are currently required by statute to have one judge per county); consider the services to be provided at each court location and the hours of operation; and consider the appropriate use of technology, cost containment or reductions, and flexibility in the use of human resources. This Commission has been asked to make recommendations to the Supreme Court for possible changes.

The Blue Ribbon Commission has been modeled after a successful commission from the early 1970's, a study that resulted in the unification of all Kansas courts in 1977. Like our judicial and staff committees in the weighted caseload study, we made these Commission appointments representative of the wide diversity of Kansas communities and backgrounds. But unlike those committees, this Commission is not just from the judicial branch. In another example of the three branches of our government working together, we asked then Governor Parkinson, Governor-elect Brownback, Speaker O'Neal and President Morris each to make an appointment. And they have done so.

The Supreme Court intends this Commission to travel around the state for public meetings. Their initial planning meeting is in Topeka on March 9. To make it the best Commission possible, we are assisted by the National Center, the national experts who are experienced in working with this type of Commission.

Make no mistake: this is a large undertaking. Together, the weighted caseload study and the Blue Ribbon Commission are called Project Pegasus (after the winged horse of Greek mythology).

We intend to have the weighted caseload study's final reports and the Commission's recommendations on our desk by January 2012. We will look at improvements in our court system and ways to make the best use of our taxpayer dollars.

We have no preconceived ideas on what changes, if any, may result from Project Pegasus. If we conclude changes are needed, they may be made by either the Supreme Court or the Legislature, within their respective constitutional authority. I emphasize: this is not just about economics. It is also about access to justice. While it may make the most economic sense to state government to maintain only a central courthouse in the state for all judicial needs, justice will be deprived to thousands of Kansans who cannot afford the lengthy and frequent trips there.

I also want to emphasize that Project Pegasus has the potential for the most dramatic change in the judicial branch since court unification in 1977. It is additionally important that any changes be the right ones because these changes, like court unification in 1977, may be with us for many years to come.

Why do I provide this detailed and probably painful explanation? The answer is: to tell you how extensive this project is; to tell you how significant its changes can be; and to tell you how committed our judicial branch people are to it. But it is also to ask you to allow us to finish it without interruption for the benefit of Kansas.

We ask that you return to the spirit that moved you last spring when you courageously decided to provide funding to keep Kansas courts open. We ask you to preserve that funding for the rest of this fiscal year and provide the funding we have requested for all of 2012. Such funding will allow us to receive our Pegasus reports and start considering needed improvements to the judicial branch. Less than that means closing courts — very quickly.

I know that is a big request, given the economic situation. But please consider this: The fundamental rights of Kansans are jeopardized when courts close. When courts are closed, justice is delayed until they open again. When courts close, Kansans' belief in our justice system is undermined.

Those jeopardized fundamental rights include the one I mentioned earlier: the right to a speedy public criminal trial by an impartial jury. A criminal defendant whose

right to a speedy trial has been violated is not simply a matter of academic interest to law school professors — to which we can say "so what?" Under our system of laws, that defendant will have the criminal charges dismissed and will be free to go. Kansas Statute 22-3402 provides that "such person shall be entitled to be discharged from further liability to be tried for the crime charged."

Kansans also have the right to have civil justice administered without delay. Section 18 of the Kansas Bill of Rights, in effect since 1861, states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." The same general message from the people is found in various Kansas civil law statutes passed by this Legislature. For example, Kansas Statute 60-102 charges Kansas courts "to secure the just, speedy and inexpensive determination of every action or proceeding." If the courts are closed, then on those days any business owners who want a competitor immediately restrained from improper competition or from misappropriating trade secrets created after lengthy and expensive research and development, will have to wait until the courts are open to obtain such an order. We all know, to business people, "time is money."

If we don't maintain this funding, courts not only will close, but court employees will also be sent home without pay. Again. And some of our well-trained and experienced but worn out employees quit because some form of hiring freeze for the last two years has left them shorthanded. Then, because we must maintain 80 vacancies, we may be unable to replace *them*. It is a tough cycle: even more employees then quit because they become more worn out and shorthanded.

In addition, funding cuts jeopardize completion of our current court review project, Project Pegasus. It is ironic, if not tragic, because Pegasus looks for ways to make the best use of taxpayer money and to save money. And Pegasus looks at improvements to the Kansas court system. The weighted caseload study is at the heart of Project Pegasus. If Pegasus is stopped before completion, we will be back where we were in 1944: waiting for such a study to be performed. Someday.

Loss of funding also jeopardizes electronic case filing, otherwise known as "e-filing." E-filing, as its name suggests, allows lawsuits and related legal documents to be filed with the courts electronically from office or home, with no gas used in driving to the courthouse. After initial start-up costs, such filing systems in other states and at the federal level in Kansas have demonstrated efficiencies that save both the public and the judiciary considerable time and resources. It is designed with the basic business philosophy: spend money now to save more money in the future. An incredible amount

of time and federal grants have already been spent; that investment would be lost without further funding.

Like your present efforts to save Kansas money by reexamining KPERS and Medicaid, we need time to reexamine the judicial branch. We respectfully ask you to give us the necessary time, through adequate funding, to do it right.

I began with Abraham Lincoln: allow me to close with him. I was pleased to learn last week just before I swore in Senator Allen Schmidt, that Lincoln's words are found in the office of Senate President, Steve Morris. As President Morris and others of you know, after visiting Kansas in 1859, Lincoln said, "If I went west, I think I'd go to Kansas."

I think you will agree: What a great idea from a great man. Speaking of great, my great-grandparents "went west to Kansas" in the 1870's. They lived in a dugout carved in a creekbank outside Dodge City while they homesteaded their claim of 160 acres. I am proud to say my mother still owns that land. As a descendent from these humble beginnings, I consider it a special honor to stand before all of you in a chamber of the people and to speak on behalf of the entire judicial branch of my native state.

During your legislative session, I am confident that you will take fair account of the needs of the judicial branch as we provide our core functions of Kansas government in administering justice to our citizens. And finally, for all the good work you have done and continue to do for the people of our state in these difficult times, I want to express my gratitude and bid you Godspeed. Thank you.