

2025 State of the Judiciary

Chief Justice Cory Swanson

Mister President, Mister Speaker, members of the Montana Legislature, members of the Supreme Court, and guests:

Thank you for inviting me to address this joint session of the Montana House and Senate to inform you of the State of the Montana Judiciary. We truly live in interesting times, as witnessed by the fact that I am standing here before you, still expecting to wake up and realize we have been subjected to an elaborate prank.

But through God's grace and direction, and the will of the people, I stand before you, intent on giving every bit of diligence, integrity, and wisdom in my being. When I awoke on November 6 to the news I had won the election, I was reminded of the words of Brigadier General Theodore Roosevelt, Jr. on Utah Beach when he realized his division had been dropped 2 kilometers away from their intended objective. He told the Navy to keep sending in the troops, "We'll start the war from here."

Good Governance

What war am I engaged in? Actually, it's the same war you are also fighting, and we're on the same side. It's the enduring struggle for good governance, which is one of the scarcest resources in human history. The people consented to delegate a portion of their self-governing powers to you and me, so we could act on their behalf. This deal gave us the duty to serve them, not the power to rule over them.

The same leaders who fought for our right to live in such a government designed the system to protect the rights of citizens. These rights were granted by our Creator, not doled out by a regulator. The genius of our Republic prevents the entirety of governmental power from being concentrated in the hands of a single individual or branch of government. One of the pictures hanging in my Chief Justice chambers is a pictograph that shows the French Army's disastrous attack into Russia, and eventual retreat home, in 1812. I look at it every day as a reminder of the consequence of placing an entire nation's power into the hands of a single mad genius. America does not want a Napoleon or a cheap imitation of him, in any branch of government at any level.

That's where the judiciary and the legislature come in. Our two branches of government have historically been the bulwark against tyranny. You have been the branch closest to the people, expressing their will through laws, taxation, and spending. And the judiciary has been the check on executive and legislative power to prevent the popular will from destroying individual rights. Not only do we interpret the laws and Constitution, but we create a forum where citizens can dispute against their government as equals in the courtroom. Think about that. Any two parties are equals in a courtroom, whether they are the least powerful citizen or the most powerful leader. That is at least partially the meaning of the phrase EQUAL JUSTICE UNDER LAW, which is carved across the front of the United States Supreme Court.

The genius of our system is that it creates conflict to check the power of ambitious people. But the drawback of our system is that it creates conflict to check the power of

ambitious people. I mean, how am I supposed to get anything done around here when I have to ask you people for money?

But before we get to the big elephant and donkey in the room, I invite you to agree with me on a few important measures in the interests of good government.

People and Their Problems

The first and most important thing to emphasize is that the vast majority of the judiciary's work has nothing to do with inter-governmental power struggles. Well over 99 percent of cases are just ordinary people trying to make it through their lives and hoping the local court can quickly resolve their problems. They are our customers and your constituents.

My team and I presented the Judicial Branch budget last week in the joint appropriations sub-committee. Most of our requests are simply carrying forward our duties under current law. But I also asked for the addition of three District Court Judges in Yellowstone County. If you have been paying attention the past few years, you know that Montana is growing and crime in Billings is reaching new levels.

The rising caseload problem in Yellowstone County is not exaggerated. In calendar year 2024, twenty-nine percent of all statewide criminal cases were filed in Yellowstone County, and twenty-six percent of all child dependent neglect cases were filed there. That means just 15 percent of the state-wide judges are assigned to more than a quarter of the most time-intensive cases.

We are working on measures in that judicial district to help them cross-level their caseloads and resolve them more efficiently. But the bottom line is that we also need more judges assigned to these cases. So as you weigh new policy proposals such as specialty courts, please continue to support the additional District Court judges in Billings so we can uphold our responsibility to the people in our largest city.

Opportunities for Cooperation

The second observation I will share is that we can find ways to work together without compromising our mutual commitments to the Constitution. To do so, we need to break down walls of misunderstanding and mistrust between us.

Charlie Russell told a story about a young girl who asked her mother if cowboys were born with horns, and her mother answered, “No dear, cowboys are partly human.” Well, some folks wonder if judges are born with their black robes on, and I’m here to tell you they are partly human, as well. I’d urge you to get to know them and they will probably surprise you with their humanity and common sense. I want to briefly highlight four ways I hope to work with you now and in the next two years.

1. Confirming Judges

The next time some of you see me in a committee hearing, I will be supporting the Senate’s confirmation of four judges to the bench.

Governor Gianforte has recently appointed Scott Herring to a vacant District Court Judgeship in the 7th Judicial District in Eastern Montana. The Governor will soon appoint

a District Judge to fill a vacancy in the 20th Judicial District in Western Montana. I enthusiastically support both of these appointments.

We also have two Water Court Judgeships that require confirmation. Steven Brown has been appointed the Chief Water Court Judge to fill the vacancy created by Judge Russ McElyea's retirement. And I had the pleasure to appoint Bina Peters as the Associate Water Court Judge to fill Judge Brown's vacancy when he was elevated to Chief Water Judge. I strongly support both Judge Brown and Judge Peters and request your speedy confirmation.

2. Mental Health Needs

As I have visited with District Court Judges across the state, I have asked them for recommendations on how to address functionality problems in our system. The number one response has been a request to speed up mental health evaluations and treatment for people in criminal court cases.

There have been well-publicized and extensive discussions about the needs at the Montana State Hospital, and I'm not going to reiterate those here. But there is a sub-set of this problem that directly affects many criminal cases across the state. When a criminal defendant is possibly mentally unfit to proceed to trial, Montana law requires the judge to order a mental evaluation. If the person is found unfit, he or she cannot proceed to trial until made fit. That often requires treatment at the Forensic Mental Health Facility at Galen. And some criminal defendants are adjudicated guilty but mentally ill, and they

also typically get sent to Galen for additional evaluations to begin their sentence at the Montana State Hospital.

For years, the demand for the services has outpaced the resources to fund this facility. When a defendant charged with a serious crime is referred to Galen but there is no room, district judges all over the state are confronted with the difficult question of keeping a mentally ill person in jail or letting them out and potentially endangering themselves or the community. Some of these wait times are very long, and they are placing judges in the position of potentially having to dismiss criminal cases involving very serious crimes.

The solution lies entirely in your hands, and I know you have smart and creative people working with the Department to figure this out. I'm just taking this opportunity to reinforce the concerns from district judges that the problem is real, it is state-wide, and it is not going away.

3. Open the X Files

Now we need to talk about the "X Files." Montana has a surprisingly diverse array of Legislative records kept in multiple locations, depending upon the type of record and the year it was generated. Four different entities have various partial archives, with no single entity containing all the archives in a preserved and easily accessible format.

These four entities are the Montana Historical Society, Montana State Library, Legislative Services Division, and the State Law Library. They are under different

branches or boards, and there does not seem to be any unifying effort for these organizations to compile and preserve comprehensive historical records.

There is one subset of records that is in danger of being permanently lost if we don't act soon to preserve them. These are the recordings of Legislative Committee Hearings from the 1997 to 2003 Legislative sessions. These recordings are currently housed in the Montana Historical Society, and they have been difficult and at times impossible to access during the years the Historical Society has been under renovation. Some of these records are only stored on a single cassette tape, which time and storage conditions may work to completely erase before they are preserved. This inability to access these meeting minutes (and my imagination that they are in a warehouse next to the Lost Ark of the Covenant) is what prompted me to start calling these missing records the X Files.

I'm asking that you take the lead, through an interim study or commission, to bring stakeholders from each of these entities and their governing bodies together. Let's catalog the entire array of Legislative archives, preserve these records, and make them accessible to the public. I am volunteering the services of the State Law Librarian Frankin Runge (RUN GEE) to participate in such an effort. He will bring substantial expertise and enthusiasm to this project.

4. Judicial Review

My fourth effort for the next two years is a thorough top to bottom review of the judicial branch. Our judicial branch is a small portion of the state budget, but we still owe

the taxpayers our diligent focus on spending every dollar wisely. That means we need to ensure we are meeting today's needs, not yesterday's. I will review every program and every person in the branch. If we can save money or innovate to better meet Montana's needs, we will do so.

That includes my commitment to you that we will be as open as possible. Judges cannot speak about cases they are working on, out of fairness to the parties who rely upon their decisions. But we can and should speak about how our courts function, about how we spend the people's money, and how we fulfill their trust. To the extent we can open up the doors and windows and brush out the cobwebs, we will do so. In two years, I'll present a budget and a Judicial Branch policy that will be the result of renewed scrutiny and innovation, as well as the collective wisdom of the smartest people I can consult.

CAPACITY

As I prepare to depart, I want to leave with you one word that summarizes my long-term goals and vision for the Judiciary: the word is CAPACITY.

Leaders have a fundamental duty to develop greater capacity in their people. Capacity is a realistic vision of what a person can achieve in the future. It requires the recognition of existing latent capability, and the faith to develop it. That includes coaching individuals to increase their personal capacity, and leading groups to multiply their capacity through teamwork.

And what does this have to do with judges?

Improving the judiciary's proficiency means encouraging excellent lawyers with high capacity and a vision of public service to become judges. Just as the Legislature rises and falls by the quality of people in your seats, so the judiciary rises and falls by the quality of the people on the bench. But most good judges and good lawyers don't get excited about being hauled into a legislative committee and grilled about politics and not the law. We want juicy cases all about life, death, love, hate, and greed. (Pretty much my wife's podcast playlist.) We don't look forward to cases about power struggles between the legislature and the courts.

That means encouraging really good lawyers and judges to adopt or continue in this profession gets significantly harder when they hear about a litany of bills that many in my profession would call judicial harassment. How does that affect you? It may feel good to pass laws that make it harder for me to do my job, but ultimately it will be counter-productive because it will harm the proper functioning of our government.

The Elephant and the Donkey

So it's time to talk about the elephant and the donkey in the room. But I see my time is up, so I'll be on my way...

We have recently experienced a higher than normal level of tension among our three branches. If you will permit me to speak candidly, I believe the conflicts of 2021 and 2023 caught leaders in all three branches of government by surprise. America and Montana have experienced a changed political dynamic, which was expressed in legislation that some viewed as *overdue* and others viewed as *overreach*. People then

fought over this legislation in the courtroom, because that's what Americans do, and many of you did not like the outcomes.

What do we do about the present and what do we do about the future? I'd like to break this cycle, and get back to writing more opinions on the rule against perpetuities. On many occasions I speak for the entire Court, but in writing judicial opinions I am only one voice out of seven. So the following comments I offer on this point are my own.

We are in the midst of a robust public debate on the Supreme Court. Some say the Court has repeatedly over-ridden Legislative policy-making authority and skewed its own canons of interpretation to reach pre-determined case outcomes. Others say the Legislature has passed blatantly unconstitutional laws, and then blamed the Court for striking them down. My personal response to these arguments will not be delivered in this forum. You will need to read the full case opinions and dissents in the coming months and years to see how the Court navigates these difficult issues.

But these pitched battles have led some to say the non-partisan nature of the judiciary is a façade, and we should openly declare political affiliations of candidates and Supreme Court Justices. I understand from your comments and the Governor's speech this is one of the main things you want to accomplish.

I have personally stated that the judiciary should remain non-partisan, despite the almost irresistible pull of partisan spending and messaging in these campaigns. That is not based on a Constitutional opinion, because I have not researched the issue and have not provided such an opinion. It's based on my personal commitment to decide every case

based upon the facts and law of that case, not based upon the party or affiliation of the litigants. If at least three of my colleagues have the same commitment to process, then it won't matter whether we are Republicans or Democrats.

I urge you to focus the rest of your judiciary-related legislation on making the institution better. The Legislature has broad policy-making authority, including over many parts of the Judicial Branch. We welcome legislation that addresses and resolves policy problems in the judiciary. But I urge you to reject legislation that will undermine the effective functioning of the judiciary, not because judges don't like it, but because it will ultimately harm Montana citizens.

As it happens, you are considering a number of bills that well-respected attorneys are telling you violate the Constitutional separation of powers. I urge you to listen to those arguments because they are probably the same arguments you will hear in my courtroom if litigants challenge newly-passed statutes. Again, there is no point in creating unnecessary and quite predictable conflicts between our branches.

So if you support my vision to increase the capacity and proficiency of the Judiciary and you have trusted my judgment up to this point, I ask that you consider these remarks each time you vote on a judicial bill. We have enough structurally-designed friction and conflict without needlessly inviting more.

Conclusion

In conclusion, thank you for your gracious invitation to share my thoughts on the State of the Judiciary. Now it's time for me to get back to doing my job, and I leave you here with the assurance that I won't try to do yours. I sincerely offer my gratitude, respect, and friendship as you fulfill your duty to pass the budget and set policy for the coming biennium.

To modify that famous phrase from General Roosevelt, "Let's *end* the war from here."