

STATE OF THE JUDICIARY

An Address to the Joint Session
of the 71st Legislature on February 14, 1989

By Chief Justice Thomas R. Phillips
Supreme Court of Texas

Governor Clements, Governor Hobby, Speaker Lewis, distinguished members of the Senate and House of Representatives, Presiding Judge McCormick and other members of the judiciary, and fellow Texans:

I appreciate this opportunity to bring my report from the third branch of government to the second branch of our government and to the people of Texas. Since 1979, you have directed the Chief Justice to deliver this state of the judiciary message to each regular session of the Legislature. The purpose of this message is to "promote better understanding between the legislature and judicial branches of government and promote more efficient administration of justice in Texas."¹ These are lofty goals, worthy indeed of our highest efforts.

In recent years, we have learned much about the necessary elements for a successful judiciary. Under your leadership, Texas is seeing many improvements; but much remains to be done if we are to have the best possible judicial system. I will review some of our recent gains and explore our two most urgent needs: increased funding and support, and a new method of selecting judges.

RECENT IMPROVEMENTS

In the ten years since these messages began, Texas has taken significant steps to advanced the administration of justice. The people have adopted eleven of the twelve constitutional

¹Tex. Gov't Code § 21.004.

amendments submitted by you relating to the judiciary, including giving criminal jurisdiction to the intermediate appellate courts², strengthening the mechanisms for judicial discipline³, mandating judicial redistricting⁴, and permitting certified questions from federal appellate courts.⁵

You have made numerous statutory improvements in the administration of justice, such as simplifying venue determinations⁶, requiring mandatory judicial education⁷, and modernizing the jurisdiction of the Supreme Court.⁸ You instigated our court's adoption of the Texas rules of Evidence⁹, which have been an unqualified success. And, at your direction, the Supreme Court has adopted, or will adopt, rules of administration¹⁰, child support guidelines¹¹, and visitation guidelines.¹²

The Courts of Texas have also worked to improve our legal system. In attempting to fulfill its constitutional responsibility to assure "the efficient administration of the judicial branch"¹³, the Supreme Court has made frequent and vigorous use of its administrative authority, and occasional,

²S.J.R. No. 36, Acts 1979, 66th Leg., adopted November 4, 1980.

³H.J.R. No. 4, Acts 1983, 68th Leg., adopted November 6, 1984.

⁴S.J.R. No. 14, Acts 1985, 69th Leg., adopted November 5, 1985.

⁵S.J.R. No. 10, Acts 1985, 69th Leg., adopted November, 5, 1985.

⁶Ch. 385, Acts 1983, 68th Leg. (S.B. 898), Tex. Civ. Prac. & Rem. Code § 15.001 et seq.

⁷Ch. 732, Acts 1985, 69th Leg. (H.B. 1658), Tex. Gov't Code § 74.025.

⁸Ch. 1106, Acts 1987, 70th Leg. (S.B. 841), Tex. Gov't Code §§ 22.001, 22.225.

⁹S.R. 565, Acts 1981, 67th Leg.

¹⁰Tex. Gov't Code § 74.024.

¹¹Tex. Fam. Code § 14.05(h).

¹²Tex. Fam. Code § 14.03(i).

¹³Tex. Const. art. V, § 31.

but equally appropriate, use of its inherent power. Our court is working more closely than ever before with the State Bar of Texas to improve the discipline, education and governance of the legal profession. We are also working with all the state agencies that regulate or assist various facets of the legal process. And even more encouraging, trial and appellate judges across the state are testing new and innovative programs to dispose of cases promptly and correctly.

ACCESSIBILITY OF THE COURTS

The greatest challenge facing our legal system is to ensure the availability of justice for all our citizens. A democratic society requires a court system that is not only hard-working, honest and dedicated, but accessible to everyone. You have recognized this by requiring the Chief Justice in this message to evaluate "the accessibility of the courts to the citizens of the state."¹⁴

Our Constitution and laws provide our citizens with ample access to the courts. The Texas constitutional guarantee of access to the courts has been broadly enforced in judicial decisions.¹⁵ Both statutory and case law have created many new avenues of legal redress for plaintiffs in Texas courts. Finally, no state is more vigorous than Texas in its protection of the right to trial by jury.¹⁶

But a theoretical right to vindication is not enough. Meaningful justice must also be timely and affordable. If not always swift, it at least must not be interminable; and if not always cheap, it at least must not be exorbitant. We must all be sensitive to the emotional and financial toll which even "ordinary" litigation can impose on party litigants. When cases take years to conclude, or fees

¹⁴Tex. Gov't Code § 21.004(a).

¹⁵Tex. Const. art. I, § 13. See, e.g., Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Sax v. Votteler, 648 S.W.2d 288 (Tex. 1983).

¹⁶Tex. Const. art. I, § 15, art. V, § 10, See, e.g., State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288 (Tex. 1975); White v. White, 108 Tex. 570, 196 S.W. 508 (1917).

and expenses exceed the amount in dispute, our system fails to meet its fundamental purpose.

Fortunately, progress is being made on several fronts. Last session, you passed a comprehensive alternative dispute resolution program which will allow the amicable settlement of thousands of disputes short of trial.¹⁷ ADR, as it is called, is truly an idea whose time has come, and we commend you for your support of it. Just weeks ago, the Supreme Court in the exercise of its inherent power amended Article XI of the State Bar Rules to require lawyer participation in the IOLTA program. By requiring the interest on all short term legal trust accounts to be dedicated to legal services for the poor, we can provide increased legal services to our less fortunate fellow citizens without spending any additional public funds. In promulgating our rules of administration, evidence and procedure, the Supreme Court is increasingly mindful of the need for the legal process to be simple and expeditious, as well as fair. Finally, the trial courts of Texas, on their own and with the Supreme Court's encouragement, are taking control of their own dockets in civil cases as never before. Trial judges are using pre-trial conferences, docket control orders, settlement weeks, team judging and other modern solutions to move cases more efficiently and expeditiously.

The judiciary is ready to work with other branches of government to make equal access to justice a reality for all Texans. With increased funding and support, we can do an even better job of making justice for all a reality.

JUDICIAL FUNDING AND SUPPORT

Your second and final requirement of this message is that it evaluate "the future directions and needs of the courts of this state."¹⁸ While many areas merit discussion, I believe two needs are

¹⁷Tex. Civ. Prac. & Rem. Code § 154.001 et seq.

¹⁸Tex. Gov't Code § 21.004(a).

paramount: adequate funding and support for our judges, and a better method of judicial selection. Because of the importance of these issues, I will devote the balance of my remarks to them.

An increased commitment by the state to judicial funding in this session is essential. During the last ten years, the volume and complexity of matters brought to the courts has steadily increased, but the commitment of state resources has not kept pace. The courts have increased their productivity to meet these growing needs, but more help is needed now if we are to make further improvements.

The situation in the trial courts is especially acute. By relying on county and local governments for virtually all of the expenses associated with operating a judicial system, our state government spends less per capita on its judicial system than most other states.¹⁹ Although some counties and cities have generously supported their local judiciaries, others have not provided even essential services.

Eventually, Texas must recognize its judicial structure from top to bottom, with the state assuming full responsibility for state courts, and local governments providing special courts with separate jurisdiction.²⁰ Until that day arrives, however, we must correct the most glaring deficiencies in our current system.

One serious problem is the state's reliance on local supplementation for district judges' salaries. The basic state salary of \$57,257 is quite low, ranking 45th in the nation among general

¹⁹In 1985, Texas ranked 40th in the nation in per capita state spending on the judicial system.

²⁰In all, Texas has about 3,000 judges, approximately 40% more than any other state. Many of these courts have confusing and overlapping jurisdiction. For instance, there are currently 174 statutory county courts in 68 counties. The salary and qualifications for office vary from court to court, and at least 51 different jurisdictional schemes exist. Much of that jurisdiction is concurrent with other courts, particularly in general civil matters. Office of Court Administration, 1987 Texas Judicial System Annual Report.

jurisdiction trial courts' salaries. While nearly all district judges receive some local supplement, there is no justification for paying more than \$21,000 to some judges than to others for the same job. Moreover, the independence of the third branch can appear to be compromised by a system which allows county officials to reduce a state judge's salary at will.²¹

This must be the year litigation is passed and signed to pay intermediate appellate justices and district judges 95% and 90%, respectively, of the salaries paid to supreme court justices and court of criminal appeals judges. The judiciary urges your support again this session for this urgently needed reform.

Both trial and appellate judges need additional staff and improved equipment to manage crowded dockets and reach informed, cogent decisions. It makes no sense to waste limited and expensive judicial time on non-judicial tasks, like typing letters, setting dockets and posting notices, which can be performed more economically and efficiently by support personnel using modern equipment. Judges, like the rest of government and society, must move beyond the era of the Big Chief tablet and No. 2 pencil to meet the complex challenges of modern society.

The precise needs of the state judiciary are set forth in the recommendations of the Judicial Committee on Court Funding. This committee, comprised of presiding officers from all levels of the state judiciary, has carefully studied the needs of the third branch. I hope you will give careful consideration to each of its recommendations.²² Every one is meritorious, but I will mention only two by way of example. First, all sixteen appellate courts desperately need uniform automated equipment to manage case flow and prepare quality opinions. Every lawyer who appears in the

²¹Since 1985, supplements have been significantly reduced or eliminated in five judicial districts.

²²The requests of the Judicial Committee on Court funding are summarized on the table at Appendix B.

courts uses computer legal research; but the judges who decide the cases they bring are using research methods that are one hundred years old. Second, the trial courts need a district court support fund to provide essential resources not available, for whatever reason, from their local governments. At least this degree of state support is necessary to assure the minimum delivery of adequate judicial services.

While the requested increases we seek are small indeed in the context of the state's overall budget, they are critical if the courts are to continue meeting their constitutional responsibilities to our citizens.

JUDICIAL SELECTION

The most important issue facing our state regarding the third branch of government is judicial selection. For reasons I will discuss, it is an issue that I believe you must address in this session.

You have heard the arguments about judicial selection before. You know that Texas is one of only eight states still selecting its entire state judiciary by partisan ballot. You know that our recent judicial elections were the most expensive in the history of the world.²³ You know that the politization of our judiciary has undermined confidence in the judicial process at home and made us the object of ridicule abroad. Texans want and deserve a change.

But what change? On that issue, divisions are sharp, and positions strongly held. Even on the court where I serve, there is sharp disagreement. Under ordinary circumstances, this is an issue which you might like to defer to another day. But if I say only one memorable thing today, let it be

²³Candidates for the Texas Supreme Court spend well over ten million dollars in 1988. In addition, further millions were spent by independent committees advocating the election or defeat of Supreme Court candidates and by candidates for other judicial positions across Texas.

this: the status quo in judicial selection is not an option. Change is occurring across our entire nation, either by popular will or federal judicial decree. Change will almost inevitably come to Texas. The only real questions are what those changes will be, and who will make them.

The United States Court of Appeals for the Fifth Circuit has held that the Voting Rights Act²⁴, as amended in 1982, applies to elected judges the same as to all other elected officials.²⁵ Last November, the Supreme Court declined to hear an appeal from that decision, and we are bound by it. Judicial district lines are illegal if their effect, whether purposeful or not, is to dilute minority voting strength.

In response to the Fifth Circuit decision, two lawsuits have been brought in federal district court to challenge the Texas method of choosing judges. One suit, pending in Brownsville, attacks the at-large election of justices to the Thirteenth Court of Appeals in Corpus Christi. The other suit, pending in Midland, challenges the at-large election of 208 district judges from most metropolitan counties in Texas. These cases may soon be resolved, at least at the district court level. Discovery is scheduled to close at the end of this month in the Brownsville case, and trial is set for April 17 of this year in the Midland case.

Texas is not facing these challenges alone. Similar lawsuits have been or are being filed in most states where judges are elected by open ballot; and in those cases which have proceeded to trial or appeal, the plaintiffs have thus far been uniformly successful. In Mississippi, for example, the state recently settled a lawsuit after the Legislature failed to address the issue. Under the terms of that settlement, trial judges in Hinds and Yazoo Counties will now be elected from single-member

²⁴42 U.S.C. § 1973.

²⁵Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), cert denied sub non. Roemer v. Chisom, 109 S.Ct. 390 (1988).

districts. Unlike Mississippi, we should let the people, not the federal courts, decide this fundamental question.

Texans must be sensitive to why these lawsuits are being brought, and why they are succeeding elsewhere. People of all racial and ethnic backgrounds must feel that they have a stake in the judicial system, and that all qualified persons have equal opportunity to serve in the judiciary. If our current election system impedes this, it should be changed. You should examine the ways in which our election system might be structured to increase the opportunity for minority judicial services. Three principal methods have been suggested.

Multiple Voting

The first method is multiple voting. This system would abolish separate districts within a geographical area and require all judges, and judicial candidates, to run against each other in a single, at-large election. Voters would cast a number of votes, possibly with the right to cumulate more than one vote for a single candidate.

This is a wholly unacceptable method of electing judges. Every judge would always be the political opponent of every other judge, and would-be judge, in his or her locality. The efficiency of the judicial process would almost surely be eroded.

Sub-Districts

The second option is electoral sub-districts. This method is advocated by the plaintiffs in both of the pending federal lawsuits. Under this approach, judges would be elected from an area within the districts where they serve, rather than by the voters of the entire district. These districts might be single-member, like legislative districts, or multi-member, with two or more judicial "posts" within a sub-district. I also believe this method is unacceptable, particularly as to trial

judges. Unlike legislators, city council members, or other officials typically selected by district, trial judges are not members of a collegial body. They act alone and wield immense power. They must be accountable to all the people over whom they exercise primary jurisdiction, not just a portion or a segment of the electorate. Outside of Mississippi, I know of no jurisdiction which currently selects trial judges by sub-district.²⁶

Retention Elections

The third alternative is retention elections, an essential element of the so-called merit election plan. While all judges would initially be appointed, all judges would also periodically face the voters for retention or rejection. Judges would continue to be responsible to the entire electorate in their district, with far more accountability than under our current open election system.

The constitutional amendment you present to the voters to implement this plan must guarantee that qualified persons of all racial and ethnic backgrounds will have full opportunity to serve as judges. One possible solution, now under investigation by a legislative committee in Louisiana, is to require members of the nominating commissions, rather than judges, to come from sub-districts. Your careful deliberation will no doubt lead to a retention election plan that is right for Texas.

Among those three alternatives, you will find it helpful to know that a majority of the justices on the Texas Supreme Court favor retention elections for the selection of trial judges.

Even apart from the legal challenges to our existing system, I personally believe that the

²⁶Interestingly, Texas for a brief time elected judges by sub-districts in Bexar and Dallas Counties. Acts 1889, 21st Leg., pp. 152, 165. Each county was divided in half, with the line running through the courthouse, but all judges had countywide jurisdiction. The experiment was abandoned in Bexar County in 1895, Acts 1895, 24th Leg., p. 181, and, due to the "great inconvenience to the people," in Dallas County in 1907. Acts 1907, 30th Leg., p. 131. The Legislature is now constitutionally prohibited from creating districts smaller in size than an entire county unless an enabling election has first been held. Tex. Const. art. V, § 7a(i).

retention election system is an idea whose time has come for all our state judiciary. I am sure you read over the weekend the results of the latest Texas Poll, which show that only 19% of all Texans favor our current election system, while a substantial plurality favor retention elections.²⁷ This poll is consistent with all impartial studies in recent years.²⁸

Opponents of reform call the current system the "election" of judges, while labeling the retention elections system the "appointment" of judges. This is clever, but misleading. Over 55% of all sitting state judges in Texas initially reached their benches by appointment, not election.²⁹ This is because judges, unlike legislators, are appointed, not elected, whenever an incumbent dies or resigns or a new district is created.³⁰ More strikingly, 43% of all sitting judges, however they initially reached the bench, have never been opposed for their positions. A change to retention elections would actually give the people more, not less, control over their judicial officers.

No system of judicial selection is perfect. In my opinion, however, retention elections best resolve the inherent tension between a judge's responsibility to the rule of law and a judge's ultimate obligation to the democratic process.³¹ Merit election is used by more states than any other method of judicial selection., and no state has ever abandoned the system after adopting it.

²⁷See Austin American-Statesman, Feb. 12, 1989, p. B3.

²⁸See, e.g., Tarrance Hill Newport & Ryan Survey, January 21-23, 1987; Texas Poll, September 24 - October 11, 1984. Opponents of reform rely on tests of voter attitudes which ask only about appointment, not retention elections. Thus last year's Democratic Primary ballot issue was worded as follows:

Texans shall maintain their right to select judges by direct vote of the people rather than change to an appointment process created by the Legislature.

This language was obviously designed to create a predetermined result rather than accurately to gauge voter sentiment.

²⁹See Appendix E.

³⁰Tex. Const. art. V, §§ 2, 4, 28.

³¹For a scholarly treatment of these issues, see, e.g., Judicial Selection: What Fits Texas? 40 Sw. L. Rev. (Special Issue)(1986); USC Symposium on Judicial Election, Selection, and Accountability, 61 S. Cal. L. Rev. 1555-2073 (1988).

Regardless of what action you take, I further hope you will examine the whole area of judicial campaign financing. Judges have fundamentally different responsibilities and different obligations than other public officials. Any system of judicial election must recognize these differences by placing meaningful limits on both the amount and source of contributions to judicial candidates.

It is within your power to let the people decide the momentous issue of judicial selection. A constitutional amendment is required to implement any of the proposed changes, including a retention election system. A federal court, on the other hand, may order changes in our system, even those that contradict our state constitution, by judicial decree. If Texans are to be heard on this issue before the 1990 elections, it is imperative that you submit a proposed constitutional amendment this year. It would be a tragedy for this state if an issue so fundamental to our right of self-government were decided by default in the federal courts.

CONCLUSION

With the help of the other branches of government and the people of Texas, the judiciary has accomplished much in the last decade. If we are to continue this progress, we need your continued support, especially in the appropriations process and in changing the way we are selected. With that

support, we can accomplish great things for Texas. Our state courts can truly be, as Alexander Hamilton envisioned them, the "great cement of society".³²

³²The Federalist Papers, No. 17.