term, voters again are given the choice of retaining or removing the judge from office. (See, *e.g.*, American Bar Association, *Model State Judicial Article*, secs. 5, 6.)

The "Missouri" plan works essentially the same in the case of trial courts, except that regional nominating commissions are sometimes created to screen and propose candidates for trial court appointments. Some states have adopted the "Missouri" or "merit" plan for appellate judges but retained popular election of trial judges – Montana is an example – perhaps on the theory that voters are more likely to be able to make intelligent electoral choices in races involving local candidates.

Sec. 3. JURISDICTION OF SUPREME COURT; WRITS; SESSIONS; CLERK. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide.

History

The 1836 Constitution simply gave the supreme court "appellate jurisdiction only." Since then, many limitations have been placed upon the supreme court's jurisdiction. Most of these undoubtedly were prompted by the heavy caseload that plagued the supreme court throughout most of the nineteenth century. (See the *History* of Sec. 2.) These repeated attempts to reduce the supreme court's workload by limiting its jurisdiction naturally introduced a great deal of detail into the section.

The 1845 and 1861 Constitutions permitted the legislature to restrict appeals from criminal convictions and interlocutory (*i.e.*, nonfinal) orders. (Art. IV, Sec. 3.) The 1866 Constitution permitted the legislature to restrict criminal appeals only in misdemeanor cases, thus restoring the supreme court's constitutional jurisdiction in felony appeals. (Art. IV, Sec. 3.)

The 1869 Constitution attempted an entirely new solution to the continuing problem of criminal appeals; it simply prohibited them unless a supreme court judge, after reviewing the record, believed the trial court had erred. (Art. V, Sec. 3.) This limitation proved unsatisfactory and was removed by amendment in 1873.

The 1876 Constitution created a separate "court of appeals" to handle all criminal appeals and some civil appeals. It gave the supreme court jurisdiction only of civil cases in which the district courts had original or appellate jurisdiction. Since

at that time appeals from most county court judgments went to the court of appeals, this meant that the supreme court had virtually no jurisdiction over cases tried by the county and justice courts. This limitation was attacked in 1881 and 1887 by proposed amendments that would have given the supreme court appellate jurisdiction of all civil cases, but both amendments failed.

A minority report at the 1875 Convention would have created an appeals plan for civil cases very similar to the one now in use. It suggested creation of an intermediate appellate court, and would have limited the supreme court's jurisdiction to appeals from the decisions of the intermediate court. (See *Journal,* p. 543.) This plan was ahead of its time, however, and was rejected by a 46-1 vote, apparently without serious consideration. (*Journal,* p. 458.) The only recorded discussion of the plan is one judge's objection that the intermediate appellate court would simply duplicate the role of the supreme court. (See *Debates,* p. 380.)

The 1891 reorganization of the judicial system gave the supreme court essentially the jurisdiction that it has now. The 1891 amendment contained a provision on supreme court sessions which was deleted from Section 2 in 1930 when Section 3-a was added.

The Legislature in 1927 and again in 1929 attempted to permit direct appeal to the supreme court from county or district court judgments holding statutes unconstitutional, but the voters both times rejected the proposed amendments.

Explanation

Although this section is somewhat intricate, the primary function of the supreme court can be described quite simply: it reviews decisions of the courts of civil appeals on questions of law. Its appellate jurisdiction is constitutionally limited (1) to civil cases, (2) to questions of law (fact findings by the courts of civil appeals are final), (3) to cases that have been decided by a court of civil appeals (except for the direct appeals allowed by Sec. 3-b), and (4) to cases in which the jurisdiction of the courts of civil appeals is appellate, rather than original (*e.g.,* the supreme court has no appellate jurisdiction of original mandamus proceedings in the courts of civil appeals). (*Schintz v. Morris,* 89 Tex. 648, 35 S.W. 1041 (1896).)

Cases reach the supreme court in three ways: (1) by an original proceeding in the supreme court, (2) by direct appeal under Section 3-b on certified questions filed by a court of civil appeals, or (3) on writ of error to a court of civil appeals. (See Calvert, "The Mechanics of Judgment Making in the Supreme Court of Texas," 21 *Baylor L. Rev.* 439 (1969).)

Section 3 contains five grants of jurisdiction to the Supreme Court.

1. The most important of these grants is the one giving the supreme court appellate jurisdiction "in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe." In 1973, 611 of the 936 cases decided by the supreme court rested on this jurisdictional foundation. (See Texas Civil Judicial Council, *Fourty-Fifth Annual Report,* (Austin, 1973), p. 11.)

This grant has been interpreted to permit the legislature to diminish the supreme court's jurisdiction. Many cases within the appellate jurisdiction of the courts of civil appeals are excluded by statute from the supreme court's jurisdiction. For example, the supreme court is forbidden by statute from granting writs of error in cases of slander, divorce, and certain uncontested elections. (Tex. Rev. Civ. Stat. Ann. art. 1821.) Because the 1891 amendment was designed to ease the supreme court's caseload by reducing the number of cases within its jurisdiction, this section has been interpreted to limit the court's jurisdiction. (See *Betts v. Johnson,* 96 Tex. 360, 73 S.W. 4 (1903).)

The language of this grant is somewhat peculiar; it limits the supreme court's jurisdiction to cases within the appellate jurisdiction of the courts of civil appeals, but then leaves the appellate jurisdiction of those courts entirely to the legislature. (See Sec. 6 of Art. V.)

2. The legislature is authorized to "confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State." By its terms this is not a constitutional grant of jurisdiction to the supreme court; it is merely an authorization for the legislature to confer jurisdiction. (A "writ of mandamus" is an order directing a public official to perform a ministerial duty; a "writ of quo warranto" is an infrequently used method of challenging a person's right to hold an office.) The supreme court therefore has jurisdiction under this provision only to the extent that it is provided for by statute. (*Malone v. Rainey,* 133 Tex. 622, 133 S.W.2d 951 (1939).)

3. Section 3 provides that "under such regulations as may be prescribed by law, the [Supreme Court] and the Justices thereof shall have power to issue the writs of mandamus, procedendo, certiorari and such other writs as may be necessary to enforce its jurisdiction." This grants a second, more specific kind of mandamus power quite distinct from the general mandamus power discussed under number 2 above. This mandamus power is broader because it can be exercised by a single justice as well as by the entire supreme court. On the other hand, it is also narrower because it may be used only to enforce the supreme court's jurisdiction. (The supreme court has held that the phrase "as may be necessary to enforce its jurisdiction" applies to all of the writs mentioned.) (*Milam County Oil Mill Co. v. Bass,* 106 Tex. 260, 163 S.W. 577 (1914).) These two sources of mandamus jurisdiction have sometimes been confused. The legislature has enacted four civil statutes on the subject: Articles 1733, 1734, 1735, and 1735a. In doing so, it has not always observed the distinction between the two constitutional grants. Article 1733 purports to give the supreme court "or any Justice thereof" power to issue writs of mandamus against lower court judges "or any officer of the state government, except the Governor." Since this power is not limited to enforcement of the court's jurisdiction, it must rest on the general constitutional mandamus power discussed under number 2 above, but that power is exercisable only by the full supreme court, not by an individual justice. Similarly, Article 1734, providing for mandamus to compel a district judge to proceed to trial, necessarily is based on the general mandamus power, but it also purports to give the power to individual justices. Article 1734 has been held unconstitutional insofar as it purports to give the power to individual justices, though it remains valid as a grant of power to the full supreme court. (*Kliever v. McManus,* 66 Tex. 48, 17 S.W. 249 (1886).) Presumably the same reasoning would apply to Article 1733.

Article 1735a purports to give the supreme court power to issue "the writ of mandamus, or any other mandatory or compulsory writ or process" in certain election cases. Again, the statute attempts to implement the general power discussed under number 2 but exceeds that power because that authorization encompasses only two writs, mandamus and quo warranto. Article 1735a therefore has been held void insofar as it attempts to give the supreme court power to issue writs other than the two named. (*Love v. Wilcox,* 119 Tex. 256, 28 S.W.2d 515 (1930).)

The general mandamus power exists only to the extent that the legislature has authorized it, but the power to issue writs to enforce the court's jurisdiction is an outright grant of jurisdiction to the supreme court that does not require legislative implementation. (*Cleveland v. Ward,* 116 Tex. 1, 285 S.W. 1063 (1926).)

The court of criminal appeals, courts of civil appeals, and district courts also have mandamus powers. (See Art. V, Sec. 5, 8; Tex. Rev. Civ. Stat. Ann. arts.

1823, 1824.) The supreme court restricts its own mandamus caseload by refusing in most cases to consider an application for mandamus unless relief has first been sought in a court of civil appeals. The court further restricts mandamus and other original writ actions by refusing to consider them if fact issues are raised (*e.g.*, *Depoyster v. Baker,* 89 Tex. 155, 34 S.W. 106 (1896)).

Although the supreme court's jurisdiction is essentially civil, it considers some criminal cases under its mandamus powers. Despite the grant of mandamus power to the court of criminal appeals in Section 5 of Article V, the supreme court, rather than the court of criminal appeals, has jurisdiction to order a district judge to proceed to trial in a criminal case. (*State* ex rel. *Moreau v. Bond,* 114 Tex. 468, 271 S.W. 379 (1925).) The supreme court also has power to order a district judge to vacate an improper sentence in a criminal case. (*State* ex rel. *Pettit v. Thurmond,* 516 S.W.2d 119 (Tex. 1974).) In 1973, 150 of the 197 mandamus applications filed in the supreme court were in criminal cases. (See *Forty-Fifth Annual Report, supra,* p. 9.) These are primarily letters from prisoners asking the supreme court to mandamus trial courts to act speedily on their applications for habeas corpus or on other pending felony charges. (See Calvert, 21 *Baylor L. Rev.* at 443.)

The writs of procedendo and certiorari are rarely used. The only "other writ" of significance is the writ of prohibition, which is sometimes issued by the supreme court to prohibit a lower court from acting. (See, *e.g.*, *Milam County Oil Mill Co. v. Bass,* 106 Tex. 260, 163 S.W. 577 (1914).)

The supreme court's mandamus powers are described in detail in Norvell and Sutton, "The Original Writ of Mandamus in the Supreme Court of Texas," 1 *St. Mary's L. J.* 177 (1969).

4. "The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law . . . ." This gives the supreme court only such habeas corpus power as may be prescribed by law, and the legislature has prescribed very little. The "writ of habeas corpus" is an order directing that a person be released from custody. The legislature has given the supreme court this power only when a person is restrained of his liberty for violation of any order in a civil case. (Tex. Rev. Civ. Stat. Ann. art. 1737.) In practice, this means that most habeas corpus petitions filed in the supreme court come from fathers who are held in contempt for failure to make child support payments. (See Calvert, 21 *Baylor L. Rev.*, at 440.) In 1973 only ten habeas corpus petitions were filed in the supreme court.

Although both this provision and the statute permit a writ of habeas corpus to be granted by an individual justice, in practice at least three justices consider each petition. This has been explained as an attempt to discourage petitioners from "shopping" among the justices for a receptive one. (Calvert, 21 *Baylor L. Rev.*, at 440.)

5. The supreme court is given power "to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction." Perhaps because it does not want to spend its time conducting evidentiary hearings, the court has used this fact-finding power very sparingly. As pointed out above, the court has held that it has no power to act in mandamus cases that raise fact issues. The court has explained this reluctance as follows:

> This court is not provided with the means of ascertaining the facts in any controversy. It has none of the powers conferred by law upon the district court to take depositions, issue subpoenas, writs of attachment, or other process neccessary to the trial of issues of fact; and in this court the right of trial by jury, which is secured by the constitution to every person demanding it, could not be afforded. (*Depoyster v. Baker,* 89 Tex. 155, 160, 34 S.W. 106, 108 (1896).)

The court does, however, exercise power to determine facts relating to the court's jurisdiction—for example, whether a party had notice of the filing of a document. (*e.g., Tarpley v. Epperson,* 125 Tex. 63, 79 S.W.2d 1081 (1935).)

There are at least three other sources of supreme court jurisdiction elsewhere in the constitution. Section 3-b of Article V gives the supreme court jurisdiction of direct appeals from trial courts in certain cases. Section 28 of Article III gives the court power to mandamus the Legislative Redistricting Board. Section 1-a of Article V gives the court power to censure or remove a judge for misconduct or involuntarily retire him for disability.

The last paragraph of Section 3, providing for a clerk of the supreme court, is generally self-explanatory and has raised few questions.

Comparative Analysis

More than half of the state constitutions mention supreme court jurisdiction, but with widely varying degrees of specificity. About 11 define at least part of the court's jurisdiction. About 14 have provisions containing as much detail as or more than the Texas provision. In four states, the subject is left entirely to the legislature, and in seven others jurisdiction is determined primarily by the legislature, but one or more specific jurisdictional matters are also mentioned in the constitution.

About six state constitutions make no mention of supreme court jurisdiction, and the recently revised constitutions of Michigan and Illinois allow the supreme court to fix its own jurisdiction by rule.

Approximately 32 states provide constitutionally for some original jurisdiction in the supreme court. A few do not mention original jurisdiction generally but authorize the court to issue remedial writs.

About 19 states provide constitutionally for a clerk of the supreme court.

The United States Constitution grants the Supreme Court original jurisdiction in "all Cases affecting Ambassadors, other public Ministers and Consuls," and those in which a state is a party. In all other justiciable matters enumerated in Article III, Section 2, the Supreme Court is given appellate jurisdiction, "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The *Model State Constitution* provides the high court with original jurisdiction in two areas: review of legislative redistricting and all matters concerning the governor and "in all other cases as provided by law." Appellate jurisdiction is granted in all cases arising under the state and federal constitutions and "in all other cases as provided by law."

Author's Comment

Compared to the constitutional provisions governing jurisdiction of trial courts in Texas, the provisions governing supreme court jurisdiction are relatively simple and straightforward. With the exception of the two grants of mandamus power, they have not proven unduly troublesome.

It is sometimes said that the legislature has given the supreme court too much jurisdiction. The 1891 amendment stated that until otherwise provided, the supreme court should have jurisdiction of three categories of cases in the courts of civil appeals: (1) those in which the various courts of civil appeals hold differently on the same question of law, (2) those in which a judge of a court of civil appeals dissents, and (3) those in which a state statute is held to be void. When the legislature replaced that provision with its own definition of the supreme court's appellate jurisdiction, it retained these three grounds, but it also added three others.

(See Tex. Rev. Civ. Stat. Ann. art. 1728.) One of these additional grounds is a catch-all giving the supreme court jurisdiction in any other case in which it is made to appear that an error of substantive law has been committed by the court of civil appeals which affects the judgment, but excluding those cases in which the jurisdiction of the court of civil appeals is made final by statute. (Tex. Rev. Civ. Stat. Ann. art. 1728(6).) This clause has had two major effects. First, it permits practically any kind of case to be appealed twice – once to a court of civil appeals, then to the supreme court. Second, it complicates the matter of defining supreme court jurisdiction. The courts have held that, because of this clause, the supreme court's jurisdiction is limited not only by the statutes and constitutional provisions dealing with that subject directly, but also by the statutes dealing with finality of civil appeals decisions. (*State* ex rel. *Dunn v. Thompson,* 88 Tex. 228, 30 S.W. 1046 (1895).)

One writer has stated that "One of the objectives of the reform movement of 1891 was the limiting of appeals to the three essential categories which are listed in the first three sections of article 1728." (Sinclair, "The Supreme Court of Texas," 7 *Hous. L. Rev.* 20, 44 (1969).) If this is true, the amendment failed to carry out the objective because it very clearly authorized the legislature to give the supreme court jurisdiction of all cases within the appellate jurisdiction of the courts of civil appeals. Nevertheless, one objective of the amendment undoubtedly was reduction of the supreme court's workload, and the interim provision limiting the jurisdiction to the three specified grounds probably indicated a desire to limit the supreme court's jurisdiction. The present system gives litigants a second appeal, regardless of the public importance of the case, and introduces additional elements of chance and expense into litigation. (See Sunderland, "The Problem of Double Appeals," 12 *Texas L. Rev.* 47, 49 (1933).)

Another criticism of the present jurisdictional scheme is that it allows the supreme court little discretion in deciding which cases merit its attention. Unlike the United States Supreme Court, which generally may refuse to review decisions of the United States Courts of Appeals for any reason, the Texas Supreme Court takes the position that it is required to grant a writ of error when the statutory conditions are met, regardless of the importance of the case. (See Hart, "The Appellate Jurisdiction of the Supreme Court of Texas," 29 *Texas L. Rev.* 285, 290 (1951).) Former Chief Justice Robert W. Calvert has estimated that only 20 percent of the court's time is spent on cases "which develop the jurisprudence of the state." (Sinclair, 7 *Hous. L. Rev.*, at 45, n.27.) A system giving the court more flexibility in deciding which cases to review might result in a more productive allocation of judicial resources.

The supreme court's habeas corpus jurisdiction is quite insignificant. As pointed out in the preceding *Explanation,* virtually all habeas corpus petitions go to some other court. It might be argued, therefore, that all habeas corpus power could be removed from the supreme court without significantly changing present practice. The writ of habeas corpus, however, is "the great writ" of Anglo-American jurisprudence (see *Fay v. Noia,* 372 U.S. 391, 399-405 (1963)), and it may be argued that it should be within the arsenal of any court of last resort.

The criticisms mentioned so far could be met without constitutional change. The court's appellate jurisdiction is subject to restriction by the legislature; if the court's workload is too heavy, the legislature has power to reduce it. The legislature also is free to give the court more discretion in deciding which cases it should hear. Since the court has only such habeas corpus power as the legislature may prescribe, the legislature is free to remove it entirely.

Section 3 could be simplified greatly by simply providing that the supreme court has such original and appellate jurisdiction as is provided by law. As pointed out

above, the legislature already has great freedom in defining the supreme court's jurisdiction. On the other hand, the case law interpreting present Section 3 is well-settled and most of the language is reasonably clear. With a few minor changes, the section could be retained without serious harm to the objectives of good constitution-making.

At least three changes should be made, however. The third sentence should be deleted; the legislature long ago "provided otherwise," so the sentence is now inoperative. The two grants of mandamus power should be clarified, either by combining them in a single general grant of mandamus power or by more clearly distinguishing between them. Finally, the direct appeal provision of Section 3-b should be consolidated with this section.

Two other changes might be considered. As pointed out previously, the supreme court has no appellate jurisdiction in cases within the original jurisdiction of the courts of civil appeals. This is important primarily in mandamus cases. The supreme court generally declines to consider such cases unless they have been presented first to a court of civil appeals. If that court denies the writ, the applicant then goes to the supreme court. His action must be an original mandamus proceeding, however, because the supreme court has no appellate jurisdiction of the matter. There is no apparent reason why the legislature should not be empowered to give the supreme court appellate jurisdiction of all decisions of courts of civil appeals, whether they result from original or appellate proceedings. This could be accomplished simply by deleting the word "appellate" from the phrase "in cases of which the Courts of Civil Appeals have appellate jurisdiction."

Second, the provision for a clerk of the supreme court might be removed. It is hardly a matter of constitutional magnitude, and the subject already is covered by statute. (See Tex. Rev. Civ. Stat. Ann. arts. 1718–1721.) Even if the office of clerk is to remain constitutional, however, it could be removed from this section. Sections 5 and 6 of Article V provide for clerks of the court of criminal appeals and the courts of civil appeals, respectively, and are patterned after the provision for the supreme court clerk. These three sections could be combined in a single, one-sentence provision for appellate court clerks, thereby eliminating two of the three references to the subject.

Sec. 3a. SESSIONS OF COURT. The Supreme Court may sit at any time during the year at the seat of government for the transaction of business and each term thereof shall begin and end with each calendar year.

History

Until 1930 sessions of the supreme court were prescribed in Section 3. The 1845 Constitution provided for an October-June term and authorized the court to sit "at not more than three places in the State." (Art. IV, Sec. 3.) All subsequent constitutions fixed specific, noncontinuous terms, and all except the 1869 Constitution authorized the court to sit in places other than the state capital. The 1891 amendment provided that the court sit only at the state capital, and the term provision was repealed in 1930 by the adoption of Section 3a.

Amendments proposed in 1927 and 1929 would have provided for continuous terms, but they were defeated, probably because they also contained other, more substantial changes.

Explanation

When the supreme court's term was noncontinuous, it had no power to act as a court during the "vacation" months. The court in *Hines v. Morse*, 92 Tex. 194, 47

S.W. 516 (1898), alleviated this problem somewhat by holding that it could issue a writ of mandamus during vacation because the phrase "and the Justices thereof" in Section 3 conferred power on the justices even at times when the court as such was powerless. The court sometimes did dispose of agreed motions during vacation. (See Stayton and Kennedy, "A Study of Pendency in Texas Civil Litigation," 23 *Texas L. Rev.* 311, 316, n.16 (1945).)

Adoption of Section 3a removed this problem from the constitution by allowing the court to sit year-round. A statute purporting to limit the supreme court's term from June through October is still on the books (Tex. Rev. Civ. Stat. Ann. art. 1726), but it presumably was implicitly repealed by the addition of Section 3a in 1930.

Comparative Analysis

Only Maryland has a constitutional provision naming specific dates for supreme court sessions, and it provides only minimum terms.

More than half the states prescribe the state capital as the court's meeting place. A few provide for alternative meeting places in certain circumstances.

Author's Comment

There is no apparent reason for constitutionally limiting the supreme court's work-year. In this respect, Section 3a is obviously an improvement over the previous continuous term provision. But it may be doubted whether the section serves any useful purpose, other than to repeal the old provision. It does not require the court to sit continuously, and in fact the court customarily does not meet during a portion of the summer. As an authorization to the court to sit at any time during the year, it is unncessary because the court would have that authority anyway in the absence of any limitation on its term.

A great deal of repetitive verbiage could be eliminated from the judiciary article by removing all the term provisions from Sections 3a, 5, 6, 7, 17, 19, and 29 of Article V and replacing them with a single, general provision for court terms.

Sec. 3-b APPEAL FROM ORDER GRANTING OR DENYING INJUNCTION. The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.

History

During the 1920s the legislature twice asked voters to give it power to permit direct appeals in certain cases in which the legislature's enactments had been held unconstitutional. Both proposed amendments were defeated. The more limited provision now contained in Section 3-b was approved by the voters in 1940 by a majority of 2-1. (See *Seven Decades*, p. 219.)

Explanation

This section is in effect an exception to Section 3 which gives the supreme court appellate jurisdiction only of cases that have already been decided by a court of civil appeals. (See the *Explanation* of Sec. 3.) Section 3-b allows an appellant to bypass the intermediate court in certain cases. It probably is a recognition of the fact that delay in granting an injunction, or in dissolving an injunction that should not have been granted, often works a great hardship on one of the parties. This obviously is

not the only purpose of Section 3-b, however, because the section does not apply to all injunctions. It applies only to injunctions granted or denied "on the grounds [sic] of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." This limitation undoubtedly reflects the legislature's desire, evidenced in the 1927 and 1929 proposed amendments, to obtain quick, decisive action in cases challenging the constitutionality of legislative acts.

Section 3-b is merely an authorization for legislative action. Article 1738a of the civil statutes actually implements the direct appeal authorization. Although the constitution says "any state agency," Article 1738a says "any State Board or Commission." The supreme court has interpreted this difference to mean that the legislature has not exercised the full measure of its constitutional power. In *Standard Securities Service Corp. v. King* (161 Tex. 448, 341 S.W.2d 423 (1960)), for example, the court held that it had no jurisdiction under the statute when the order in question was the order of the securities commissioner, because a single officer is not a state board or commission. The supreme court also has restricted direct appeals by requiring that the decision granting or denying the injunction be based squarely on a constitutional determination. If unconstitutionality is only one of two possible grounds for the trial court's decision, the supreme court will refuse to accept a direct appeal. (See *Mitchell v. Purolator Security, Inc.*, 515 S.W.2d 101 (Tex. 1974).)

A litigant in a case that qualifies under Section 3-b and Article 1738a is not required to take a direct appeal. He has the option of choosing that route or the usual route through a court of civil appeals. (See Calvert, "The Mechanics of Judgment Making in the Supreme Court of Texas," 21 *Baylor L. Rev.* 439, 443 (1969).)

Comparative Analysis

Of the 19 states having constitutional intermediate appellate courts, seven provide for direct appeal in some cases. None of the other state constitutions that provide for intermediate appellate courts prohibit direct appeals, however, either directly or indirectly (as Sec. 3 of Art. V does) by limiting supreme court jurisdiction to cases from the intermediate court.

Author's Comment

In a system that has an intermediate appellate level, direct appeal to the supreme court is an extraordinary procedure usually reserved for cases of great importance, or cases in which there is an unusual need for speedy resolution. It is not clear that the cases defined by Section 3-b fit either of those categories. There is no apparent reason why injunctions involving constitutionality of a statute or validity of an administrative order deserve more speedy treatment than other kinds of injunctions. If the goal is speedy resolution of the constitutionality of a statute or the validity of an administrative order, there is no reason to restrict the procedure to injunction cases. Finally, the cases covered by Section 3-b are not necessarily those of greatest importance; injunctions based on administrative orders are fairly routine, and as a class probably have no greater public importance than many other classes of lawsuits.

There are situations in which the usual two-step appellate process is inefficient. Sometimes a number of suits involving the same legal question are pending in several courts of appeals; time and expense could be saved if there were some way the supreme court could resolve the question for the benefit of all the intermediate courts. There are other cases in which time does not permit the full appellate

process; by the time two appeals have been completed, the matter will be mooted by other developments.

The California Constitution contains a provision that in effect permits the supreme court itself to decide when the intermediate court should be bypassed. Section 12 of Article VI of the California Constitution provides that "The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal." This procedure requires no action by the litigants or the intermediate court; the supreme court simply transfers the case on its own motion. This may be done at any time from the filing of the case in the intermediate court until 30 days after the intermediate court's decision becomes final. (The California Supreme Court may extend this period for an additional 30 days "for good cause.") (This system is described and evaluated in Comment, "California Supreme Court Review: Hearing Cases on the Court's Own Motion," 41 *S. Cal. L. Rev.* 749 (1968).) New Jersey has a somewhat similar procedure. (N.J. Supreme Court Rules 1: 10-1(a) (1963).)

This procedure, called "transfer *sua sponte*" (on the court's own motion), might offer a more flexible method than that of Section 3-b to provide for direct review of certain cases. In any event, the provisions for direct appeal should be consolidated with the other supreme court jurisdictional provisions contained in Section 3 of Article V.

Sec. 4. COURT OF CRIMINAL APPEALS; JUDGES. The Court of Criminal Appeals shall consist of five Judges, one of whom shall be Presiding Judge, a majority of whom shall constitute a quorum, and the concurrence of three Judges shall be necessary to a decision of said court. Said Judges shall have the same qualifications and receive the same salaries as the Associate Justices of the Supreme Court. They shall be elected by the qualified voters of the state at a general election and shall hold their offices for a term of six years. In case of a vacancy in the office of a Judge of the Court of Criminal Appeals, the Governor shall, with the advice and consent of the Senate, fill said vacancy by appointment until the next succeeding general election.

The Judges of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall become Judges of the Court of Criminal Appeals and continue in office until the expiration of the term of office for which each has been elected or appointed under the present Constitution and laws of this state, and until his successor shall have been elected and qualified.

The two members of the Commission of Appeals in aid of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall become Judges of the Court of Criminal Appeals and shall hold their offices, one for a term of two years and the other for a term of four years, beginning the first day of January following the adoption of this Amendment and until their successors are elected and qualified. Said Judges shall by agreement or otherwise designate the incumbent for each of the terms mentioned.

The Governor shall designate one of the five Judges as Presiding Judge and at the expiration of his term and each six years thereafter a Presiding Judge shall be elected.

History

In the original Constitution of 1876, Section 4 of Article V related to the clerk of the supreme court; Sections 5 and 6 related to the court of appeals. In the 1891 revision, the sections were rearranged by moving the clerk provisions to Section 3 and devoting Sections 4 and 5 to the court of criminal appeals, thus making Section 6 available for creation of the courts of civil appeals.

The court of criminal appeals is the descendant of the old court of appeals, which was created under the Constitution of 1876. Under the earlier constitutions, all appeals went to the supreme court, and the result was an unmanageable backlog of

cases in that court. Several attempts had been made to relieve this problem; the 1861 Constitution permitted the legislature to exclude all criminal appeals from the supreme court's jurisdiction; the 1866 Constitution permitted the exclusion of misdemeanor appeals; the 1869 Constitution excluded criminal cases from the supreme court entirely unless a member of the supreme court granted permission for an appeal in a specific case. (See Williams, "History of the Texas Judicial Machine and Its Growth," 5 *Texas L. Rev.* 174, 175-77 (1927).) None of these measures solved the workload problems, however, and the resumption of normal activities after Reconstruction crowded the supreme court's docket even more. This prompted the 1875 Convention to consider more drastic measures to relieve some of the pressure on the supreme court. (See *Debates,* p. 422.) Several alternatives were considered. One plan would have created an intermediate appellate court and given the supreme court jurisdiction of both civil and criminal appeals from that court. (*Journal,* p. 457.) Another would have permitted the supreme court to sit in two sections, one civil and one criminal. (*Journal,* p. 563.) But the plan chosen was one creating a separate court of last resort.

Section 5 of Article V of the 1876 Constitution created a court of appeals with three judges and gave it jurisdiction of all criminal cases and some civil cases. Decisions of the court of appeals were not reviewable by the supreme court.

The decision to separate the civil and criminal appellate processes has been described as a result that "arose as a makeshift rather than from any hallowed legal or constitutional theories." (Willis, "The Evolution of the Texas Court of Criminal Appeals," 29 *Texas Bar Journal* 723 (1966).)

The court of appeals was not a totally satisfactory solution. For one thing, it did not solve the caseload problem; by 1891 the supreme court had a backlog of about 1,200 cases. (Williams, *supra,* 5 *Texas L. Rev.*, at 179.) For another, there was no method for resolving conflicts between the court of appeals and the supreme court; each was authoritative within its sphere of jurisdiction. Amendments proposed in 1881 and 1887 would have removed all civil jurisdiction from the court of appeals, but both were defeated.

The inability of the court of appeals and the supreme court to cope with the volume of appeals led to the extensive judicial reform package of 1891. The major innovation in that package was creation of the courts of civil appeals as intermediate appellate courts. Creation of the court of criminal appeals was merely a by-product; the civil jurisdiction of the court of appeals was transferred to the new courts, and its name was changed to reflect its resulting status as a purely criminal court. Judges of the court of appeals automatically became judges of the court of criminal appeals.

Section 4 was unchanged from 1891 until 1966, when membership of the court was increased from three to five by making the two "commissioners" full-fledged members of the court.

The "Commission of Criminal Appeals" had been authorized by statute in 1925. (Tex. Laws 1925, ch. 95, 22 *Gammel's Laws,* p. 269.) It was composed of two attorneys who sat with the court and generally performed all the functions of judges, except that they were not permitted to vote. (See Barrow, "In Support of Constitutional Amendment No. 9 Providing for a Court of Criminal Appeals of Five Judges," 29 *Texas Bar Journal* 721 (1966).) The commission was abolished after expansion of the court to five members, but in 1969 it was recreated because the workload of the court had become too heavy for five judges. (Roberts, "Proposed Changes in Structure of Appellate Courts," 35 *Texas Bar Journal* 1003 (1972).) A new statute describing the powers and duties of commissioners in greater detail was enacted in 1971. (Tex. Rev. Civ. Stat. Ann. art. 1811e.)

Art. V, § 4

Explanation

The court of criminal appeals is the court of last resort in Texas in criminal matters. Within its field, its decisions are authoritative and must be obeyed by all lower courts. (*State v. Briggs,* 171 Tex. Crim. 479, 351 S.W.2d 892 (1961).) Texas thus has two "highest" courts; the supreme court is the highest court in civil matters, but the court of criminal appeals is supreme in criminal matters. There is no provision for resolving conflicts between the two courts. As a result, there are a few areas in which the law is one thing in the civil courts and another in the criminal courts. For example, in the criminal courts a witness can be impeached by showing that he has been convicted of any felony (*Smith v. State,* 346 S.W.2d 611 (Tex. Crim. App. 1961)), but in the civil courts such convictions are inadmissible unless they involve crimes of moral turpitude. (*Compton v. Jay,* 389 S.W.2d 639 (Tex. 1965).)

Judges of the court of criminal appeals are required to meet the same qualifications as judges of the supreme court, and they receive the same compensation and serve terms of the same length, six years. The tendency to treat judges of the two courts equally is so strong that the attorney general has ruled that the presiding judge of the court of criminal appeals, like the chief justice of the supreme court, may be paid more than the other judges of his court, even though Section 4 clearly states that judges of the court of criminal appeals are to receive the same salaries as "Associate Justices of the Supreme Court." (Tex. Att'y Gen. Op. No. M-1003 (1971).)

The presiding judge of the court of criminal appeals, like the chief justice of the supreme court, is considered a distinct office; the presiding judge is chosen by the voters, rather than by the other members of the court. In the case of the chief justice, this is merely a matter of custom (see the *Explanation* of Sec. 2). But in the case of the presiding judge, Section 4 apparently requires this practice by providing specifically for the election of a presiding judge.

Commissioners of the court of criminal appeals perform all the functions of a judge, except that they may not vote. Their opinions, when approved by the court, have the same legal effect as opinions written by members of the court. (Tex. Rev. Civ. Stat. Ann. art 1811e.) The statute provides for two different kinds of commissioners. Those in the first category might be called "temporary commissioners." They must be retired district or appellate judges. They receive the same salaries as members of the court and are designated by the presiding judge with the concurrence of a majority of the court. They perform whatever duties the court gives them and may serve for a period of time or in particular cases. (Tex. Rev. Civ. Stat. Ann. art. 1811e(1).)

The second category of commissioners are the full-time, permanent commissioners. They need not be retired judges. They must be attorneys, must have the qualifications of judges of the court of criminal appeals, and are appointed by the full court for two-year terms. Their salaries are left to the legislature. (Tex. Rev. Civ. Stat. Ann. art. 1811e(1a).)

Comparative Analysis

Oklahoma is the only other state that has a separate court of last resort for criminal matters. In Oklahoma the court of criminal appeals is not quite "equal" with that state's supreme court. The Oklahoma Constitution permits the legislature to take away the exclusive appellate jurisdiction of the court of criminal appeals and gives the supreme court power to resolve jurisdictional conflicts between itself and the court of criminal appeals (Okla. Const. Art. VII, Secs. 1, 4).

Alabama and Tennessee recently have created courts of criminal appeals, but they are intermediate appellate courts rather than courts of last resort, because their

decisions are subject to review by the state supreme court.

Author's Comment

The desirability of retaining the court of criminal appeals cannot be intelligently discussed without keeping in mind two important factors. First is the large volume of criminal appellate work in Texas. The state has about 2,000 trial courts with criminal jurisdiction; in about 525 of these courts (including all the major ones), the only route of appeal from criminal convictions is to the court of criminal appeals. The general increase in criminal litigation, together with federal court decisions giving indigent defendants a right to counsel, increased the caseload of the court of criminal appeals more than 50 percent since 1968. As a result, the court is undeniably overworked. The court of criminal appeals disposed of 2,560 cases in 1973. In the same year, the supreme court, with 9 judges, disposed of 936. The 14 courts of civil appeals, with a total of 42 judges, disposed of 1,404 cases. Another measure of a court's workload is the number of opinions written. The judges and commissioners of the court of criminal appeals wrote 1,839 opinions in 1973; the justices of the supreme court wrote 130; and the judges of the courts of civil appeals wrote 1,313. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. xiv-xvii.) These comparisons do not reflect unfavorably on the judges of the supreme court and the courts of civil appeals. Civil appeals are often more complex than criminal appeals; and part of the problem of the court of criminal appeals is a statute that requires the court to write an opinion in every case appealed, however frivolous. (Code of Criminal Procedure art. 44.24.) But by any conceivable measure, the court of criminal appeals handles far more work than any other appellate court in Texas, and possibly in the nation.

Second, retention or abolition of the court of criminal appeals cannot be considered without regard to the rest of the appellate court structure. Any change in jurisdiction of the court of criminal appeals is likely to affect the supreme court and the courts of civil appeals, and vice versa.

The solution that usually comes to mind first when an appellate court is overworked is to increase the number of judges. This was tried in 1866 when the supreme court's membership was increased to five. A variation on this solution was attempted in 1927 when the court of criminal appeals was given two commissioners to assist it. The same variation was used again in 1969 when the commission was revived to aid the five judges then sitting on the court of criminal appeals. These increases in personnel did not solve the court's workload problem, and the caseload now has probably reached such proportions that no expansion of the court can solve the problem. To reduce the opinion-writing burden of each judge of the court of criminal appeals to that of the average judge of the courts of civil appeals would require a court of 51 judges. (See Roberts, 35 *Texas Bar Journal*, at 1006.)

Another possible solution is creation of intermediate appellate courts. This is the method that finally solved the supreme court's caseload problem in 1891 after several less drastic measures had failed. (See the *History* of Sec. 6.) Since Texas already has intermediate appellate courts, it has two choices in pursuing this solution. The existing courts of civil appeals could be given criminal jurisdiction, or a separate system of intermediate courts with only criminal jurisdiction could be created. Both of those possibilities have disadvantages as well as advantages. Creating a separate system of intermediate courts for criminal cases seems wasteful when the state already has 14 intermediate courts distributed widely across the state, each with clerks, courtrooms, offices, and the other resources needed to operate a court.

On the other hand, the existing courts of civil appeals might be overworked if

they were required to take on criminal appeals in addition to their present civil caseloads. If all the cases disposed of by the court of criminal appeals in 1972 had been handled by courts of civil appeals, the total caseload of those courts would have nearly tripled, increasing from 1,392 to 3,625 cases. (See Texas Civil Judicial Council, *Forty-Fourth Annual Report,* pp. 34, 39.) The caseload per judge, however, would still have been considerably less than that of either the supreme court or court of criminal appeals. Moreover, the intermediate courts in other populous states apparently are able to dispose of both civil and criminal appeals with judicial manpower not significantly greater than that of Texas. (California has 48 intermediate appellate court judges, Ohio has 38, New York has 28, and Illinois has 24. See U.S. Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* (Washington, D.C.: Government Printing Office, 1971), pp. 92-94 (Table 14).)

A decision on intermediate jurisdiction of criminal appeals would not automatically decide the fate of the court of criminal appeals. The latter could be abolished even if separate intermediate criminal appellate courts are created, or retained even if civil and criminal jurisdiction are merged in a single appellate court system. But at both levels, the same questions are presented: (1) should an appellate court specialize in civil or criminal cases, and if so, (2) should such specialization be jurisdictional or only administrative?

The chief argument in favor of specialization is the opportunity it gives judges to develop expertise. No judge or lawyer can know all the law applicable to every kind of case. Maintenance of separate criminal courts permits the judges of those courts to become thoroughly familiar with the criminal law and relieves judges of civil courts of the necessity to do so. This may result in more efficient use of judicial manpower, because judges spend less time briefing themselves on unfamiliar subjects. (See Morrison and Bruder, "Merger of the Court of Criminal Appeals and Supreme Court of Texas," 35 *Texas Bar Journal* 1002 (1972).) On the other hand, specialization may deprive judges of the broadening influence of exposure to a wide variety of legal problems. It may lead to the development of divergent and even conflicting legal doctrines, rules of procedure, and vocabularies. While this kind of division of the bar and judiciary into civil and criminal specialties has long been accepted in Texas, it becomes increasingly troublesome as new rules on representation of indigents force more civil lawyers to accept appointments that place them on the unfamiliar terrain of the criminal law. Finally, specialization probably narrows the scope of the bar's interest in and support for either court. Lawyers who do not practice criminal law are not likely to take much interest in the recruitment and election of good judges to the court of criminal appeals or in demanding adequate appropriations for that court. Likewise, criminal lawyers cannot be expected to have the same solicitude for the well-being of the courts of civil appeals and supreme court that they have for the court of criminal appeals.

Even if specialization on balance is considered desirable, it need not be jurisdictional. Individual judges, panels of judges within a court, or even entire courts can be permitted to specialize as a matter of personal preference, administrative convenience, or need, without denying them jurisdiction to hear other kinds of cases. For example, if the supreme court were given criminal jurisdiction, it might, as an administrative matter, permit certain justices to consider most of the criminal cases. This could be formal (*e.g.*, by dividing the court into permanent civil and criminal sections) or very informal (*e.g.*, by assigning to a judge who prefers criminal cases a higher proportion of applications for review in such cases).

Possibilities for flexible administrative specialization in the intermediate courts would be even greater if those courts were unified so that each judge had statewide jurisdiction and thus could sit with judges other than those of his district.

Intermediate criminal appellate courts cannot alone solve the present caseload problem. If all of the cases still go to a court of last resort after first being heard by an intermediate court, there would be no reduction in the burden on the highest court. Some decisions in criminal appeals would have to be final at the intermediate court stage. There is no reason why this could not be done. There is no constitutional right to even one appeal, much less two. (*National Union v. Arnold,* 348 U.S. 37 (1954); *McKane v. Durston,* 153 U.S. 684 (1894); *United States v. Brierley,* 412 F.2d 193 (3d Cir.), *cert. denied,* 397 U.S. 942 (1969).)

There are two major methods of limiting the number of cases that are appealable from the intermediate courts. One is by permitting second appeals in specified kinds of cases, such as capital cases or cases in which a long prison sentence is imposed. Other states permit such appeals only to resolve conflicts between intermediate courts or when constitutional questions are raised (since nearly every criminal case can involve constitutional issues, this solution may be unsatisfactory). (See the *Explanation* of Sec. 6.)

The other common method of limiting appeals from the intermediate court is to give the highest court (or courts) discretion to determine which cases it will review. This is basically the method by which the United States Supreme Court limits review and is the method favored by many students of judicial administration. (See, *e.g.*, Tate, "Relieving the Appellate Court Crisis," 56 *Judicature* 228, 233 (1973).)

The second and third paragraphs of Section 4 are transitional provisions whose purposes have been accomplished. They should be deleted from any revision of the section, and Section 4 should be combined with Section 5, relating to jurisdiction of the court of criminal appeals. Provisions on selection, qualifications, terms, and compensation of judges, as well as the method of filling vacancies, should be consolidated with provisions dealing with those subjects for other courts. (See the *Author's Comment* on Sec. 2.)

Sec. 5. JURISDICTION OF COURT OF CRIMINAL APPEALS; TERMS OF COURT; CLERK. The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the state in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

The Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.

The Court of Criminal Appeals may sit for the transaction of business at any time from the first Monday in October to the last Saturday in September in each year, at the State Capitol. The Court of Criminal Appeals shall appoint a clerk of the court who shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for a term of four years unless sooner removed by the court for good cause entered of record on the minutes of said court.

The Clerk of the Court of Criminal Appeals who may be in office at the time when this Amendment takes effect shall continue in office for the term of his appointment.

History

See the *History* of Section 4.

Section 5 was reenacted by amendment in 1966. The only substantive changes were deletion of a phrase from the old section that permitted the legislature to require the court to sit at two locations other than the capital and removal of language authorizing a clerk at each of the additional locations.

Explanation

Although this section seems to give the court of criminal appeals jurisdiction of all criminal appeals unless the legislature excepts them, the court has said that it has no appellate jurisdiction unless a statute specifically confers it. (*Millican v. State,* 145 Tex. Crim. 195, 167 S.W.2d 188 (1942).) The precise question apparently has never arisen, however, and is not likely to arise under the present statute. The statute gives the court of criminal appeals jurisdiction of all criminal cases except misdemeanors that have already been appealed to a county court (or county court at law) in which the fine imposed does not exceed $100. (Code of Criminal Procedure art. 4.03.) All cases that are within the constitutional jurisdiction of the court of criminal appeals thus are either included within the statutory grant of jurisdiction or specifically excluded therefrom. Whether the court would have jurisdiction of a case on which the statute is silent therefore is a question that does not arise.

Most of the cases appealed to the court of criminal appeals are felonies (murder, rape, robbery, theft, burglary, forgery and drug offenses make up about two-thirds of the court's workload), but the court also receives a substantial number of misdemeanor appeals. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), p. 23.)

The appellant is always the defendant, because the state has no right of appeal in criminal cases in Texas. (See Art. V, Sec. 26.)

The original jurisdiction of the court of criminal appeals is approximately the reverse of that of the supreme court. The supreme court has general power to issue writs of mandamus but only limited power to issue writs of habeas corpus (see the *Explanation* of Sec. 3); the court of criminal appeals may issue writs of mandamus only in aid of its jurisdiction but has general power to issue writs of habeas corpus. The grant of habeas corpus power appears to be an absolute constitutional grant, not requiring legislative implementation. The legislature has, however, provided an extensive body of rules governing habeas corpus proceedings in all courts, including the court of criminal appeals. (Code of Criminal Procedure arts. 11.01-11.64.)

The court has power to issue writs of habeas corpus even in connection with civil proceedings, (*e.g.*, where a person is jailed for contempt for violating an injunction) but if the application is also within the jurisdiction of the supreme court, the court of criminal appeals generally will not act until the supreme court decides whether it will accept jurisdiction. If the supreme court does take the case, the court of criminal appeals will not review the supreme court's decision in the matter. (Ex parte *Cvengros,* 384 S.W.2d 881 (Tex. Crim. App. 1964.)

The constitution gives the court of criminal appeals no power to issue other writs except "as may be necessary to enforce its own jurisdiction," and such writs are to be issued "under such regulations as may be prescribed by law." This power exists even when not specifically provided for by statute. (See *State v. Clawson,* 465 S.W.2d 164 (Tex. Crim. App.), *cert. denied* 404 U.S. 910 (1971); *State v. Jones,* 395 S.W.2d 612 (Tex. Crim. App. 1965), both holding the court has power to issue writs of prohibition even though the statute does not mention such a writ.)

There have been times when neither the supreme court nor the court of criminal appeals would exercise its mandamus powers. For example, in one case the supreme court declined to accept an application for a writ of mandamus on grounds it was within the jurisdiction of the court of criminal appeals. That court disagreed; it said the writ sought was not necessary for the enforcement of its own jurisdiction, so it also refused to application. The applicant then went back to the supreme court, but the latter still said it had no jurisdiction. (*Millikin v. Jeffrey,*

108 Tex. Crim. 84, 299 S.W. 435 (1927); *Millikin v. Jeffrey,* 117 Tex. 134, 299 S.W. 393 (1927); *Millikin v. Jeffrey,* 117 Tex. 152, 299 S.W. 397 (1927).) The supreme court's holding is questionable. It is undoubtedly wise (and perhaps even obligatory) for that court to defer to the court of criminal appeals until the latter is given an opportunity to enforce its own jurisdiction. It might even be desirable, as a matter of policy, to continue to refuse relief even after the court of criminal appeals has refused it. But since the supreme court has general mandamus power, it is difficult to argue that it has no jurisdiction of an application simply because it believes the matter is also within the jurisdiction of the court of criminal appeals. In any event, the case illustrates the injustice produced because Texas has two courts of last resort with no means of resolving a conflict between them.

Another example of injustice resulting from the dual system of courts is *Bretz v. State,* 508 S.W.2d 97 (Tex. Crim. App. 1974). Bretz was acquitted of a charge of receiving and concealing stolen property, but the trial court nevertheless awarded to the complaining witness the property alleged to have been stolen. When Bretz appealed to the court of criminal appeals, he was told the court had no jurisdiction because there was no longer any criminal case. Judge Roberts, concurring in the result, wrote a separate opinion in which he described numerous other problems created by the bifurcated system of courts of last resort and advocated merger. (508 S.W.2d, at 98-100.)

The court of criminal appeals construes its mandamus jurisdiction narrowly. For example, it refused to exercise mandamus jurisdiction in a criminal case when it had not yet received the appellate record. (Ex parte *Giles,* 502 S.W.2d 774 (Tex. Crim. App 1974).) Once the court of criminal appeals has acted, however, it will exercise mandamus jurisdiction to assure that its mandate is carried out. (*State* ex rel. *Vance v. Hatten,* 508 S.W.2d 625 (Tex. Crim. App. 1974).)

The court of criminal appeals, like the supreme court, has limited fact-finding powers and virtually no fact-finding capability. Its power is limited to the determination of "such matters of fact as may be necessary to the exercise of its jurisdiction." The court has held that this gives it power to consider matters not in the official record of a case. (See, *e.g., Vance v. State,* 34 Tex. Crim. 395, 30 S.W. 792 (1895) (certificate from district judge).) The court does not conduct evidentiary hearings, however, even on applications for writs of habeas corpus. (Ex parte *Carlile,* 92 Tex. Crim. 495, 244 S.W. 611 (1922); see also *Castillo v. Beto,* 281 F. Supp. 890 (N.D. Tex. 1967).) As a practical matter, the evidentiary hearing in habeas corpus matters is conducted by a district court, and the court of criminal appeals considers only the record. (See Code of Criminal Procedure art. 11.07.)

Comparative Analysis

The Oklahoma Constitution permits the legislature to give appellate jurisdiction in criminal cases to courts other than its court of criminal appeals. It also gives the Oklahoma Supreme Court power to resolve conflicts between the two courts (Okla. Const. Art. VII, Sec. 4.)

Author's Comment

If a separate criminal court of last resort is to be continued, most of this section could be retained; it does a reasonably good job of describing the court's jurisdiction. The section actually gives the legislature considerable flexibility. For example, there is nothing in the constitution to prevent the legislature from modifying the onerous requirement that the court of criminal appeals write an opinion in every case. (See Code of Criminal Procedure art. 44.24.) Moreover, there is nothing in this section that prevents the legislature from significantly

reducing the number of criminal cases that are appealable to the court of criminal appeals; this section clearly permits the legislature to withdraw jurisdiction from the court. The real problem is finding another court to handle those appeals. Misdemeanor appeals might be placed within the jurisdiction of the district courts. But those courts are the general trial courts in the system and probably should not be burdened with extensive appellate jurisdiction. The only alternative within the present system is to route some criminal appeals to the intermediate appellate courts. This might be possible under the existing constitutional provisions. Certainly Section 5 presents no bar to such a change. The question would be whether the courts of civil appeals constitutionally can be given criminal jurisdiction. Since the second jurisdictional grant in Section 6 of Article V gives the courts of civil appeals "such other jurisdiction, original and appellate as may be prescribed by law," it can be argued that the legislature already has power to give those courts criminal jurisdiction. The contrary argument would be that the language, taken in context with the rest of Section 6 and also with Sections 4 and 5, must be interpreted as if it read "other *civil* jurisdiction." There is language in several cases suggesting that the courts of civil appeals cannot exercise criminal jurisdiction (*e.g., State v. Morris*, 208 S.W.2d 701 (Tex. Civ. App.—Waco 1948, *writ ref'd n.r.e.*)), but the question has never been decided because the legislature apparently has never attempted to give the courts of civil appeals criminal jurisdiction.

The provision describing the court's term should be deleted or consolidated with term provisions of other courts (see the *Author's Comment* on Sec. 3a), and the provision for appointment of a clerk should be deleted or included in a single section dealing with appellate court clerks generally (see the *Author's Comment* on Sec. 3). The last paragraph of Section 5 is merely transitional and should be deleted.

Sec. 6. COURTS OF CIVIL APPEALS; TRANSFER OF CASES; TERMS OF JUDGES. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a [a] term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until otherwise provided by law. Said courts shall have such other jurisdiction, original and appellate as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of [of] the Courts of Civil Appeals which may be hereafter created under this article after

the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes and the Justices thereof shall draw for the different classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution.

History

The courts of civil appeals were the major innovation of the 1891 reform package. The supreme court was falling so far behind that either the right to appeal had to be severely curtailed or the system had to be radically revised. (See Murray, "Our Courts of Civil Appeals," 25 *Texas Bar Journal* 269 (1962).) It is not surprising that the solution chosen was intermediate courts; the federal courts of appeal were also first created in 1891. Shortly after the adoption of the 1891 amendment, the governor called the legislature into special session to enact legislation implementing the new constitutional provisions. (See Black, "Importance of the Courts of Civil Appeals," 9 *Texas Bar Journal* 426 (1946).)

The theory in creating the courts of civil appeals apparently was that their decisions would be final in most civil cases. The supreme court's primary function was to be the resolution of conflicts. The creation of supreme judicial districts was thought desirable because of the vastness of the state. (See Crane, "Suggestions for Improving Court Procedure in Texas," 5 *Texas L. Rev.* 285 (1927).)

Creation of the courts of civil appeals was one of a series of attempts to reduce the caseload of the supreme court. One earlier attempt was the creation of the court of appeals in 1876; that court was given appellate jurisdiction of all criminal cases and of all civil cases from the county courts. A still earlier attempt was included in the 1869 Constitution which permitted no criminal appeals unless authorized by a supreme court justice. Unlike the earlier attempt, which did not succeed in relieving the supreme court's backlog, the intermediate appellate court system has proven quite durable; it has not been substantially changed since 1891. Ironically, a proposal for intermediate appellate courts had been introduced in the 1875 Convention but was rejected overwhelmingly. (*Debates,* p. 380; *Journal,* p. 457.)

At the special session called to implement the 1891 amendment, the legislature created three courts of civil appeals at Dallas, Austin, and Galveston. (Tex. Laws 1892, ch. 15, *Gammel's Laws,* p. 389.) The legislature has added courts from time to time since then, and there are now 14 courts of civil appeals. (Tex. Rev. Civ. Stat. Ann. art. 1817.)

In 1927 a proposed amendment to Section 6 would have limited the maximum number of civil appeals court districts to 12 but would have permitted more than three judges per district. This was apparently the legislature's answer to a bar association proposal for a unified court system. (See McKnight, "Proposed Amendment to the Judiciary Article of the Constitution," 5 *Texas L. Rev.* 290 (1927).) The 1927 proposal was a compromise and was therefore disappointing to many. (McKnight, "The Fortieth Legislature and Judicial Reform," 5 *Texas L. Rev.* 360 (1927).) Some reformers wanted to do away with the courts of civil appeals altogether. Some thought there were too many of these courts. (McKnight, 5 *Texas L. Rev.*, at 363.) Some thought the amendment offered in 1927 should have gone farther toward bringing about a unified court system. (Dabney, "Court Organization: The Superiority of the Unit or Collegiate System," 5 *Texas L. Rev.* 377 (1927).) When the proposed amendment was submitted to the voters it was defeated.

In 1954, in response to an expressed desire by members of the state bar for judicial reform, the Bar Committee on Constitutional Revision submitted a new judiciary article to members of the bar in a referendum. The article proposed, among other things, a court of appeals with both civil and criminal jurisdiction. The supreme court was to define districts, appoint judges, and prescribe jurisdiction of this intermediate court. (The proposal, and various arguments pro and con, appear in 17 *Texas Bar Journal* 687 *et seq.* (1954).) The proposal was rejected by state bar members 2 to 1. (18 *Texas Bar Journal* 65 (1955).)

In 1973 a similar proposal by the Chief Justice's Task Force for Court Improvement was introduced in the legislature but died without action. (Tex., Legislature, Senate, SJR4, 63d Leg., Reg. Sess., 1973.)

Explanation

It is not clear whether Section 6 would permit the legislature to reduce the number of courts of civil appeals. The section authorizes creation of "such additional districts as the increase of population and business may require." Population and business can decrease as well as increase, however, and presumably the intention was to permit the legislature to adjust the number of courts as needed—in either direction. Since no attempt has been made to reduce the number, the question has not been resolved.

The courts of civil appeals are the courts to which virtually all appeals from county and district courts are taken. There is one exception: A few cases may be appealed directly from the trial court to the supreme court under Section 3-b. (See the *Explanation* of that section.)

Although most decisions of the courts of civil appeals are reviewable by the supreme court, in fact their decisions are usually final. In 1973, for example, 614 civil appeals decisions were taken to the supreme court, but only 80 were accepted. In other words, in nearly 90 percent of the cases taken to the supreme court, the decision of the court of civil appeals was allowed to stand. In the same year, there were only four direct appeals to the supreme court. (Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. 7-8.) Thus, for most litigants in civil cases, a court of civil appeals is in fact the court of last resort.

In all cases, Section 6 makes the decision of the court of civil appeals final "on all questions of fact brought before them on appeal or error." This provision is really a limitation on the supreme court's scope of review, rather than a grant of power to the courts of civil appeals. It is one of the more troublesome phrases in Texas jurisprudence. The courts have held that whether there is *any* evidence to support a jury verdict is a question of law and therefore may be reviewed by the supreme court. (*E.g., Choate v. San Antonio & A.P. Ry.*, 91 Tex. 406, 44 S.W. 69 (1898).) But whether the evidence is *sufficient* to support a verdict is held to be a question of fact and therefore not reviewable by the supreme court. (*E.g., Electric Express & Baggage Co. v. Ablon,* 110 Tex. 235, 218 S.W. 1030 (1920).) The attempt to apply this distinction to specific cases has produced much litigation, considerable confusion, and several traps for unwary lawyers. (See, *e.g.*, Calvert, " 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 *Texas L. Rev.* 361 (1960).)

The provision making civil appeals court decisions conclusive on matters of fact applies only to questions "brought before them on appeal or error." This presumably means that a civil appeals court's conclusions on matters of fact are *not* conclusive when they arise in an original proceeding in that court. This exception is of little consequence, however, for several reasons. First, courts of civil appeals have no general fact-finding power; the fact-finding power given them by article

1822 of the civil statutes and rule 406 of the Rules of Civil Procedure applies only to determining facts necessary to the proper exercise of their own jurisdiction. (*Rosenfeld v. Steelman,* 405 S.W.2d 301 (Tex. 1966).) Second, even if a court of civil appeals were to make a fact finding in an original proceeding, that finding would not be subject to appellate review because the supreme court has no appellate jurisdiction of original proceedings in the courts of civil appeals. Such proceedings reach the supreme court only if the same case is filed as an original proceeding in that court. (See Sec. 3 of Art. V.) Third, in an original proceeding in the supreme court, that court would not be likely to review an earlier fact finding in a court of civil appeals, because the supreme court normally refuses to consider any writ application that involves a disputed fact question—whether or not the question has been previously decided by another court. (See *Depoyster v. Baker,* 89 Tex. 155, 34 S.W. 106 (1896).)

The only case in which the supreme court might reverse a civil appeals court's conclusion of fact in an original proceeding would be one in which the court of civil appeals made a fact finding relating to its own jurisdiction, that finding also involving the supreme court's jurisdiction, and the supreme court disagreed with the finding. Section 3 of Article V gives the supreme court power to ascertain facts necessary to the proper exercise of its jurisdiction. The supreme court has held that this gives it power to reject a district court's fact finding on a jurisdictional question in a mandamus case. (*Tarpley v. Epperson,* 125 Tex. 63, 79 S.W.2d 1081 (1935).) Moreover, the supreme court has held that the fact-finding power of a court of civil appeals applies only to facts relating to its own jurisdiction and does not permit it to ascertain facts relating to a trial court's jurisdiction. (*Rosenfeld v. Steelman, supra.*) The supreme court stated in that case that it would apply the same rule to itself and would not inquire into the jurisdiction of the court below by reference to facts outside the record. The possibility of the supreme court reviewing a fact conclusion of a court of civil appeals in an original proceeding therefore is very remote.

The phrase in Section 6 providing that the appellate jurisdiction of the courts of civil appeals is only "co-extensive with the limits of their respective districts" has also proven troublesome. As soon as the courts of civil appeals were created, problems of inequality in their caseload became apparent. (See Williams, "History of the Texas Judicial Machine and its Growth," 5 *Texas L. Rev.* 174, 179-180 (1927).) The legislature attacked the problem by directing the supreme court to equalize the intermediate courts' dockets by transferring cases from those with too many cases to those with too few. (Tex. Rev. Civ. Stat. Ann. art. 1738.) This statute was attacked on the ground it attempted to give courts of civil appeals jurisdiction beyond the boundaries of their districts. The supreme court saved the statute by relying on other language in Section 6 which allows the legislature to give courts of civil appeals "such other jurisdiction original and appellate, as may be prescribed by law." Normally this phrase would be interpreted to mean other kinds of *substantive* jurisdiction, rather than additional territorial jurisdiction. But the supreme court said that the phrase also permits the legislature to increase the intermediate courts' territorial jurisdiction. (*Bond v. Carter,* 96 Tex. 359, 72 S.W. 1059 (1903); *Witherspoon v. Daviss,* 163 S.W. 700 (Tex. Civ. App.—Austin 1914, *no writ*).) The phrase "co-extensive with the limits of their respective districts" is not entirely inoperative, however. When the transfer statute is not applicable, one court of civil appeals has no jurisdiction of a case arising in another court's district. (*Parr v. Hamilton,* 437 S.W.2d 29 (Tex. Civ. App.—Corpus Christi 1968, *no writ*).) In other words, the phrase has been interpreted as if it read, "The appellate jurisdiction of the courts of civil appeals is co-extensive with the limits of their respective districts except to the extent that the legislature provides otherwise."

The courts of civil appeals have two different sources of appellate jurisdiction

under Section 6. The first paragraph of the section gives them jurisdiction "of all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." The second paragraph provides that "said courts shall have such other jurisdiction, original and appellate as may be prescribed by law." It is not clear, however, that the courts of civil appeals have anything more than "such jurisdiction as the legislature may prescribe." The first grant could be construed as a constitutional grant of jurisdiction which the legislature may regulate but cannot take away. There are a few cases suggesting that there is a constitutional right of appeal to a court of civil appeals that the legislature cannot deny. (*Outlaw v. Gulf Oil Corp.*, 137 S.W.2d 787 (Tex. Civ. App.—El Paso 1940), *rev'd on other grounds,* 136 Tex. 281, 150 S.W.2d 777 (1941)); *Eppstein v. Holmes,* 64 Tex. 560 (1884); *Pratley v. Sherwin-Williams Co. of Texas,* 36 S.W.2d 195 (Tex. Comm'n App. 1931, *holding approved*).) None of these cases actually decides the question, however, and in fact the courts have permitted the legislature to diminish the appellate jurisdiction given to the courts of civil appeals under the first grant. Articles 2249 and 1819 of the civil statutes deny the intermediate courts jurisdiction of cases within the jurisdiction of the county courts if the amount in controversy or the judgment does not exceed $100. (*Ray v. San Antonio & A.P. Ry.*, 45 S.W. 479 (Tex. Civ. App. 1898, *no writ*); *Green v. Warren,* 45 S.W. 608 (Tex. Civ. App. 1898, *no writ*).) Section 6 contains no minimum jurisdictional amount; it therefore appears that the courts have assumed that the phrase "under such restrictions and regulations as may be prescribed by law" includes the power to take away the jurisdiction specifically conferred by Section 6. If so, then the effect of Section 6 is merely to give the courts of civil appeals jurisdiction of the specified cases only until the legislature provides otherwise. The question has not been definitively answered because, with the exception of the $100 minimum, the legislature has not attempted to take jurisdiction away from the courts of civil appeals.

The 1973 amendment to Section 8 of Article V also contains a grant of appellate jurisdiction to the courts of civil appeals. It states that the legislature may provide for appeals to the courts of civil appeals in probate matters. This appears to be unnecessary, since the courts of civil appeals would have jurisdiction of probate cases anyway because they are cases within the original or appellate jurisdiction of the district or county court. The provision in Section 6 giving the courts of civil appeals "such other jurisdiction . . . as may be prescribed by law" makes the language in Section 8 doubly superfluous.

Section 6 contains no specific grant of original jurisdiction. The courts of civil appeals therefore have only such original jurisdiction as the legislature has prescribed, and that is quite limited. They have power to issue writs of mandamus to compel the judge of a district or county court to proceed to trial in a case and power to issue writs of mandamus or other writs for the enforcement of their own jurisdiction. (Tex. Rev. Civ. Stat. Ann. arts. 1823, 1824.)

In 1969 the courts of civil appeals were given limited power, concurrent with that of the supreme court, to grant writs of habeas corpus. (Tex. Rev. Civ. Stat. Ann. art. 1824a; see also Chadick, "Original Habeas Corpus Proceedings in the Courts of Civil Appeals," 33 *Texas Bar Journal* 183 (1970).) It is limited to cases in which the petitioner is confined on account of violation of an order entered in a divorce case, wife or child support case, or child custody case. It is not clear whether a single judge can issue the writ of habeas corpus. (Chadick, 33 *Texas Bar Journal,* at 184.) This habeas corpus power was given to the courts of civil appeals on the recommendation of the Civil Judicial Council to relieve the Supreme Court of some cases.

Neither the supreme court nor a court of civil appeals has power to issue advisory opinions. Since it is not mentioned in the constitution along with original and

appellate jurisdiction, the courts have held that the legislature cannot confer advisory jurisdiction. (*Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641 (1933).)

The final two paragraphs of Section 6 are notable mainly because they have been obsolete for 80 years. They were transitional provisions to implement the 1891 reorganization and then became surplusage.

Comparative Analysis

Almost half of the states have intermediate appellate courts. (See Tate, "Relieving the Appellate Court Crisis," 56 *Judicature* 228, 232 (1973).) Half of these are organized on a unitary or statewide basis, and the other half are organized by district or region. Not all of these are constitutional courts; only about 19 states create intermediate appellate courts by constitutional provision.

Author's Comment

The intermediate court system created by Section 6 is rather inflexible. Each court has three judges, regardless of its workload. This limitation can be circumvented only by creating an additional district in the same geographical area. This has been done in Harris and Galveston counties, where districts 1 and 14 both encompass the same two counties. (See Tex. Rev. Civ. Stat. Ann. arts. 198, 1817a.) The result is two separate courts, rather than a single court with six judges.

There is no provision for the assignment of judges from one court of civil appeals to another. Article 1738 of the civil statutes does, however, permit the supreme court to equalize dockets by transferring cases from one civil appeals court to another and permits the judges of the latter to go to the court from which the case was transferred to hear oral arguments. (See Guittard, "Court Reform: Texas Style," 21 *Sw.L.J.* 451 (1967).) This is a useful device for reducing the inequality of workloads among the courts, but it is not completely effective. Some of the courts of civil appeals still handle twice as many cases as others. (See Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. xvi-xvii.)

Most of the intermediate appellate courts created recently in other states are "unified," meaning that there is a single court with statewide jurisdiction that sits in panels, usually of three judges. This system is generally thought to provide more efficient use of judicial manpower and more consistency in intermediate court decisions. (Tate, "Relieving the Appellate Court Crisis," 56 *Judicature* 228 (1973).)

Intermediate appellate courts generally are not considered essential elements in an ideal judicial system, but rather an evil that is necessary in most populous states. Invariably, they make the appellate process more complex, more time consuming, and more costly. They create another procedural step before final disposition of a case and often permit wasteful double appeals. But where the volume of appeals is large, creation of intermediate courts generally is considered a better solution than expansion of the highest court; there is a point of diminishing return at which the addition of more judges to the highest court creates more problems than it solves. One observer has said, "The basic [ideal] model for the high court is one with discretionary review of intermediate court opinions, based upon a primary function of clarifying and developing the law and of resolving conflicts between the three-judge intermediate panels." (Tate, 56 *Judicature,* at 233.)

Most intermediate appellate courts have criminal as well as civil jurisdiction; the possibility of giving the Texas courts of civil appeals criminal jurisdiction is considered in the *Author's Comment* on Section 5.

The name used in Section 6 to designate the districts served by the courts of civil appeals—"Supreme judicial districts"—is confusing. The word "supreme" is simply misleading, because the courts of civil appeals are in no way supreme, and the

districts have no connection with the supreme court. Moreover, the districts themselves are one of three kinds of districts in the Texas judicial system; the others are "judicial districts," which are the geographical unit for the district courts, and "administrative districts," which are nine regions each with a presiding (district) judge who has limited power to transfer judges and cases between district courts in his district. (Tex. Rev. Civ. Stat. Ann. art. 200a.) Since there is no correlation between "administrative districts" and "Supreme judicial districts," a district court may be in one district for administrative purposes and another for appellate purposes. The system could be simplified somewhat merely by making administrative districts correspond to the districts of the civil appeals courts.

In any revision of Section 6, the last two paragraphs should be deleted because they are no longer operative. Consideration should also be given to the possibility of eliminating the two troublesome phrases relating to the territorial limits of the courts' jurisdiction and the conclusiveness of their decisions on questions of fact. (In any event, the latter should be moved to the supreme court section because it is really a limitation on that court's power.) The legislature's power (or lack thereof) to reduce the number of courts and to take away the courts' jurisdiction by means of "restrictions and regulations" should also be clarified.

Sec. 7. JUDICIAL DISTRICTS; DISTRICT JUDGES; TERMS OR SESSIONS; ABSENCE, DISABILITY OR DISQUALIFICATION OF JUDGE. The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a General Election, a Judge, who shall be a citizen of the United States and of this State, who shall be licensed to practice law in this State and shall have been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who shall have resided in the district in which he was elected for two (2) years next preceding his election, who shall reside in his district during his term of office, who shall hold his office for the period of four (4) years, and shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district at least twice in each year in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

The District Judges who may be in office when this Amendment takes effect shall hold their offices until their respective terms shall expire under their present election or appointment.

History

District courts have been the trial courts of general jurisdiction in Texas since the Republic. The Constitution of the Republic provided for "convenient judicial districts, not less than three, nor more than eight," with judges chosen by the congress to serve in each district. (Art. IV, Sec. 2.)

Under the Constitutions of 1845 and 1861, district judges were appointed by the governor with the advice and consent of the senate. (Art. IV, Sec. 5.) The 1866 Constitution provided for popular election of district judges (Art. IV, Sec. 5), but in 1869 the method of selection was changed back to gubernatorial appointment. (Art. V, Sec. 6.) From 1866 to 1876, the term of a district judge was eight years; before that the term was six years, and since 1876 it has been four years.

The 1876 Constitution provided for 26 districts, and an accompanying ordinance