STATE OF THE JUDICIARY

An Address to the Joint Session of the 73rd Legislature on February 23, 1993

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Mr. President, Mr. Speaker, Distinguished Members of the Seventy-Third Legislature, colleagues in the judiciary, and fellow Texans.

Thank you for permitting me to visit with you about the state of the judiciary. The judges of Texas appreciate your interest in and attention to the needs of the Judicial Department.

This is my third such address to a joint session of the Legislature, and it is by far the most important. Judicial issues this year are among the most difficult and most significant awaiting your deliberation. The decisions you make in the next three months will profoundly affect the administration of justice for years to come.

From many different directions, forces are in play to compel basic changes in the system we have known. From the Texas Constitution comes a mandate for comprehensive judicial redistricting. From a distinguished Commission created by our Court, as well as from private studies, comes a call for a simplified, more efficient court structure. From the Texas Ethics Commission comes a thorough blueprint for judicial campaign reform. And finally, perhaps from federal law, as interpreted by the United States Department of Justice and by the federal courts, comes a demand for a new method of judicial selection.

These pressures could be viewed as discrete problems to be avoided if possible, or resolved with a minimum of bother if necessary. But they could also be seen as interrelated, challenging us to decide what judges should be doing, and how they should be organized and selected to do it. By treating these challenges as a coherent whole, you have a unique opportunity to provide our citizens with the best possible system of justice. As President Woodrow Wilson once said: "So far as the individual is concerned, a constitutional government is as good as its courts. No better, no worse."

JUDICIAL REDISTRICTING

In judicial redistricting, a task so inherently unpleasant that it has not been attempted in more than a century, both houses of the legislature are actively at work. The House Judicial

Affairs Interim Committee concluded that the current district court lines are "fundamentally unfair."[1] There is a tenfold disparity in case filings between the busiest and the least crowded courts[2] and an eightfold difference in population.[3] Three judicial districts include counties that are not even contiguous. One county is in four different multi-county districts, none of which have the same boundaries. Rectifying this imbalance is worthy of your best efforts, particularly when the people demand and deserve more efficient government.[4]

JUDICIAL RESTRUCTURING

The task of redistricting would be simplified by combining the 185 statutory county courts and probate courts with the 386 existing district courts to create one level of lawyer-judge, general jurisdiction trial courts across the state. Within the past decade, the responsibilities of the statutory county courts have substantially increased. Rather than dealing merely with quick, simple disputes, some statutory courts now have unlimited civil jurisdiction and some felony jurisdiction, and all of the judges may be assigned to preside in district courts. If we are to give all Texans more equal access to justice, we should bring these courts into the equation.

Such a unification is but one of many suggestions for increased uniformity and efficiency made by the Citizens' Commission on the Texas Judicial System. This distinguished group of attorneys, judges, and lay leaders was appointed by the Supreme Court in 1991 to study judicial organization. Under the leadership of Dr. A. Kenneth Pye, a nationally recognized legal scholar who serves with distinction as president of Southern Methodist University, the Commission has urged changes at all levels to simplify, streamline, and modernize the Texas courts. For example, the Commission suggests merging the Supreme Court and Court of Criminal Appeals for administrative purposes, standardizing the jurisdiction of the constitutional county courts, requiring competency testing for the more than 2000 judges serving on Texas benches where formal legal training is not required, and increasing the flexibility of judicial assignments. The

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[1]Tex. House of Representatives, Committee on Judicial Affairs, Interim Report: Toward a Fair Distribution of Justice 3 (1992).

[2]In Fiscal Year 1992, 2735 cases were filed in the 5th District Court of Bowie and Cass Counties, while only 274 cases were filed in the 110th District Court of Briscoe, Dickens, Floyd and Motley Counties.

[3]As of the 1990 census, Ellis County had 85,167 persons per district judge, while the 39th Judicial District, comprising Haskell, Kent, Stonewall, and Throckmorton Counties, had only 11,723 persons.

[4]The appellate districts are less askew, but 23 counties are in two or more districts, and both case filings and population are unbalanced. Within a few weeks, the Supreme Court will forward "rules, regulations, and criteria to be used in assessing" the "need for adding, consolidating, eliminating, or reallocating existing appellate courts." Tex. Govt. Code §74.022.

Commission's Report complements a recent three-part study on the courts by the Texas Research League. Together, they offer creative ideas to transform our many courts into a true system, rather than a conglomeration of disparate local entities.

JUDICIAL SELECTION

Some of the reforms advocated by the Citizens' Commission and the Texas Research League, particularly those that relate to which judges should hear what kinds of cases, may become particularly significant if Texas changes the way it selects and retains judges. The state's current preference for specialization by court in most metropolitan areas is incompatible with several proposals for increasing minority participation in judicial selection. Moreover, judicial redistricting may be affected by a change in the selection process.

One thing can be said with confidence about our current system of choosing judges: No one likes it. Opinion polls suggest that it enjoys little public confidence.[5] Even the judges selected under this system do not support it. Of the 208 state judges who responded to a 1985 survey of the Texas judiciary by Judge Ron Chapman, for example, 88 favored merit selection, 74 favored non-partisan elections, and 18 favored removing the straight lever, but **no one** favored the status quo. While the options have broadened since then, I doubt that support for the current method has grown very much.

As Attorney General Dan Morales said a few weeks ago: "Texans deserve a judiciary free of partisanship, free of political influence, free of obligations to financial interests which exercise too much influence in the selection of our judges, and most importantly, Texans deserve a judiciary that gives meaning to the notion of fair and equal representation." I agree in every respect with this assessment, and I believe most Texans share those views as well.

The question, of course, is how to achieve these goals. There may, in fact, be more than one right answer. After careful consideration, however, I have concluded that there are at least three prerequisites to any successful plan of judicial selection. Let me discuss them briefly.

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[5]For example, a 1988 Texas Poll found that 61% of all respondents believed that judicial campaign contributions were a very serious or somewhat serious problem, while only 6% believed they were not serious at all. Dallas Morning News, March 13, 1988. And a 1989 Texas Poll revealed that only 19% of all Texans surveyed favored the current election system, while 19% favored non-partisan elections, 12% favored gubernatorial appointment with Senate confirmation, and 38% favored gubernatorial appointment with retention elections. Austin American-Statesman, February 12, 1989.

These polls cited in support of the current system invariably pose the choices only as election versus appointment, ignoring other alternatives such as retention elections. 1990 Texas Poll, Dallas Morning News, February 19, 1990; 1988 Texas Democratic Primary Referendum.

Campaign Reform

The first is judicial campaign and ethics reform. Enacting the recommendations of the Texas Ethics Commission with regard to campaign finance laws, judicial campaigns, and judicial relationships would help our judges function better, and would increase public confidence in our fairness and impartiality. The Commission's recommendations are simple and straightforward. They include: More frequent and more complete campaign finance disclosure, shorter campaign seasons, more detailed disclosure of financial activities and relationships, full disclosure of all fees paid to lawyers pursuant to judicial appointments, and a ban on fundraising by judges except during contested election campaigns. These are essential changes which are critically needed now. The appearance of a cozy relationship between some judges and some campaign contributors has been devastating to the public image of our system of justice. I urge your full support of all the judicial reforms proposed by the Ethics Commission, and your serious consideration of those additional reforms to be suggested by the forthcoming report of the Supreme Court's Task Force to Examine Appointments by the Judiciary.

Nonpartisan Elections

The second necessary reform is nonpartisan elections. Only eight other states, mostly in the South, select all their judges by partisan ballot. This practice had a certain practical virtue when all judges were of one party and the highest voter turnout was for that party's primary.[6] In a two-party state, however, political labels only produce confusion. How can anyone justify our practice of selecting mayors and school boards on a nonpartisan ballot, while requiring judges to be Democrats or Republicans? If anyone should be without party affiliation, it is a judge, who must restrict his or her campaign to a pledge of "the faithful and impartial performance of the duties of office."[7]

Retention Elections

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[6]Fifty years ago, in 1942, 951,216 persons voted for Governor in the Democratic primary, but only 289,939 voted for the same office in the general election. Last year, however, only 2,280,181 persons voted for President in both primaries combined, while 6,154,018 voted for that office in the general election.

[7]Canon 7(2) of the Code of Judicial Conduct of Texas provides in full:

> A judge or judicial candidate shall not make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of office, but may state a position regarding the conduct of administrative duties. Any statement of qualifications, record, or performance in office of either the candidate or the candidate's opponent should be such as can withstand the closest scrutiny as to accuracy, candor and fairness.

The final essential reform is that elected judges should stand for reelection on a district-wide retention, or "yes/no" ballot. Because of the unique nature of the judiciary, retention elections actually afford more, not less, popular control over the judiciary. The large number of judgeships, together with the relatively small number of qualified candidates, make most judicial races unopposed, particularly when incumbent judges are seeking reelection.

Let's look at the 481 active state judges in Texas. While 58% were opposed in their initial election (275 out of 474), only 19% were opposed in their second election (66 of 343). In other words, over 80% of Texas judges were unopposed in both the primary and general election when they first sought reelection. And in bids for subsequent terms, that trend accelerates, with no more than 14% being opposed in a third (27 of 190), fourth (13 of 79) or fifth (3 of 40) race. Moreover, of those judges who initially reached the bench by appointment, rather than election, 55% have **never** had an opponent at any time, either in a primary or a general election.[8]

The bottom line is that in most judicial elections, the people have no meaningful vote. With retention elections, the accountability of all judges to the electorate will be greatly enhanced, but the huge campaign warchests and unseemly personal attacks that may accompany contested campaigns will be greatly reduced.

Initial Selection Options

Once these three principles - campaign finance reform, non-partisan elections and re-election retention campaigns - are accepted, we can focus on which method of initial judicial selection will best meet the goals of an independent and accountable judiciary while increasing its racial and ethnic diversity.

Let there be no mistake: the current at-large system is no longer acceptable. In Dallas County, 37% of the people, but less than 14% of the judges, are African-American or Hispanic. In Harris County, 42% of the people, but less than 9% of the judges, are from the same minority populations. Candidates from these racial and ethnic groups have often been defeated in campaigns for benches in those counties. The federal courts may ultimately hold that the evidence presented in pending litigation is insufficient to demonstrate that the system is illegal, but they cannot make it fair or right. The status quo is unjust and inequitable.

Three principal avenues have been suggested to increase diversity. Each has both promise and problems.

Merit Selection

Appointment from a recommended list with retention elections, frequently called "merit

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[8]Of the 236 initially appointed judges, 128 have never had an opponent, and 36 more have never had a general election opponent. Even of the 245 initially elected judges, 34 have never had an opponent, and 59 more have never had a general election opponent.

selection," is a relatively modern phenomenon now used by more states than any other single approach. Nationwide, more minority and women judges have reached the bench through merit election than any other method.[9] The recent voting rights challenge to Georgia's at-large election system may be settled by converting to merit selection.[10] No state that has adopted merit selection has ever abandoned it, and no merit selection plan has been successfully challenged under the Voting Rights Act.

However, the central question in merit selection is always, who picks the pickers? Nominating commissions must be carefully constructed in order to secure diversity and reduce political pressures. Merit selection without dedicated, independent nominating commissions and an informed, vigilant public would be unacceptable.

Subdistricts

Dividing some judicial districts into electoral subdistricts has been used to settle voting rights challenges in Arkansas, Louisiana and Mississippi. Each of these settlements has been different. Louisiana allows widely varying numbers of judges in various subdistricts, while Arkansas keeps most judgeships at-large, creating subdistricts only in areas with substantial minority population. Subdistricts will best increase diversity only when minority voters are geographically concentrated and politically active. In the initial single member district elections in Mississippi, I am told, Anglos won in at least two districts that were drawn to protect minority voters.

I recognize that many members of the Legislature are committed to electoral subdistricts, even without the protective features of nonpartisan ballots and district-wide retention re-elections. While sub-district elections have long been used to elect some appellate judges around the nation, particularly at the Supreme Court level, they are largely untested at the trial court level.[11] Many observers, and I am one of them, fear that trial judges will lose, or will be seen as losing, both independence and accountability if they report to only a portion of those whom they serve. Judges are not representatives in the legislative sense, but rather serve only the law. Whatever selection process you choose must preserve that distinction.

Multiple Post Voting

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[9]American Judicature Society, Women and African-American Judges Currently Serving on State Appellate Courts, 1991.

[10]See Cheeks v. Miller, No. S93A0079; Erhart v. Miller, S93A0141 (Ga.Sup.Ct., Jan 29, 1993).

[11]Justices are elected from districts to the Illinois, Kentucky, Louisiana, and Mississippi Supreme Courts, and run for retention from districts under merit selection plans to the Maryland, Nebraska, and Oklahoma Supreme Courts. In South Dakota, the initial retention election is by district, with subsequent retention elections statewide.

Some scholars believe that a better method of electing trial judges, particularly in metropolitan areas, would be limited or cumulative at-large elections.[12] For instance, if there are seven new judges or open seats on the ballot, all prospective candidates would run in one election, and the top seven vote-getters would win. Minority voters could be protected by any method which permits votes to be aggregated or limits each voter to fewer votes than the number of positions to be filled. While little used in judicial elections, such procedures have long been used in both public and private elections around the world.

In fact, few of these methods are novel, even to the Texas judicial selection debate. At the 1875 Texas Constitutional Convention, for example, one delegate moved that all judges be appointed by the Governor, who was to declare that the nominee was believed to be "the best appointment to be made to that office, without regard . . . to personal or partisan considerations."[13] Another delegate proposed that trial judges be initially appointed, then elected for subsequent terms,[14] and that Supreme Court justices be elected from single member districts.[15] Finally, one distinguished member proposed as follows: "To insure the just representation of minorities, the system of voting in all general, special or municipal elections, shall be by ballot, and shall be the cumulative system."[16]

The system that was ultimately devised by that Convention, of course, is still with us, despite persistent criticism for more than a century. Now, finally, it must be changed. The method you select will profoundly impact the future of all Texans, and your judiciary stands ready to offer advice, suggestions, and encouragement in these efforts.

ACCESS TO JUSTICE

The ultimate goal of all your labors, of course, is to maintain a court system where all citizens have equal, timely and efficient access to justice. Unfortunately, the entire American legal system falls short of this goal today. As former President Derek Bok of Harvard has observed: "We have too much law for the rich, and too little law for the poor." Reform is needed in both criminal and civil law.

In criminal law, the state must assure the adequate representation of death row inmates, rather than relying on the efforts of volunteer attorneys through the Texas Resource Center.

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[12]E.g., Samuel Issacharoff, The Texas Judiciary and the Voting Rights Act: Background and Options (1989).

[13]Journal of the Constitutional Convention of 1875 at 117.

[14]Id. at 651.

[15]Id. at 185, 563-64.

[16]Id. at 39.

In civil law, the lack of representation is also acute. For our most disadvantaged citizens, over 92% of the state's total funding for civil legal services comes from the federal government's allocation to Legal Services Corporation.[17] To supplement this resource, the State Bar of Texas has promulgated an aspirational pro bono standard and devised a voluntary reporting system for Texas attorneys. Numerous local bar associations have also undertaken creative and effective programs to increase voluntary legal services, and many attorneys on their own are devoting thousands of hours to pro bono cases. Despite these magnificent efforts, most legal needs of the poor remain unmet, as the State Bar's recent report to the Legislature demonstrates.

For all citizens, the price of civil justice continues to escalate. The spiraling cost of litigation, especially of pre-trial discovery, threatens the legitimacy of our entire judicial process. The Supreme Court is committed to streamlining the rules of civil and appellate procedure to increase certainty and efficiency in the legal process. The Texas trial bench continues to experiment with innovative docket management techniques. And Texas has been in the forefront of exploring alternative methods of dispute resolution. All these efforts will be beneficial.

Ultimately, however, Texas courts must be provided with professionally trained staff and state-of-the-art equipment to meet the demands society places on us. As the Citizens' Commission concluded, the resources for a modern court system must come from you. It is a false economy to force some citizens to wait years for resolution of their disputes because some courts are understaffed or ill-equipped. In Judge Learned Hand's memorable command: "Thou shalt not ration justice."

CONCLUSION

Before my speech, we gathered here to celebrate the two-hundredth birthday of that most remarkable of all Texans, Sam Houston. Whether founding a new nation or trying to save an old one, attorney Houston was a devoted servant of the rule of law. As President, he told the Sixth Congress of the Republic of Texas: "To maintain an able, honest and enlightened judiciary should be the first object of every people."[18] If Texas was true to that commitment as a struggling Republic, threatened by invasion and insolvency, surely it can be even more steadfast to that goal today, as we strive to provide equal justice for all.

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[17]American Bar Association, Funding the Justice System: A Call to Action 54 (1992).

[18]Message to the Sixth Congress, Republic of Texas, 1842.