



THE STATE OF THE JUDICIARY MESSAGE

Delivered by
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SUPREME COURT OF TEXAS

To The
SIXTY SIXTH LEGISLATURE
January 31, 1979

STATE OF THE JUDICIARY
By Chief Justice Joe R. Greenhill
Wednesday, January 31, 1979

Governor Clements, Governor Hobby, Speaker Clayton, Distinguished Members of the Senate and the House, fellow members of the Judiciary, ladies and gentlemen:

The Judiciary and I sincerely appreciate this invitation and opportunity to present this First State of the Judiciary message.

At your last session, your House Bill 828 called upon the Chief Justice to deliver a message to you upon our condition, and upon future directions and needs of the courts.

Let me hasten to add that we appreciate the careful consideration given to us in the past by each member of the Legislature and by Governor Hobby as President of the Senate.

In making this address, I have called upon other judges, particularly the presiding administrative judges and the appellate judges, both civil and criminal. I appreciate their help, and I believe what I say here reflects the view of the great majority of them.

Your invitation is, I think, an appropriate recognition that there are three branches of our government.

The very first article of the Constitution of the Republic of Texas provided that "the powers of this government shall be divided into three departments...which shall remain ever separate and distinct."

This provision was carried forward in Article II of our present constitution of 1876 as requiring "three distinct departments, each of which shall be confined to a separate body of magistracy to wit,

to those which are Legislative to one,
those to the Executive to another,
and those which are judicial to another;
and no person, or collection of persons, being
of these departments, shall exercise any power properly
attached to either of the others..."

The constitution does not expressly say that the three branches shall be equal. The facts of life are that some groups are more equal than others. But I think that it does mean that there shall be three branches of government which shall be separate, and of equal dignity. All three branches must act, and be in a position to act, if the constitutional mandate of the people is to be carried out.

I mention this at the outset because I have noticed a tendency in the past of some persons, not of these Houses, to regard the State as being made up of two important branches,--the executive and the legislative; and the judiciary is relegated to the status of an agency or bureau.

The point is not that personal egos are offended, because that is not important.

What is important is that the people of Texas must have confidence in our judicial system, and are demanding, and have a right to demand, that the third branch of government,--the Judiciary, be an efficient, effective and independent arm of the government.

Those of us, as individuals, in the judiciary, must bear our full share of this responsibility. There are among us, some lazy and inefficient judges. But after all, the judges of this State are ultimately elected by the people.

Most judges, on the other hand, I believe, are dedicated and hard working people who are doing their best with the system and the tools at hand, to make the system work.

A major part of the responsibility, however, is in your hands. The solution to many of the problems of the third branch are within your power to strengthen and correct.

The internal system which we have, and the tools we are given to work with efficiently, must be provided by you.

Criminal Justice

A major part of the problem, and the understandable impatience of the people, lies in the administration of criminal justice.

A recent poll taken at Sam Houston State University at the Criminal Justice Center, documents what we all know:

- that criminal justice is too slow;
- that 57% of the people fear that they will be a victim of a major crime in the next year;
- that while most persons accused of crime are fairly treated, the victims of crime are not.

While many people feel that the judiciary should be active in crime prevention, that is not its function.

But it should be our function to bring these accused to justice, with a finding of guilt or innocence, without delay;--and to act with such dispatch that the judicial system act not only to free the innocent, but afford sure and speedy punishment to the guilty so that there is a deterrent to crime. In this we are not succeeding, though there has been a marked improvement, particularly at the trial court level in recent times.

The Criminal System

The Republic of Texas, and the State of Texas, began with a unified court system. All courts, including the Supreme Court, had civil and criminal jurisdiction. I am still of the view that this is the best system, and one used by the federal government and all states except two. But I will not dwell upon that here, except in one respect dealing with the Courts of Civil Appeals.

In 1891, one separate court of appeals for criminal cases, as well as courts of civil appeals were created. That was done when the State had a total population of two million, and its largest city was Dallas with 38,000.

There was no need, then, for more than one court of appeals for criminal cases. There certainly is now.

One of the major sources of delay in the disposition of criminal cases is that the appeal in virtually all criminal convictions of whatever nature must go to one court, the Court of Criminal Appeals.

Those judges are able people, and they turn out an amazing number of opinions. But there is no way that one court can handle the load. It cannot, even with an enlarged court sitting in panels, catch up with, or handle in the future the number of criminal cases.

Since 1970, the number of its cases have tripled; and despite diligent work, the court has fallen farther and farther behind in its backlog. If the present rate of filings persist, that court will have a caseload of almost 6,000 cases by 1980.

The situation is now, and I get these facts from the court itself, that on the average, a case filed in that court today will not be heard for well over a year. And if either side requests oral argument, the probability is that the case will not be heard for 17 to 18 months.

It is now clear that we must adopt, or perhaps adapt, the intermediate level court system to handle the great bulk of criminal appeals.

At the same time, there should be a mandatory review by the Court of Criminal Appeals of capital cases; and I suggest a direct appeal. Other cases should be taken, or denied, by the Court of Criminal Appeals by discretionary review; i.e., by writ of certiorari as is done by the Supreme Court of the United States.

The people, and you, have already established 14 intermediate appellate courts. A recent constitutional amendment provided that the number of judges on each of these courts could be enlarged; and you have already enlarged three of them to six-judge courts. These courts are authorized to sit in panels; and, if you direct, they could sit in civil and criminal panels. My recommendation is, however, that all of the judges should be empowered to hear both civil and criminal matters.

Six of the present 14 courts of civil appeals could, and would, hear more cases if they had them. They are badly under docketed. The judges are able and willing, but each of these courts get appeals in only an average of about seven cases per month. Our Court adjusts the dockets of the various courts and transfers cases to these courts to equalize the dockets.

The present intermediate appellate courts should be given criminal, as well as civil, appeals. They can handle them; and the judges of the courts are willing to do so. All who have written me, and many have, think this step should be taken.

It would be my view that you could, and should, make the appeal in many criminal cases, certainly including misdemeanors, final, in the court of appeals,--with the

Court of Criminal Appeals having power to resolve any conflicting holdings of the various courts, and a discretionary review of other holdings.

In civil matters, many cases are now final in the courts of appeals,--divorces, election contests, and the like; and the system has worked well.

Moreover, less than half of the decisions of the courts of civil appeals are appealed to our Court. And of those in which application is made to us, we take for oral argument only about one out of six or seven cases. The result is that much time and expense is saved, and matters do become final at the court of appeals level. The same should be true of criminal cases.

I, therefore, respectfully suggest that you submit a constitutional amendment to accomplish this result. This proposal is also recommended by the Texas Judicial Council and the Judicial Planning Committee of Texas.

The Court of Criminal Appeals has another major problem. Forty per cent of its operating funds now come from the federal government by LEAA grants. Those federal funds are being reduced and may be phased out.

The function of that court is a State responsibility, and it should be State funded.

The same is true with regards to funding of the Office of Court Administration and the Texas Center for the Judiciary which furnishes needed training to new judges.

Violent Juvenile Crime

As we are all aware, there is a growing amount in the numbers of violent and serious juvenile crime,--murder, robbery, burglary, and rape. Many are by juveniles old enough to know better but are beneath the age when they may be certified as adults for trial. We would hope that each juvenile could be rehabilitated; and it would not help most of our juvenile offenders to be locked up with adult hardened criminals.

But one may question whether it is realistic to say that Juvenile Courts are equipped to rehabilitate and treat all juveniles, whether they be status offenders, juvenile delinquents, or violent criminals.

Our statutes are beneficently designed to provide rehabilitation for all minors, and without regard to the number of crimes committed, or the seriousness of the offenses. The "trial" of all minors is civil in nature, with the judge, and others, acting as counsellor. The judge does not find the person guilty of a particular crime, and does not sentence the offender.

There is a growing feeling, in some responsible quarters, that adult crimes like murder, robbery by firearms, and rape, deserve adult treatment at least among the older juveniles.

It occurs to me, as it may to you, and to members of the public, that steps must be taken to deal with vicious and violent juvenile crime, and the seriousness of the offense, or offenses, committed should be considered in at least some stages of the matter, as well as the background of the child.

Juvenile Probation

Moreover, in my opinion, there is not adequate provision for juvenile probation. Many counties have no probation boards, or the personnel to handle juvenile probation.

You may wish to consider whether a State Juvenile Probation Commission should be established; or whether the Adult Probation Commission should be given authority over juvenile and adult offenders; or whether the Texas Youth Council be given this power.

You may also wish to consider whether each county, which does not have one, should be required to establish a juvenile board, or be included in a regional board.

Voir Dire

Also in the criminal area, there is another pressing problem, which faces all who are concerned with the great amount of time being taken to select juries in death penalty cases.

The public, with justification, simply cannot understand why it should take weeks or months to select a jury in a capital case--at great expense to the public.

You are familiar with such cases. In one, it took 53 days to select a jury; and the cost to the county of just that voir dire time was over \$60,000. In another recent case before the Court of Criminal Appeals, it took 16 days to pick a jury and only five days to try the case. This means, among other things, that the court facilities are unnecessarily at a standstill while other cases could be tried.

The actions in these and other cases have been within the law, and I intend no criticism of the courts or counsel for these delays. But if this is not corrected, it will cause serious problems to the administration of justice.

Although few would deny that fairness and due process must be carefully applied where a person's life is at stake, certainly all should agree that our trial judges must be given discretion to assure that the selection of a single juror does not consume days or weeks of a court's regular attention.

Such a statute is not necessary in the trial of civil cases; and I urge the trial judges to exercise the discretion which our court's decisions say that they already have to expedite jury selection. But in consultations with the Court of Criminal Appeals, it is felt that a statute is necessary in criminal cases.

I recommend that you enact a statute making the court-adopted civil rule applicable to the trial of criminal cases, including capital cases.

Speedy Trial Act

This Legislature, at its last session, enacted a Speedy Trial Act for criminal cases. It requires that persons accused of a crime shall be brought to trial within certain specified periods of time.

A commission appointed by the Governor, has been working on that Act; and some modifications will be suggested to you.

The purpose and thrust of the Act is, in my opinion, a good one.

Since its enactment, the time from arrest to trial has been substantially reduced. The presiding judges of our administrative districts tell me that the Act is working.

In the past, many district judges tried only civil cases. Now most, or many, try both civil and criminal. In El Paso, only two district judges used to try criminal cases. Now all 12 of them do. In San Antonio, over half of the judges try criminal cases. For those judges who felt the need of a refresher course in the trial of criminal cases, a full week's seminar was held in Austin; and many judges attended voluntarily. Any good judge can try civil or criminal cases, and should be prepared to do so.

While the trial judges are making a determined effort to comply with the Speedy Trial Act, they need help from you in the form of staff, administrative help, and court reporters, to insure an undelayed flow of disposition of criminal cases. And while criminal cases should be given priority, the trial judge must also move the civil docket.

Trial Courts

In this regard, the district judges, who are, and should be considered as State officials, should be the concern and responsibility of the State. They can do a better job in trying and disposing of more cases, criminal and civil, if they are given some assistance. The same is true of the judges of the county courts at law.

A court administrator, or at least a secretary and a bailiff, should be available to each of these judges so that they can move cases with dispatch. This is a State responsibility,--a necessary part of the third branch. The people of Texas should afford these necessary tools to the trial judges from the State level, rather than to have the trial judges argue and bargain with the local county commissioners courts.

Speedy criminal justice must begin at the trial court level, and State responsibility at the trial level certainly merits your attention.

Finality of Judgments in Traffic Cases

And finally in the so-called criminal areas, there is a mountain of undisposed of traffic court violations, and appeals from such violations.

A person with financial means, or one who can afford a lawyer, can plead guilty, or nolo contendere, or even be found guilty in a justice or municipal court,

and then get a whole new trial (de novo) at the county level. There are many thousands of these cases throughout the State.

These cases must either be tried again or dismissed. Thousands are dismissed each year; which often means that the little people pay and the more affluent do not.

The retrial, or trial de novo, of all such offenses is not only self defeating, but greatly clogs the dockets of the courts.

Several proposals are, or will be, before you for the solution of these problems; and the adoption of a suitable statute would greatly improve the administration of justice.

Small Claims Courts

The recently adopted constitutional amendment authorizing the increase in the jurisdiction of the justice courts should be a major improvement in the accessibility to the courts by those having small claims.

Though many people do not know of their existence, your statutes also provide for Small Claims Courts,--where the filing fee is only \$3.00, and the rules of procedure are greatly relaxed. At present, they are presided over by justices of the peace; and the overlapping with the regular justice courts makes the small claims court almost invisible.

Many states have greatly enlarged the function of these courts;--where lawyers are available but are not needed. These are places where persons of little means can have access to a dispute settlement in a minimum amount of time.

If your schedules permit, I respectfully suggest your giving more substance to Small Claims Courts, and that their jurisdiction be raised to \$500 or such sum as you see fit. Otherwise, I respectfully suggest your appointment of committees to study the matter before your next session.

Legal Education and Lawyers

Experienced and properly trained lawyers greatly contribute to the expeditious, and non reversible trial of criminal and civil cases. Graduates of at least every State supported law school should be prepared properly to represent the citizens of Texas in the courtroom.

The law schools, on balance, do a good job of legal education; and their inability to provide clinical education stems in part from a lack of funds for such training. You may want to consider this in your deliberations as to law schools so that at least those who want to go into the courtrooms will have the opportunity for proper training. Otherwise, they get on-the-job training at the expense of their clients and of the judicial system.

In this regard, the Federal courts are so impatient that they contemplate separate bar examinations to be sure that lawyers are competent in their courts. This should not be necessary.

Traditionally and inherently, the regulation, admission, and discipline of attorneys has been a function of the judicial branch and of the Supreme Court of the various states; and we perceive it to be a proper function of our court.

Civil Cases

I have here emphasized the need for help primarily in the criminal area; and while I will not take much more of your time, there are a few things that need to be said about the civil docket and about courts in general.

You are already familiar with the judicial explosion in both civil and criminal cases.

One way to cut down on the courts' dockets is to reduce the number of cases brought to court. Alternatives to court action, and the reduction in the cost and time of litigation, need to be seriously considered.

Arbitration

The Constitution of Texas has provided since 1845 that

"It shall be the duty of the Legislature to pass such laws as may be necessary... to decide differences by arbitration. . ." [Art. 16, sec. 13].

In most states, a large volume of litigation is disposed of by arbitration, and I think this should be encouraged. Several states have statutes requiring compulsory arbitration of relatively small claims. The parties do not have to abide by the arbitration; but if arbitration award is appealed to the courts and lost, they must pay the attorney's fees of their adversary and court costs.

I do not advocate going that far, but I do suggest that you consider a more usable voluntary arbitration statute. We do have a statute, but it contains many restrictions which cause it to be seldom used.

Neighborhood Dispute Centers

Some states, led by Florida, are now using neighborhood dispute centers. People having minor conflicts, either civil or criminal, and without the necessity for lawyers, are referred to a dispute center presided over by some respected mediator, a member of the community,--and not necessarily a lawyer.

The LEAA is providing \$600,000 for pilot Neighborhood Justice Centers in Atlanta, Los Angeles, and Kansas City; and I'm sure that you, or your committees, will be interested, as we are, to follow their success or failure.

Ultimately, we must have a way of solving minor problems, which are major to the people who have them, with speed and with a relief to the courts' dockets.

Venue

The congestion in the dockets of the courts and jury time could be substantially reduced by a revision of the venue statutes.

In simple language, venue means a determination as to where a case will be tried. Generally a person may be sued only in the county of his residence. Your Article 1995 provides many exceptions; and the adjudication of these exceptions generate much litigation.

It is a gross extravagance of the time of jurors, litigants, of courtroom facilities, and the judiciary's docket for there to be two separate jury trials in these cases.

Where venue is contested, and it often is, the first trial is to determine where the case is to be tried; i.e., whether the plaintiff can prove by a preponderance of the evidence that the defendant was at fault in a particular county. The result of that trial is appealable. After some two years, that matter of where the case is to be tried is finally settled. Then the parties go back and try the case to a second court and jury,--and the appeal starts over again.

The right of a person to be sued in his or her home county is an important one. But like other matters, the proof, or establishment, of that right, and related venue procedures, have gotten out of hand.

We need your help to remove this large volume of cases of venue from our dockets, and to speed to adjudication of cases.

Court Administration

A few words need to be said about the administration of the court system,--mainly of the district courts and county courts at law.

Because our system was set up in 1891, and our population was largely rural, virtually all court case flow is handled on a local or regional basis. Perhaps in the future, you will want to consider strengthening the court system by providing for more state-wide coordination.

As of now, each trial judge has a large degree of independence; and about the only provisions for coordination and control the judiciary has lies in the hands of the trial judges who preside over the nine regional administrative districts of Texas.

This is the system which we have, and will have for the foreseeable future. I therefore respectfully suggest that since the trial courts are administered by those nine presiding administrative judges, they should be given the tools and the staffs to do their jobs well.

Most of these administrative judges are also active trial judges. They necessarily must spend most of their time in the courtroom. They are, in my opinion, overworked and under paid.

They need a staff to keep them informed as to when other courts and judges are busy or not; when court rooms are in use and when they are not; and as to when judges should be brought in or moved. Your assistance is needed to see that they have the facilities to operate the courts in their regions, in an expeditious and business-like manner.

The Civil Docket

The docket of civil cases, trial and appellate, is at present, manageable.

The number of cases which the Courts of Civil Appeals handle has doubled in number in the past few years, and the difficulty of their cases has increased. Nevertheless, the dockets of these 14 courts are current; and, as indicated, they can handle additional cases.

At our latest monthly report, -- last month, only 2 submitted cases had been pending in any of the 14 courts in excess of six months time; and both of them have now been disposed of.

Civil dockets, both trial and appellate, as well as criminal filings, will continue to grow for several reasons,

- the growth and complexity of our population;
- the addition of new causes of action such as those dealing with environmental law, truth in lending, consumer protection and products liability; and the like
- as well as the increase in the divorce rate and family law problems.

Impact Statements

At this and future sessions, you will probably create additional causes of action, and new forms of relief and accessibility of citizens to the courthouse.

It is respectfully submitted that you consider, with each such bill, a judicial impact statement as well as a financial or budgetary impact statement.

It is not unreasonable that when additional potential cases are added to the judicial dockets, you also consider the courts' ability and capacity to dispose of them.

The Texas Supreme Court's docket is current. Including cases argued only last week, we have only 17 cases which have been argued to us in which opinions have not been written.

While we are authorized by the constitution to sit in sections or panels, all nine justices sit on all matters except in the granting of habeas corpus.

The great bulk of our case load is upon writs of error,--deciding which cases to make final without the delay of oral arguments and written opinions. But we require that an internal memorandum, the equivalent of an opinion, be written by each judge on each case and circulated to the others before it may be brought before the court for disposition by the entire court.

Our court also has many administrative duties,--the promulgation of rules of civil procedure; rules for district and county attorneys; the organization, admission and discipline of court reporters; the admission and discipline of lawyers; the ethics of lawyers and judges and the like.

I spend well over half of my time in working with the nine presiding judges and other administrative matters,--in addition to carrying a full one-ninth of the purely judicial responsibilities.

These matters are not mentioned to belabor our responsibilities, but to dispel the belief held by some, others than yourselves, that our productivity is to be judged by the number of written opinions produced.

Our function, as part of the third branch, is to expedite the proper disposition of cases and to try to make the system work as well as we can.

We are prepared to handle an additional case load by dividing ourselves into sections,--or panels--as the court did when I was a law clerk, and the court was 3 years behind with its inherited case load. I hope that this will not be necessary; and that we will be able to continue our judicial and administrative responsibilities in an effort to make the third branch operate more efficiently and swiftly.

Rules of Civil Procedure

You have delegated to us the power and duty to promulgate rules of civil procedure.

In making these rules, we have worked in cooperation with your committees and with individual Legislators.

The thrust of our efforts has been to expedite and simplify trials so that all may have access to the courts for the speedy disposition of their problems. The costs and speed of service of process and subpoenas have been greatly reduced. The number of jury issues have been greatly reduced and simplified, and have been brought into line with your directive of comparative negligence. The authorization of ten to two jury verdicts has reduced the number of mistrials and the required re-use of courtrooms and juries for new trials.

We are presently working on the reduction of time and expense in discovery proceedings and other matters, including uniform rules of procedure among the nine administrative judicial districts.

Judicial Retirement Act

The Judicial Retirement Act, authorized by the Constitution and our statutes, was one of the finest things ever done to encourage able men and women to leave their private practice and to accept the Judiciary as a career,--for far less money than they could make in private practice. Let me hasten to add that I do not ask for additional funds or benefits upon the retirement of judges.

The intent of the Retirement Act was to encourage judicial careers and the judicial experience that goes with such service. It began with a requirement of 24 years of service, or ten years next before the age 65.

The statutory eligibility to these benefits have been relaxed, over many legislative sessions, to where a person with four years of military service can earn full judicial retirement in eight years.

Thus a person can enter the judiciary and retire at age 45, and be entitled to full judicial retirement when he or she reaches 65.

I suggest that as to persons entering the judiciary in the future, you consider returning, and strengthening, the incentive of a judicial career.

Judicial Appropriations

Throughout this message, reference has been made not only to needed structural improvements, but to the need for the personnel and equipment to get the job done.

The latter translates into needed appropriations to allow the third branch to operate efficiently.

We of the third branch heartily agree that there should be zero based budgeting,

--that no money should be appropriated, or spent, which is not absolutely necessary to carry out a proper and necessary governmental function.

But, as I stated at the outset, the third branch is one which public demand does operate; and the needs of the third branch can be met and should be met, without measurably affecting the State's overall budget.

In the budgetary material furnished to you by the executive and legislative budget people, are pie charts, --showing how the State's funds are allocated. The amounts shown for the judicial branch either are not shown or need an arrow to point to the very small portion.

The amount allocated on those charts to the other branches of government constitute well over 99% of the funds appropriated.

The amount the third branch receives from the state funds does not amount to even one percent of the total. It receives approximately 1/3 of 1% of your total appropriations.

The total state appropriations for the judiciary for the current fiscal year is a little over \$22 million,--approximately the same amount as that for each of the following:

- the Committee on the Aging, or
- the Adult Probation Commission, or
- the San Antonio State Hospital and Special School, or
- the Support Services Division of Department of Public Safety
- and only 1/4 of the appropriations for the Department of Corrections.

All of the above are worthwhile and necessary projects; and the comparative appropriations, and their mention, is just to put judicial appropriations in context with other governmental functions.

Other and larger funds are furnished the judiciary by city and county operations, and some funds are received from the federal government.

But over all, the judiciary brings into the system approximately \$125 million in revenues in the form of court costs, fines, forfeitures, and other matters.

Subtracting the total revenue generated to the total amount expended on the third branch, we are talking about a net of a little over \$19 million expended for the entire judicial branch at all levels.

So let me emphasize again, that the third branch can be funded, so that it will work with much greater efficiency, without encroachment on the overall tax structure of the state.

Judicial Selection and Tenure

Finally, a word about the selection and tenure of judges.

The quality of the people who serve as judges is of the utmost importance in carrying out any system of justice under law.

While, as many of you know, I have some strong views, there are reasonable differences of opinion on how judges should be selected and removed. There is, I believe, a great deal of room for improvement; and I hope that at this, or some future session of the Legislature, you will address this subject.

All of the above recommendations for judicial structure, and judicial tools are highly necessary. But in the last analysis, it is the integrity, intelligence, and diligence of the individual judge,--and all of the individual judges,--which will more nearly cause justice to be done in the least possible time.

Again, we thank you for the invitation to present this judicial message to you.

I assure you that all of us in the judicial branch appreciate your concern and your help.