

STATE OF THE JUDICIARY

A Report to the 74th Legislature

by Chief Justice Thomas R. Phillips
Supreme Court of Texas

April 3, 1995

STATE LAW LIBRARY

I appreciate this opportunity to report in writing to the Seventy-Fourth Legislature on the State of the Judiciary in Texas. Already, this legislative session has devoted more attention to court-related issues than any session in modern times, perhaps in our history. You are engaged in bold and often controversial efforts that will change the substantive law applied by virtually all state courts, whether in civil, criminal, family, juvenile or probate matters. The people of Texas will be affected by your actions for many years to come.

You need not hear from me in most of these areas. As the Chief Justice of the United States recently explained, the substantive nature of the laws you pass "are questions upon which a judge's view should carry no more weight than the view of any other citizen. . . . There is certainly no formal inhibition on judges publicly stating their own personal opinions about matters of policy within the domain of Congress, but the fact that their position as a judge may give added weight to their statements should counsel caution in doing so."¹

Some of the changes you are contemplating, however, may impact the procedures, rules,

¹William H. Rehnquist, 1994 Year-End Report on the Federal Judiciary 8.

or operations of the courts. In those instances, judges and lawmakers should cooperate to insure that justice is administered to meet the people's needs. Thus, in the course of this Report I will respectfully offer my views on several matters pending before you.

The Judicial Workload

Over the last two years, all the courts of Texas have worked hard to resolve the disputes before them. The sheer volume of matters heard and resolved by our courts is amazing. Each year, more than 15,000 appeals are filed in the sixteen appellate courts, while over 700,000 cases are filed in 386 district courts, over 600,000 cases in 440 county courts, over two million cases in 885 justice courts, and over six million cases in approximately 857 municipal courts. In all, there are almost as many lawsuits brought in our courts each year as there are registered voters in our state.

Despite these staggering numbers, most judges manage to resolve most matters in a timely and correct fashion. In fact, the state's two courts of last resort have both made substantial progress in reducing delay, as Appendix A shows. The efforts of the Court of Criminal Appeals have been especially impressive, as those judges have reduced their backlog despite a sharp increase in filings.

Many of our trial courts, using advanced technology and aggressive case management, have also achieved dramatic reductions in backlog. For example, the twenty-five district courts giving preference to civil cases in Harris County have reduced their pending caseload from

101,482 in 1985 to 37,527 in 1994. Those judges credit their progress to these six techniques and resources: individual dockets, judicial control of trial schedules, court coordinators, individual computers, alternative dispute resolution, and visiting judges.

Unlike most states, our Legislature provides no financial support to trial courts beyond judicial salaries.² If a county is either unable or unwilling to provide computer hardware, the court cannot make use of the excellent case management software developed by the Office of Court Administration. If the judge has no coordinator or secretary, litigants will not have the benefit of modern case management techniques. Frequently, our rural counties are too financially strapped to give any supplemental support to the judiciary. Thus, I hope you will support S.B. 1249 by Senator Montford and H.B. 2375 by Representative Junell, which would allow the state to provide court coordinators and computers to rural multi-county judicial districts. I am also encouraged by the support, in and out of the Legislature, for S.B. 1499 by Senator Montford, which would provide state funding to hire magistrate judges and operate additional courts in the largest urban counties. Along with your continued generous support for automated equipment in the appellate courts, these measures reflect a growing concern by state government for the prompt resolution of cases in all levels of courts.

²In fact, Texas has the largest percentage of locally-employed court personnel of any state in the union. National Center for State Courts, Sourcebook of Criminal Justice Statistics 1992 at 24-28. The various funding sources for Texas courts are set forth at Appendix B.

Administrative Initiatives

In addition to deciding lawsuits, most Texas judges have significant administrative duties.³ The Supreme Court in particular exercises a wide array of administrative responsibilities entrusted to us by the Constitution, by legislative directive, and through our inherent authority. During the last biennium, we were particularly active in these areas:

◆ **Judicial Appointments and Fees.** Last year, the Supreme Court began requiring public disclosure in civil cases of all fees paid to persons appointed by a court to render services.⁴ Because compliance remains incomplete,⁵ we would welcome a law with such requirements, such as H.B. 482 by Representative Denny, but with sanctions for noncompliance.

◆ **Code of Judicial Conduct.** In 1994, the Court adopted extensive revisions to the Code of Judicial Conduct, largely modeled on the American Bar Association's 1990 Model Code. One significant change restricts the time during which judges can engage in political fundraising.⁶ The Court has recently considered another amendment to the Code that would prevent sitting judges from seeking non-judicial office, but we have deferred that decision

³A simplified chart showing how our courts are administered is attached as Appendix C.

⁴Amended Order Regarding Mandatory Report of Judicial Appointments and Fees, Misc. Docket No. 94-9014, January 18, 1994, as amended by Misc. Docket No. 94-9143, September 21, 1994. Our order is supplemented by directive of the Texas Judicial Council instructing district and county clerks to report such appointments to the Office of Court Administration. Minutes of the Texas Judicial Council, January 21, 1994.

⁵See, e.g., "Saga of a Secret Fee: Judge's Friend Pockets \$400,000 as Guardian," *Texas Lawyer*, February 6, 1995, p. 1.

⁶Texas Code of Judicial Conduct, Canons 5(4) and 5(5).

pending further consultation with the judiciary.⁷

◆ **Lawyer Advertising.** At the direction of the Seventy-Third Legislature,⁸ the State Bar of Texas prepared amendments to the Texas Disciplinary Rules of Professional Conduct to further regulate law advertising. The lawyers of Texas approved these rules by an overwhelming margin.⁹ After changing certain provisions, the Supreme Court approved the rules last November, and they were in large part upheld by a federal district court ruling released last Friday.¹⁰ The Court has delayed the effective date of the rules until July 29, 1995,¹¹ and will consider possible further amendments to the rules in the interim.

◆ **Gender Bias in the Courts.** In 1994, the Supreme Court's Gender Bias Task Force issued its Final Report, concluding that "gender bias in the Texas courts does exist and that too many Texans -- both women and men -- experience discriminatory or inequitable treatment in the Texas judicial system because of their sex."¹² The Court continues to study implementation

⁷A recent poll by the Clerk of the Supreme Court of appellate, district, and statutory county court judges reveals that 110 favor such a change, 114 oppose it, 8 favor if certain modifications are made, 5 oppose unless other modifications are made, with 418 making no response. If the Court does enact such a restriction, which is found in the ABA Model Code and approximately 41 state codes, it will not take effect until after the 1996 election cycle.

⁸Act of June 16, 1993, 73rd Leg. R.S., ch. 723 § 7, 1993 TEX. GEN. LAWS 2834 (1993).

⁹Two proposals encompassing these amendments were approved by votes of 27,161 to 3,544 and 22,908 to 7,679. 57 Texas Bar Journal 623 (1994). An earlier referendum passed by a similar margin, but was not effective because less than 51% of the eligible attorneys participated. 57 Texas Bar Journal 12 (1994).

¹⁰*Texans Against Censorship, Inc., et al. v. State Bar of Texas, et al.*, United States District Court for the Eastern District of Texas, Paris Division 3:94 cv 61 (March 31, 1994).

¹¹Amended Order of Promulgation and Adoption of Disciplinary Rules, Misc. Docket No. 95-9074. April 3, 1995.

¹²Report at 3 (emphasis in original).

of the Task Force's recommendations.

During the next biennium, the Court will address other issues critical to the fair and efficient administration of justice, including whatever tasks you may request of us. Among the areas of special emphasis will be these:

◆ **Court Rules.** The Supreme Court's ongoing efforts to streamline civil litigation in Texas are nearing fruition. Our Rules Advisory Committee has already sent us its proposed revisions to the appellate rules, and we expect to receive its proposals on discovery, sanctions, and other trial rules soon. Over the years our procedures, particularly relating to pre-trial discovery, have become too complex and too cumbersome, frequently serving more to increase the cost of litigation than to enhance its fairness and efficiency. We anticipate that our rules, when adopted, will be a signal advance in making our civil trial system more affordable and more accessible. Because of our confidence in these efforts, we especially request that you use caution in passing laws that restrain or restrict the Court's rulemaking authority.

◆ **Pro bono legal representation.** In *State Bar of Texas v. Gomez*, 891 S.W.2d 243 (1994), the Supreme Court held that a state district court lacks jurisdiction to order the State Bar to implement a mandatory pro bono program. Accordingly, we transferred the issue to our administrative docket for resolution in an appropriate forum. We seek input from all interested persons as to whether the Supreme Court should mandate further pro bono services from the legal profession, and if so, what form that mandate should take.

◆ **Foster Care.** In 1994, the Supreme Court created a Task Force on Foster Care, funded by the Federal Children's Justice Act Grant Project, to study ways to improve the handling of child abuse cases in Texas.

◆ **Bar Examination.** The Board of Law Examiners is currently seeking input on whether and how to revise the subjects tested on the bar examination. The Court should act on any recommendations later this year.

Judicial Selection

Although our courts are generally performing their duties well, our entire system of justice suffers because of Texas' abysmal method of judicial selection.¹³ Public confidence in the fairness of our decisions, and the national and international reputation of our entire legal system, will continue to deteriorate until our current method is replaced with a modern system of choosing judges.

The entire litany of defects in our current system is well-documented and well-known; I need not repeat the usual arguments here.¹⁴ If you are not already convinced that there is a

¹³Most regular judges in Texas are selected in partisan elections, with vacancies filled by appointment. A chart showing all the ways by which judges may be selected in Texas is attached as Appendix D.

¹⁴I catalogued most of my complaints about the current system in my 1989 and 1993 State of the Judiciary addresses. I have also criticized the system in various editorial comments, including "Judicial Selection Reform," *Eye on Texas*, November/December 1991; "There's a better way to finance judicial races than the way we do in Texas," *Houston Chronicle*, October 18, 1992; "Party, money shouldn't decide judicial races," *Houston Chronicle*, March 4, 1993; "Several possibilities for fixing how judges are picked in Texas," *Houston Post*, August 14, 1994; "Time to change an intolerable system," *Houston Chronicle*, December 4, 1994 (with Attorney General Dan Morales, Senator Ike Harris, Senator Rodney Ellis); "GOP sweep shouldn't obscure need for Texas court reform," *Dallas Morning News*, January 27, 1995 (with former Governor Bill Clements).

problem, probably nothing I can write here will change your mind. But if you do believe that a less partisan, less expensive and more inclusive system would be better for our state, I think that this session is the ideal time to effect such change.

One reason for reform is our ongoing problem with the Voting Rights Division of the United States Department of Justice, which is denying preclearance for any new urban Texas courts until we implement a new selection system. Rumors abound that the Justice Department may even seek a court order to shut down the visiting judge program, which currently provides 17% of the total days of judicial time in the district courts of Texas. I am hopeful that the state's legal position will prevail in any current and future litigation, however, and I would not adopt a bad system merely in response to this threat.

A better reason for change is that the people want and deserve a better system. In every recent poll, the overwhelming majority of Texans have endorsed both merit selection and non-partisan elections. Nearly all Texans want at least a chance to vote on a new system. All the state's major newspapers, together with numerous legal and civic organizations, have called for selection reform.

For six months last year, a diverse group of legislators, judges, and others met at the request of Lieutenant Governor Bullock to consider this issue. Their recommendation reflects a careful compromise between those groups who most want to depoliticize the judiciary and those who most want to diversify it. The essentials of this plan are incorporated into S.B. 313

and S.J.R. 26 by Senator Rodney Ellis, and H.B. 810, H.B. 811, H.J.R. 60 and H.J.R. 61 by Representative Duncan. You can no doubt improve on its particulars, but I believe the Bullock proposal is a good starting point for debate.

To those who have worked so long this session to make our legal system more balanced and more predictable, I say that your work will not be complete until judicial selection is reformed. The perception that the Texas justice system provides fair and equal justice to all will never be restored until all traces of the "justice for sale" image have been eradicated.

Court Organization

Finally, I hope that the state begins a long-range plan to simplify and modernize the Texas judicial structure. Our current system was fine for an agrarian, nineteenth century society; it is wholly inadequate for the second-largest state in the world's dominant post-industrial nation. Appendix E shows the fractured and jumbled nature of the Texas court system.

Failed attempts at structural reform are a time-honored tradition in Texas. In 1887, Texans defeated a constitutional amendment that would have given the Legislature authority to create all local courts and to prescribe the jurisdiction of all trial courts.¹⁵ In 1913, a proposed constitutional amendment nearly passed the Senate that would have established a single Supreme Court, sitting in civil and criminal divisions, a probate court in each county appointed by the

¹⁵S.J.R. 26, 20th Leg. (1887), Tex. Gen. Laws 158, 9 Gammel's Laws of Texas 956.

district judges, and one or more elected stipendiary magistrates in each county to handle minor criminal matters.¹⁶ In the 1940s and '50s, the State Bar and the Civil Judicial Council offered several proposals to empower the Supreme Court to establish and fix the jurisdiction of all lower courts.¹⁷ The Constitutional Convention's proposed judiciary article, rejected by the voters in 1975, would have allowed multiple-judge judicial districts and established a limited jurisdiction circuit court with lawyer judges in lieu of county courts at law.¹⁸ In this decade, the Texas Research League and the Texas Citizens' Commission on the Texas Judicial System, established by the Supreme Court in 1991, have offered more modest reform proposals.

You are currently considering many ideas that would increase judicial efficiency. For example, Senator Wentworth and Representative Goodman are sponsoring a number of bills that would help the Supreme Court fulfill its responsibilities, including S.J.R. 40, S.B. 1061, S.B. 1062, S.B. 1384, S.B. 1386, S.B. 1448, H.B. 2733 and H.B. 2734. Many other bills pertaining only to particular local courts also contain innovative, useful ideas. Although I realize that the local and consent calendar is an attractive method to effect needed change, I wish that these proposals could be debated by the whole Legislature and, if found meritorious, applied to all the courts.

¹⁶Senate Journal, 33rd Leg., Reg. Sess. 142-49, 458, 1757 (1913).

¹⁷17 Tex. Civ. Jud. Council Ann. Rep. 48 (1945); 19 Tex. Civ. Jud. Council Ann. Rep. 62-63 (1947); 16 Tex. Bar J. 398 (1953).

¹⁸Tex. S.J.Res. 11, 64th Leg. (1975); 2 Official Journal of the Constitutional Convention of 1974 of the State of Texas 1352-55.

Until systemic change is achieved, I would urge that you be guided by these principles in judicial legislation:

- 1) New courts or judicial positions should be created only when they will reduce, not increase, the disparity in workload between all courts.
- 2) Additional costs and fees should be authorized only when they will reduce, not increase, the disparity in cost of access to justice from one county to another.¹⁹
- 3) Jurisdiction should be granted to courts in a manner that will reduce, not increase, geographical and subject matter overlap.
- 4) Mechanisms to achieve more equal access to justice, particularly the constitutionally-created Judicial Districts Board, should either be accorded meaningful authority or abolished.²⁰
- 5) Changes which are adopted for a particular purpose, such as placing Hunt County in two appellate districts in 1934 to assist Fifth Court Associate Justice Ben F. Looney's

¹⁹"Fee Complex: The Price of Justice in Texas," Interim Report of the Committee on Judicial Affairs, House of Representatives, 3-68 (1994), although an excellent overview of the confused patchwork of fees and costs, is too timid in its final recommendations. See Resolution of Texas Judicial Council on Court Fees, January 27, 1995.

²⁰See generally *Statement of Thomas R. Phillips and William E. Moody, Dissenting to Order of Statewide Reapportionment of Judicial Districts of the Judicial Districts Board*, August 31, 1993.

1936 re-election campaign,²¹ should be repealed after the purpose for the change has disappeared.

These principles alone will not give Texas an efficient court system, but they will help reduce the "malapportionment of judicial resources" that impedes our delivery of equal justice to all Texans.²²

Conclusion

Although the judicial department requires for its operation less than one-third of one percent of the state's total budget, the just and efficient discharge of its responsibilities is at the heart of the state's obligations to its people. As President Sam Houston told the members of the Texas Congress:

No one department of government is so immediately connected . . . with the well-being of the community, as the Judiciary. The rights of the people, their peace, their property, their persons and lives, are under the conservation of the courts so long as they exist. . . .

To maintain an honest, able and enlightened Judiciary should be the first object of every free country; and in none can its influence be more salutary than in Texas, where discord, disorder and disobedience raged with so much violence. The civil authorities of the country must be established and preserved, or Texas must fail in the accomplishment of rational government.²³

We look forward to working with you in making Sam Houston's standard a reality in the Texas judicial system.

²¹Act of September 24, 1934, 43rd Leg., 3rd C.S., ch. 31, 1934 Tex. Gen. Laws 54. Today, ten counties are in more than one non-conterminous overlapping appellate judicial districts, and 111 trial judicial districts overlap with one or more other such districts with different boundaries.

²²George D. Braden (ed.), *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 408 (1977).

²³Message to the House of Representatives by President Sam Houston (Jan. 21, 1842), *reprinted in 3 LEGISLATIVE MESSAGES OF THE CHIEF EXECUTIVES OF TEXAS* 41 (P. Daniel & J. Martin eds. 1974).

SUPREME COURT

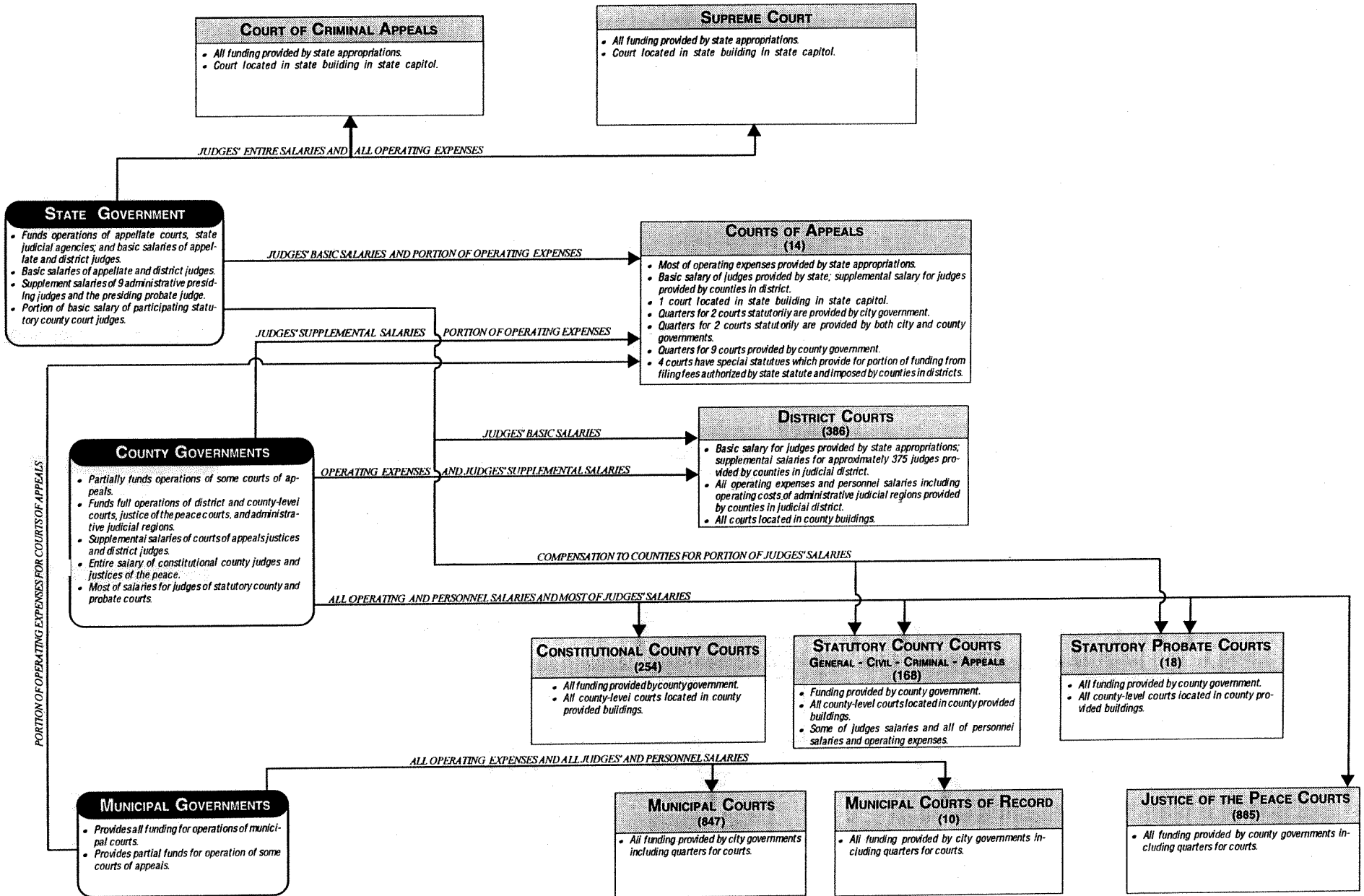
	August 31, 1992	August 31, 1993	August 31, 1994
Causes of Action Passed on during year ending	1671	1790	1641
All motions passed during year ending	1192	1651	1658
Matters Pending at year ending	751	599	557
Submitted causes pending on	57	61	17
Applications for writ of error pending on	389	354	317

COURT OF CRIMINAL APPEALS

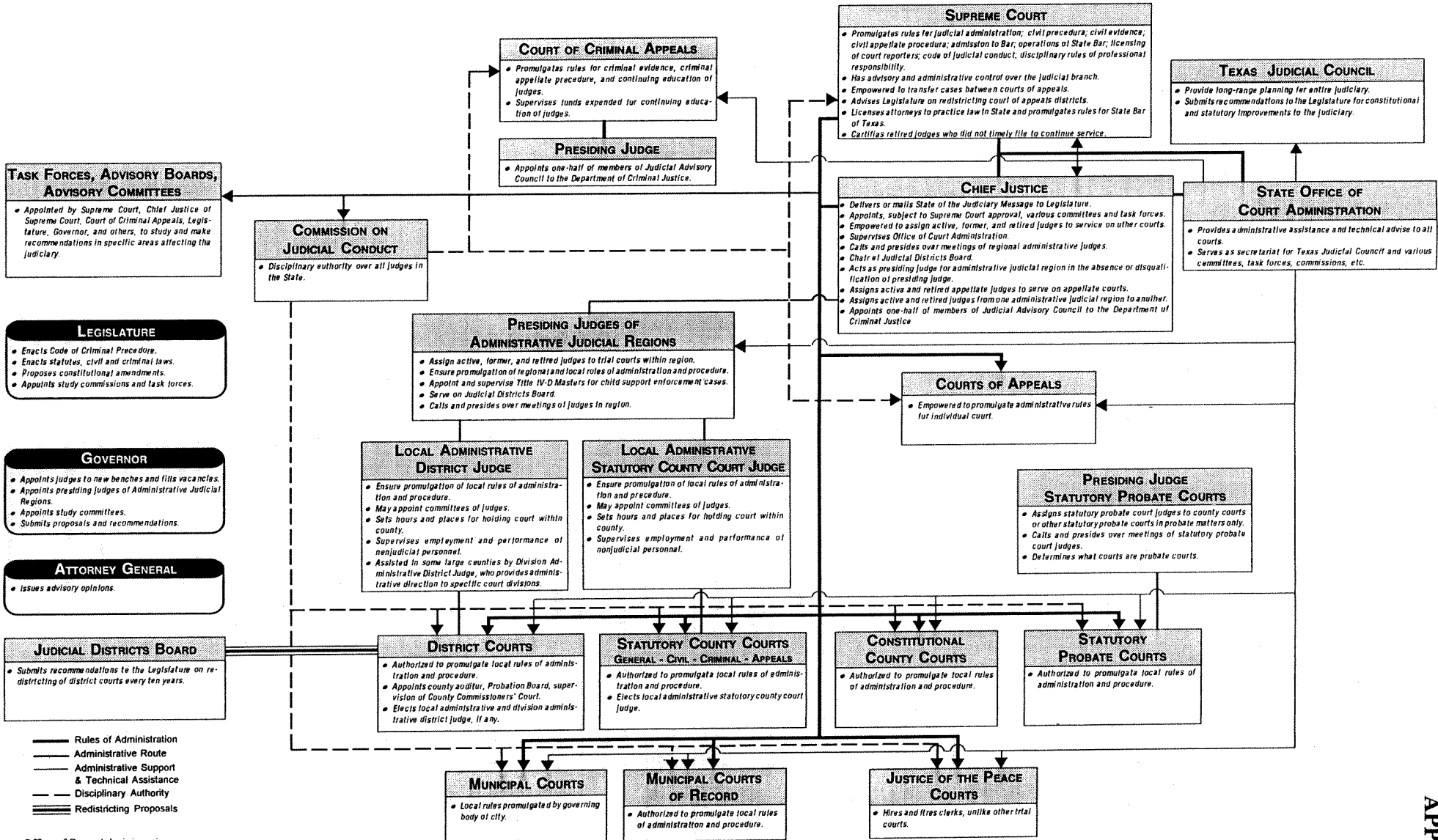
	August 31, 1992	August 31, 1993	August 31, 1994
Cases disposed of during year ending	4278	4639	5439
Motions and applications disposed of during year ending	5746	5927	6917
Matters pending on	1553	1549	1338
Submitted direct appeals, death penalty appeals, granted writs pending on	105	68	67
Petitions for Discretionary Review pending on	630	598	407

Source: Texas Judicial Council and Office of Court Administration, Annual Reports, 1992 - 94.

FUNDING SOURCES



JUDICIAL ADMINISTRATION IN TEXAS



Source - Office of Court Administration

SELECTION AND ASSIGNMENT OF JUDGES

SELECTION AUTHORITY	AUTHORITY AND DUTIES	CONSTITUTIONAL OR STATUTORY REFERENCE
Electorate	<ul style="list-style-type: none"> • Elects all appellate, district, county-level judges, and justices of the peace on a partisan ballot. • Elects some municipal court judges on non-partisan ballot. 	Const. Art 5, §§2,4,6,7,15.18 Gov't Code §25.0009 Gov't Code §29.004
Governor	<ul style="list-style-type: none"> • Fills vacancies by appointment to the Supreme Court, Court of Criminal Appeals, Courts of Appeals, and District Courts. • Appoints requisite number temporarily to the Supreme Court, the Court of Criminal Appeals, or a court appeals when the court or any member(s) is disqualified. • Appoints requisite number temporarily to the Supreme Court when a majority of the justice's are disqualified or the court is equally divided because of absence or disqualification of one or more members. • Commissions requisite number temporarily to the Court of Criminal Appeals when a member is disqualified. • Commissions requisite number temporarily to a court of appeals when two or more members are disqualified. • Appoints temporarily to the district bench when the judge certifies the need for a special judge. 	Const. Art 5, §5, §28 Const. Art 5, §11 Gov't Code §22.005 Gov't Code §22.105 Gov't Code §22.216 Gov't Code §24.002
Supreme Court	<ul style="list-style-type: none"> • Equalizes dockets between Courts of Appeals by transferring cases between the courts. • Certifies eligibility of retired and former appellate and district judges to serve on assignment who have not timely indicated their desire to serve to presiding judges. • Designates an active judge from outside of administrative judicial region to preside over lawyer disciplinary petition. 	Gov't Code §73.001 Gov't Code §75.001 Rule 3.02, Rules of Discp. Proc.
Chief Justice of Supreme Court	<ul style="list-style-type: none"> • Assigns justices of courts of appeals temporarily to sit with other courts of appeals. • Assigns active, senior, and former judges in place of the presiding judges of an administrative judicial region when the presiding judge is disqualified, unable, or absent. • Draws a panel from among the justices of the courts of appeals to hear appeals from the Commission on Judicial Conduct. 	Gov't Code §74.003 Gov't Code §74.049 Const. Art 5, §1-a(9) Gov't Code §33.034(c)
Court of Criminal Appeals	<ul style="list-style-type: none"> • May appoint commissioners to aid the court. 	Const. Art 5, §4 Gov't Code §22.106
Presiding Judge of Court of Criminal Appeals	<ul style="list-style-type: none"> • With concurrence of a majority of court, may appoint any number of active or retired district or appellate judges as commissioners to aid the court. 	Const. Art 5, §4 Gov't Code §22.107
Presiding Judges of Administrative Judicial Regions	<ul style="list-style-type: none"> • Assign active, senior, and former judges to trial courts within their administrative judicial region. 	Gov't Code §74.054
Presiding Judge of Statutory Probate Courts	<ul style="list-style-type: none"> • Assign active or retired statutory probate judges to county courts or statutory county courts in probate cases on a statewide basis. 	Gov't Code §25.0022
Local Administrative District Judges	<ul style="list-style-type: none"> • Transfer cases and assign active district judges to courts within county. Assisted in some counties by Division Administrative Judges. 	Gov't Code §74.092 Gov't Code §74.093
Trial Judges	<ul style="list-style-type: none"> • District judges may exchange benches and hold court for each other. • Trial judges may exchange benches and transfer cases within county. 	Const. Art 5, §11, Rule 330. T.R.C.P. Gov't Code §§24.002, 74.094, 74.121
Local Administrative Statutory County Judges	<ul style="list-style-type: none"> • Transfer cases and assign active statutory county court judges within county. 	Gov't Code §74.092
County Commissioners' Courts	<ul style="list-style-type: none"> • Fills vacancies by appointment to county court, statutory county courts, statutory probate courts, and justice courts when incumbent dies, resigns, or removed, or as provided by law when new courts are created. 	Loc. Gov't Code §87.041
Municipal Governments	<ul style="list-style-type: none"> • Appoint municipal court judges when charter so provides, fills vacancies when incumbent dies, resigns, or is removed. In some cities judges are elected and not appointed by governing body of city. In some small villages, the mayor serves ex officio as the judge of the municipal court. 	Gov't Code §§29.004, 29.006, 29.011
Parties	<ul style="list-style-type: none"> • Parties to a case may appoint a proper person to try case when judge is disqualified in district or county courts. • Parties to a case may agree to a special judge for a non-jury trial to be privately compensated. • One strike each against retired judges in civil cases. • Unlimited strikes against former judges in civil cases. 	Const. Art 5, §11, §16, Gov't Code §24.004, §26.014, C.C.P. Art. 30.03 Civ. Prac. & Rem. Code §151.001 et seq. Gov't Code §74.053 Gov't Code §74.053

JURISDICTION AND APPEALS OF TEXAS COURTS

