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# STATE OF THE JUDICIARY

Address to the Seventy-Sixth Legislature

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*DISTINGUISHED MEMBERS OF THE SENATE AND THE HOUSE OF  
REPRESENTATIVES OF THE SEVENTY-SIXTH LEGISLATURE:*

Thank you for the opportunity to present this, my sixth biennial State of the Judiciary Address to the Texas Legislature. By law, this message must “evaluat[e]



the accessibility of the courts to the citizens of the state and the future directions and needs of the courts of the state,” so as to “promote better understanding between the legislative and judicial branches of government and promote more efficient administration of justice in Texas.” Tex. Gov’t Code §21.004. In truth, this and the last several legislatures have worked hard to evaluate accurately and fairly the needs of the courts, and understanding between our two branches has never been better during my almost eighteen years as a judge. My report to you is that the “State of the Judiciary” is quite strong, but that it can be improved by both the Legislature and the courts.

Government derives both its power and its moral authority from the consent of the governed. This is perhaps more true of the judiciary than of other branches of government. Therefore, we are encouraged by a recent statewide survey showing that 73 per cent of all Texans believed that they would be treated fairly if they had a case in Texas courts, while 82 per cent of those with actual courtroom experience were satisfied with the process and with the judges they observed.<sup>1</sup> These positive results are a tribute to the judges, clerks and personnel of our courts, who across Texas are

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<sup>1</sup>*Public Trust and Confidence in the Courts and the Legal Profession in Texas*, Survey of 1,215 Texas adults by University of North Texas Survey Research Center, conducted by telephone July 17 to September 1, 1998.

bringing creative new approaches to resolving ever-expanding caseloads.

The Legislature has also contributed to this success by improving court administration and providing needed additional resources. The Seventy-Fifth Legislature made the Third Branch a priority by enhancing the Office of Court Administration, reorganizing the Texas Judicial Council, increasing appellate court support, raising judicial salaries, and most importantly, creating the Judicial Committee on Information Technology. This session, we ask that you build on these initiatives to strengthen our court system for the future.

### **Judicial Budget**

Bringing our courts into the information age is still our most urgent fiscal need. We are very pleased that the appropriations processes of both houses have been supportive of the work of the Judicial Committee on Information Technology. In creating the Committee in 1997, the Seventy-Fifth Legislature directed the committee to develop “a coordinated statewide communication network that is capable of linking all courts in this state,” “a state judicial web page . . . accessible to the public . . . ,” “security guidelines” to protect “the integrity and confidentiality” of electronic

information, and “minimum standards for an electronically based document system” to allow information to flow within the court system and for documents to be filed with the courts. Tex. Gov’t Code §77.031.

Meeting these statutory responsibilities is essential for the continued efficiency of the courts. Within a few years, a computer and modem will be as essential as a court room to the efficient administration of justice. Under the leadership of Dallas attorney Peter Vogel, the Committee has laid the groundwork to prepare Texas courts to meet the needs of twenty-first century justice. Details of their efforts are set out in the Committee’s First Annual Report, released January 15, 1999, which may be obtained from the Office of Court Administration.

A coordinated information system will help both court users and state and local taxpayers. For example, information technology will allow state, county and municipal governments to recover a much higher percentage of costs, fines and fees than they currently collect.<sup>2</sup> Information technology will permit more efficient court

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<sup>2</sup>See Judicial Committee on Information Technology First Annual Report at 58 (January 15, 1999). The Office of Court Administration model fines collection program in Brazoria County has resulted in increasing that county’s collection rate from 75% to over 90% since its inception in 1996, adding more than \$300,000 to state and county coffers.

scheduling, thereby reducing jail populations in criminal cases and saving money for public and private litigants in civil cases. It will increase the flow of information to judges by providing judicial benchbooks and legal research tools on-line to all courts. It will allow litigants to file papers and hold hearings without personal appearances, with especially significant savings to the state in criminal pre-trial proceedings. And finally, information technology will greatly simplify records storage and retrieval for all courts.

Moreover, Congress has mandated information from states that can only be gathered through an integrated court information system.<sup>3</sup> Fortunately, some federal grants may be available to aid states in meeting some of these requirements. Most notably, Congress in the Crime Identification Technology Act of 1998, P.L. 105-251, authorized \$1.25 billion dollars in federal aid over the next five years to help states devise systems to meet federally-imposed reporting requirements. But to be eligible

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<sup>3</sup>In this decade alone, Congress has required state courts to collect and report information under the Brady Handgun Violation Prevention Act of 1993, 18 U.S.C. §922; the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, as amended by Megan's Law, 42 U.S.C. §14071; the Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. §14072; the Adoption of Safe Families Act of 1997, P.L. 105-89; the Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, P.L. 104-193; the National Child Protection Act of 1993, 42 U.S.C. §5119 et seq.; the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §13701; the Child Support Performance and Incentive Act of 1998, P.L. 105-200; and the Deadbeat Parents Punishment Act of 1998, P.L. 105-187.

for these grants, if and when they are appropriated, a state must show that “a statewide strategy for information sharing systems is underway, or will be initiated, to improve the function of the criminal justice system, with an emphasis on integration of all criminal justice components, law enforcement, courts, prosecution, corrections, and probation and parole.” The state must also give assurances that all branches of government were considered, and that the presiding officer of the state’s highest court was consulted about grant applications. As Senator Mike DeWine, the original sponsor, explained: “Not only are the courts a supplier of information on disposition, they are also an all-important consumer of information on arrest and conviction. The courts require state-of-the-art, integrated identification systems for both functions.”

Some of the other budget priorities of the Judicial Committee on Court Funding, such as strike forces for the courts of appeals in Dallas and Houston and increased support for the State Law Library, may be met through the appropriations process alone. But at least four other priorities require independent legislation for full implementation. First, we urge your support for S.B. 1187 by Senator Armbrister and H.B. 2705 by Representative Gallego, which would provide more funding for judicial education by enlarging the Judicial and Court Personnel Training Fund (Fund

540). Second, we endorse S.B. 82 by Senator Brown, which would unify the state's judicial pension plans for district and appellate judges. Third, we support S.B. 340 by Senator Madla and H.B. 1123 by Chairman Thompson, which would set uniform pay for all statutory county courts. Finally, we support S.B. 1719 by Chairman Ellis, which would allow full per diem pay for a visiting judge rather than merely 85% of the sitting judge's salary.

### **Court Organization**

Appropriations alone will not satisfy all of the courts' needs. The Texas judicial structure needs simplification and streamlining, and previous intended reforms now may need their own reformation. The Texas Judicial Council, composed of judges, legislators, lawyers and citizens, has developed a number of proposals to improve the operation of our courts. I would like to discuss three of these.

First, S.J.R. 20 by Senator Duncan and H.J.R. 48 by Representative Gallego would ensure periodic redistricting of state judicial districts by abolishing the merely advisory Judicial Districts Board. The last comprehensive redistricting of state trial courts occurred in 1883, and the 1985 addition of Section 7a to Article V of the

Constitution was intended to effect a redistricting after the 1990 census. But the Judicial District Board's recommendations were not even considered by the Seventy-Third legislature, and no changes were made. Under the proposed amendment, the Legislative Redistricting Board would draw new districts if the Legislature failed to act after a new census, just as it now does for congressional and legislative districts.

Second, H.B. 688 by Representative Gallego would give new tools to justice and municipal courts to address the rising tide of juvenile justice issues in their courts. This bill passed the House of Representatives last week and merits support in the Senate.

Third, S.B. 263 by Senator Duncan and H.B. 639 by Representative Thompson would improve the visiting judge program by tightening the eligibility requirements for assignment and simplifying the automatic strike procedure. Visiting judges now perform the work of eight full-time appellate and ninety full-time trial judges at far less cost to taxpayers than creating new courts. We must ensure that the public retains confidence in the quality and efficiency of the visiting judge program.

I also urge your support of H.B. 1516 by Representative Gallego, which would



transfer the responsibility for appointing counsel to represent indigent convicted capital murder defendants in habeas corpus proceedings from the Court of Criminal Appeals to the convicting district court. The Court of Criminal Appeals would still promulgate rules and standards for the appointment of such attorneys.

Finally, I commend Article V of Senator Ratliff and Representative Junell's proposed new constitution, which would give Texas a much improved court structure. Under this plan, Texas would have one high court, sitting in criminal and civil divisions, and a somewhat simplified lower court structure. District clerks would be appointed by local judges, just as appellate clerks are now. The entire article would give the legislature greater flexibility to solve emerging problems than the current constitution permits.

### **Judicial Selection**

While there is no perfect way to select judges, one sure way *not* to choose judges is Texas' existing high-dollar, partisan contested election method. A decade ago, Texas showed the nation how special interest groups could try to affect public policy by approaching judicial elections just like legislative and executive races.

Now, as expensive judicial races erupt in other states, Texas can be a positive leader in enhancing the stability and independence of the third branch.

The current judicial selection system has long since outlived its usefulness. Judicial service has become a revolving door, with the median tenure for an appellate judge or justice in Texas having shrunk to less than four years and three months. As a group, our appellate, district and statutory county judges do not begin to reflect the diversity of our great state - only about 8% are Hispanic and less than 3% are African-American.<sup>4</sup> And the ethical standards of the entire Texas judiciary have been questioned by those who believe, or at least purport to believe, that modern political campaign practices are incompatible with the promise of impartial and independent justice.

There is little or nothing a judicial candidate can do to affect these realities. While most judges will freely concede that nothing about their job is partisan, no independent judicial candidate has run a viable race for state appellate or district court

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<sup>4</sup>State Bar of Texas Department of Research and Analysis, A Statistical Profile of Texas Judges (1998).

in modern times.<sup>5</sup> And while most judicial candidates intensely dislike raising funds, those who decline to raise money or severely restrict the contributions they accept are not likely ever to be called “judge,” whatever other labels they may be given. To sum up, partisan, well-funded campaigns are necessary and inevitable in modern Texas.

In truth, neither party labels nor campaign war chests necessarily compromise a judge’s ability to be fair and impartial. Most judges in Texas, as elsewhere, base their rulings on the facts and the law, not on extraneous considerations. But these attributes of Texas justice *do* compromise the *appearance* of fairness. When judges are labeled as Democrats or Republicans, how can you convince the public that the law is a judge’s only constituency? And when a winning litigant has contributed thousands of dollars to the judge’s campaign, how do you ever persuade the losing party that only the facts of the case were considered?

The recent Texas poll to which I earlier referred revealed that, despite generally favorable views of our courts, 83% of respondents thought judges were strongly or

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<sup>5</sup>In 1976, Judge Ira Sam Houston and Houston attorney Tom Lorance combined for 24.4% of the vote as write-in candidates against Democratic Supreme Court nominee Don Yarbrough. In 1990, independent Jim Scott won 20.3% of the vote as an independent candidate against Democratic Chief Justice Curtiss Brown of the Fourteenth Court of Appeals. The best showing by an independent in 1998 was Debra Champagne’s 9.3% as a write-in candidate for Judge of the 268<sup>th</sup> District Court of Fort Bend County.

somewhat influenced by contributions in their decisions; only 7% did not. That the public so strongly holds this view should not surprise us. The most widely viewed television program in the world, CBS' *60 Minutes*, asks "is justice still for sale in Texas?"<sup>6</sup> Chief Judge Richard Posner of the Seventh Circuit Court of Appeals refers to "the low professional quality and rampant politicization of many of the state judiciaries, led by Texas."<sup>7</sup> Legal ethics scholar Charles Wolfram refers to "the ritualized scandals of political spending" in Texas judicial elections.<sup>8</sup> Texas college students are taught that a "major public relations problem faced by the judicial system is the perception that many judges can be corrupted by campaign contributions."<sup>9</sup>

The Legislature has tried to improve the electoral process by passing the Judicial Campaign Fairness Act. Tex. Elec. Code §253.151 et seq. The Supreme Court has made various changes to the Code of Judicial Conduct, and we will soon promulgate further amendments based on the recommendations of our Judicial

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<sup>6</sup>November 1, 1998 broadcast.

<sup>7</sup>Commentary, March 1995.

<sup>8</sup>Wolfram, *What Will the Tobacco Fees Set in Motion?*, The National Law Journal, December 28, 1998 - January 4, 1999, page A25.

<sup>9</sup>Richard H. Kraemer, et al., Essentials of Texas Politics 185 (7<sup>th</sup> ed. 1998).

Campaign Finance Committee, chaired by attorney Wayne Fisher of Houston.<sup>10</sup> But such changes, while important, will effect only marginal improvements in an inherently defective system.

Thus, the Legislature must respond by placing a constitutional amendment before the voters. And while several good ideas have been put forth, S.J.R. 9, the appointment and retention election system for appellate judges, seems to have the most support. Under the leadership of Senator Duncan and Senator Ellis, this proposal has already passed the Senate with bipartisan support, and was referred to the Committee on Judicial Affairs of the House of Representatives last week.

Some opponents say that you should oppose this change, notwithstanding its merits, because most Texans still want to elect their judges. There are several good reasons to reject this argument.

First, under the current system, a significant number of current judges are actually appointed, not elected. The so-called elected system is now and has always

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<sup>10</sup>A copy of the Committee's report may be obtained from Mr. Robert Pemberton, Rules Staff Attorney for the Supreme Court of Texas.

been a mixed system of appointments and elections.

Second, for there to be an election under the current system, at least two lawyers who meet the constitutional or statutory requirements must decide to file. Most of the time, this does not happen. In 1998, for example, only 100 of the 257 state appellate and trial court elections had more than one candidate. In fact, eighteen of the state's 80 intermediate appellate justices and 92 of the state's 396 district judges have *never* had either a primary or a general election opponent. A retention, or "yes" or "no" election, for every judge at the end of every term would actually increase electoral control over the judiciary, not take it away.

Third, and most important, how do these critics "know" that Texans want to keep the current system? Yes, there are public opinion polls indicating opposition to change, but there are just as many or more suggesting that people support a merit selection/retention election plan. The results seem to turn mainly on how the question is phrased, not the underlying merits of the issue.<sup>11</sup> Whether the people want

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<sup>11</sup>The recent statewide poll showed that 70% of Texans wanted judges to be elected by the people, while only 20% wanted them to be appointed by the Governor subject to retention elections where people vote to determine whether the judge should remain in office. See note 1, *supra*. But other statewide polls have shown substantial public support for merit selection. In November 1995, a Baselice & Associates survey for Texans for Lawsuit Reform found that 74% favored merit selection and retention elections for appellate judges, a slight increase over the 71% who favored that

merit selection should be answered not by commissioning a poll, but by letting them vote in an open election for or against a constitutional amendment.

### **Judicial Initiatives**

Since the legislature last met, both the Supreme Court and Court of Criminal Appeals have completed important initiatives to improve the performance of our courts. In 1997, the two high courts jointly promulgated new rules of appellate procedure. Under the direction of Justice Nathan Hecht and Judges Sam Houston Clinton and Paul Womack, assisted by many excellent attorneys, the two courts made every effort to take the “traps,” the redundancies and the inefficiencies out of the T.R.A.P. rules. In 1998, the two courts also promulgated the first joint rules of evidence. In January 1998, the Supreme Court promulgated procedural rules for foreclosures of home equity loans pursuant to the Constitutional Amendment adopted in November 1997. On January 1 of this year, the Supreme Court’s new discovery rules took effect. These rules, the most carefully prepared in the court’s history,

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method in a March 1995 Tarrance Group Poll. In April 1993, the Harte-Hanks Texas Poll found that 61% of Texans supported merit selection. In January 1990, a Shipley and Associates Poll revealed that Texans favored merit selection over the current system 48% to 42%. In Winter 1989, the Texas Poll found that voters favored gubernatorial appointment with voter or legislative approval over partisan or nonpartisan elections 50% to 38%. In Fall 1984, a Texas Poll found that voters supported gubernatorial appointment and voter approval of judges 57% to 29% over the current system.

should make all civil pretrial proceedings more efficient. We hope that they will especially enhance access to the courts for citizens with limited resources or less serious disputes.

Since the last legislature, the Supreme Court has also promulgated two new administrative rules. Rule of Judicial Administration 11, adopted in 1997, allows regional presiding judges to assign one or more active district judges to hear pretrial matters in cases pending in different counties that have material questions of fact and law in common with each other. Although the procedure has been only sparingly employed, it should help reduce the incidence of inconsistent rulings and scheduling conflicts that may arise from uncoordinated parallel litigation. Under the Rule, all cases are returned for trial to the county where venue was established.

The principal limitation under Rule 11 is that the pretrial judge must, except in very limited circumstances, travel to each county to make rulings in each case. I hope that the Legislature will adopt S.B. 1436, by Senator Duncan, to permit the judge to hear pretrial motions on cases from more than one county in a central location.



On April 1, 1999, Rule of Administration 12 will take effect. This rule provides procedures for public access to judicial records not involving court cases. Case records have always been presumptively open in Texas, and their sealing is subject to the rigorous procedures of Texas Rule of Civil Procedure 76a. But public access to administrative and other judicial records has not been regulated by any formal process, sometimes frustrating the public's right to know about what should be the public's business. Special recognition should be given to Judge Mike Wood of Harris County, who chaired a subcommittee of the Texas Judicial Council regarding these rules.

Our state still struggles to provide adequate legal services to indigent persons in civil cases. The Seventy-Fifth Legislature took an important step by creating the Basic Civil Legal Services Program, administered under Supreme Court rules by the Texas Equal Access to Justice Foundation, but the other program administered by the Foundation, the Texas Interest on Legal Trust Accounts, remains under constitutional challenge in federal court. While the Texas Supreme Court has not mandated Texas attorneys to provide pro bono services, this issue is on our administrative docket while we monitor the efforts of the State Bar and local bar associations to encourage and facilitate volunteer efforts.

## CONCLUSION

Our courts are being asked to resolve more cases in more types of disputes with greater efficiency than ever before. We do not shrink from this challenge; we embrace it. But we will succeed only if lawmakers, judges, attorneys, and citizens continue working together in the best interests of all Texans. By making adequate provision for judicial operations and by improving the structure of our judicial system, particularly with regard to judicial selection, the Legislature can do its part to improve the administration of justice for all Texans in the century to come.