

# The STATE OF THE JUDICIARY in Texas



Chief Justice Wallace B. Jefferson

Presented to the 80th Legislature

February 20, 2007  
Austin, Texas

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*GOVERNOR PERRY, LIEUTENANT GOVERNOR DEWHURST, SPEAKER CRADDICK, DISTINGUISHED MEMBERS OF THE SENATE AND THE HOUSE OF REPRESENTATIVES, LADIES AND GENTLEMEN:*

I am honored to appear before you for my biennial “State of the Judiciary” address,<sup>2</sup> one of the unique privileges afforded the Chief Justice of Texas. It provides an occasion for an independent branch of government to speak directly to the Legislative and Executive branches about ideas for improving the administration of justice in our great State. The presence this morning of Lieutenant Governor Dewhurst, Speaker Craddick, and Governor Perry is testament to the respect that the Legislature and the Executive bestow on our Judiciary.

The state of our judiciary is strong. It is strong because of the public servants sitting before me – Judges who have devoted their lives to ensuring that Texans have a fair and impartial forum to resolve grievances, who insist that the guilty be convicted and the innocent freed. It is strong due to the leadership of the public servants sitting behind me. Last Session the Governor, concerned that our best and brightest judges could no longer afford to serve, called for an increase in judicial compensation. The Speaker and Lieutenant Governor, the House and the Senate, ushered in a judicial pay increase that has extended the tenure of our most talented judges.

In order to maintain the strength of our judicial system in the years and decades to come, we must begin to consider what changes may be required to meet the evolving needs of our state. I urge you, as legislators and policy-makers, and you, as citizens and opinion leaders, to take a hard look at every

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<sup>1</sup> I would like to thank Cassandra Robertson, staff attorney to Justice Phil Johnson, for her invaluable assistance. Next Fall, Cassandra will be leaving the Court to join the faculty of Case Western Reserve University School of Law. My law clerk Erin Ator Thomson gave many helpful comments.

<sup>2</sup> TEX. GOV'T CODE § 21.004.

aspect of our judicial system—its structure, its funding, its effectiveness at meeting our citizens’ needs—to ensure that our judicial system remains strong and reliable well into the future.

### *The Structure of the Judiciary*

What will the structure of the judiciary look like in the next ten to twenty years? If current trends continue, only a small fraction of the courts’ workload will include traditional jury trials. Although the number of civil cases filed in our trial courts has steadily increased in recent years,<sup>3</sup> the number of jury trials has decreased as parties insist on the right to arbitrate their claims. Growing numbers of civil litigants are turning away from the court system to resolve their disputes this way, in private, without judges or jurors.<sup>4</sup> They opt out of our courts because they believe the private sector offers a simplified, streamlined process, a quick resolution of their disputes at an efficient price, and a decisionmaker with specialized experience.

When citizens flee our judicial system, however, we lose the public component of justice. The courts of Texas are open and accessible. Cases that are litigated in our courts (even those involving private conflicts) often affect public interests—jobs, the environment, technological or medical development, land use, a stable legal environment promoting investment in the Texas market. An open court system ensures that the people of Texas benefit from a full public airing of the issues, and it allows innovations and solutions learned from today’s cases to help resolve tomorrow’s disputes. A deliberate progression in the law ensures that similar cases are treated similarly and that litigants can count on fair and even-handed justice. And when the law does change, court decisions evolve with that change in a principled and considered manner. Careful application of the law at the trial level and a guaranteed right to appellate review allow the judicial system to avoid arbitrary results.

I have no doubt that private dispute resolution plays a valuable role as an alternative to the traditional justice system, but there are hidden costs. The outcomes in a private system need not be consistent, because there is no public record of the proceedings and therefore no requirement that similar cases yield similar results. When a significant error is committed in a private setting, there is little hope of correcting the resulting injustice because appellate review is

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<sup>3</sup> Trends in Cases Added, Disposed, and Pending per District Court, Fiscal Years 2002 through 2006, <http://www.courts.state.tx.us/pubs/AR2006/trends/trends-cases-added-disposed-and-pending-per-dc-fy02-06.pdf>.

<sup>4</sup> See e.g., Justice Nathan L. Hecht, *The Vanishing Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 172-81 (2005); Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191 (2005).

virtually non-existent. And without appellate review, there is no mechanism to resolve varying and contradictory interpretations of the law. Finally, a privately litigated matter may well affect public rights. Its resolution may ultimately harm the public good or, because the decision is secret, impede an innovation to a recurring problem, much to the detriment of Texas citizens.

Of course, litigants will always have the right to seek private dispute resolution, but we should take care to make the court system responsive to people's needs so that we do not lose the benefit of a vibrant public court system, one that can provide justice at a fraction of the private cost and can ensure that the state maintains a principled and public development of the law. I therefore recommend that the Legislature consider ways in which the structure of our judicial system may be modified to incorporate the benefits of private dispute resolution while still maintaining the advantages of our public judicial system.

What would such structural changes look like? It may be time to update the statutory framework for the state's trial courts. Texas's patchwork court system has developed over many decades, resulting in a current structure that "has gone from elaborate . . . to Byzantine."<sup>5</sup> Some counties share a multi-county district court, while others have multiple districts within the county. And some counties are a part of more than one district, creating a shifting target for litigants who may not know which court's rules prevail. Overlapping geographical jurisdiction creates confusion for litigants and increases the risk of conflicting rulings in a single area. It is time to consider reapportioning the judicial districts to achieve greater consistency. The Texas Constitution provides a mechanism by which representatives from the three branches of government can work together to address reapportionment. It is time to invoke it.

The Legislature should consider other ways to simplify the current trial court system. For example, it is worth examining whether Texans are best served by the current (and often redundant) complex system of county courts at law, district courts, and statutory probate courts, or whether streamlining some of these trial courts may create a simpler system.

Although civil jury trials have been declining in certain types of cases, this has not been true across the board. Resources previously committed to jury trials in cases overtaken by private dispute resolution could be reallocated to focus on areas where there has been no such decline. The Legislature should consider creating more specialization in the district courts, allowing them to focus exclusively on family law issues, business litigation, mass tort litigation, or criminal trials. Family law cases, for example, have grown steadily throughout

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<sup>5</sup> *Sultan v. Mathew*, 178 S.W.3d 747, 753 (Tex. 2005) (Hecht, J., dissenting).

the last decade.<sup>6</sup> Concentrating our efforts there will help hasten a child's adoption, assist courts in the quick resolution of custody battles, and place more resources at the hands of court personnel whose mission it is to place children in safe and loving households.

Other types of specialization are also possible. More than a dozen other states have adopted specialized business courts to handle the complex commercial litigation docket. These states have found that adopting a specialized docket creates greater judicial expertise, enhances procedural innovation and consistency, and reduces the burden on non-specialized courts by removing these time-consuming cases from their dockets. The Legislature has already taken the first step by creating multidistrict litigation procedures. These procedures could be expanded to include other complex litigation. Greater specialization may be one way to ensure that the court system remains responsive to the public's needs, both by concentrating resources where they are most needed and by developing specialized expertise in the public court system that can compete with what is currently offered in the private sector.

These ideas will require further study; in the next biennium, legislative committees may choose to explore these issues in greater depth. I am confident that, together, we can develop a system to serve the needs of each and every litigant.

### *Ensuring Justice for our Most Vulnerable Citizens*

Another challenge facing the judicial system is the need to keep justice accessible to all. In the last biennium, the Texas judiciary continued to make strides in reaching out to the state's most vulnerable population—abused and neglected children, persons with mental illness, and the indigent. The Supreme Court appointed a task force to accurately track and analyze child protection cases. The task force has recommended a statewide commission for children and families, and that recommendation has received overwhelming support. Under Justice O'Neill's leadership, and with the collaboration of the best minds and most compassionate hearts in the field, we will soon have a commission that places Texas children first. The judicial branch can play a central role in securing for our children – the future of our great State – a safe and healthy home.

Texas is a national leader in the provision of legal services to the poor. The Supreme Court recently approved a rule that requires lawyers who have

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<sup>6</sup> <http://www.courts.state.tx.us/pubs/AR2006/trends/family-law-cases-fy97-06.pdf>.

accounts generating interest for legal services (known as IOLTA accounts) to place those funds in financial institutions that bear interest rates comparable to other accounts. That one simple change should significantly increase the revenue available for basic civil legal services. In addition, I hope the Legislature will reauthorize the \$65 fee in Senate Bill 168, devoted to legal services, which supports the impressive work of our Access to Justice Commission and Foundation.

There are two crucial areas facing the criminal justice system. One is developing a means to manage the large number of cases involving defendants with mental illness. Estimates show that approximately 15% of criminal defendants have been diagnosed with that disease. Although every jail inmate is cross-referenced with the state's mental health database, there currently exists no formal system for jails to notify the courts of a defendant's mental health disorder. As a result of this information gap, a defendant who might be eligible for specialized supervision and treatment may instead be incarcerated. Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, has recently created a Mental Health Task Force. I am proud to report that as a result of Judge Keller's and the task force's efforts, the Court of Criminal Appeals has just been selected to participate in a national project to improve our efforts to identify those in our criminal justice system who are suffering from mental illness and to address, as appropriate to the particular case, the mental health needs of this population.

The second crucial need—one that I also mentioned in my 2005 address—concerns the unfortunate reality that our criminal justice system, on rare occasions, convicts the innocent. I recognize that the convicted often falsely claim to be innocent, but we know, right here in Texas, that some of our inmates have been exonerated by DNA testing. I cannot imagine wasting away in prison for a crime I did not commit. Can you? The Legislature should establish a commission to study ways to free the innocent.

Such a commission would be a strong complement to efforts already underway to ensure that our criminal justice system complies with our constitutional mandate to provide adequate representation for the accused. For that reason, I continue to support funding for public defender programs and the work of Judge Keller's statewide indigent defense program.

## *Funding the Judiciary*

Funding for indigent defense is part of a larger challenge that the state faces in funding the judiciary as a whole. The state's funding for the entire judicial branch of government is less than four-tenths of one percent of the entire state budget. When considering how much the judicial branch accomplishes, and how many people are able to resolve their disputes through our court system each year, it is truly extraordinary how much the court system can accomplish on such limited means. In recent years, however, it has become clear that funding limitations are restricting the court system's ability to dispense justice fairly and efficiently. Ensuring that the judiciary is sufficiently funded would have an insignificant effect on the state's budget overall, but would have a tremendous impact on all the Texas citizens who seek justice through our courts.

Chief Justice John Roberts's annual report on the federal judiciary, discussed the importance of judicial compensation at the federal level. He pointed out that a revolving door on the bench can lead to a less effective judiciary. He said: "[i]f judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative private practice, the Framers' goal of a truly independent judiciary will be placed in serious jeopardy."

A revolving-door judiciary is less of a threat to Texas than it was two years ago; the Governor, the Legislature, the business community, and editorial boards all worked together to give the judiciary the first salary increase in several years. That collaborative effort marks the first crucial step toward attracting and retaining experience judges. It is important that we do not allow the efforts made last session to be eroded in the years to come. Chief Justice Roberts warns of the difficulties that ensue when annual costs rise while salaries remain stagnant for years or even decades. I strongly recommend, therefore, that the Legislature adopt a systematic process for reviewing judicial compensation on a regular basis.

More than half of the states currently benefit from systematic review of judicial salaries.<sup>7</sup> Maryland, for example, established a Judicial Compensation Commission "to ensure that highly qualified persons are attracted to the bench and judges may serve without economic hardship." Every four years, the commission reviews judicial salaries and pensions, and submits its recommendations to the Governor and General Assembly.<sup>8</sup> Iowa, Maine, and many other states have similar commissions that make biennial

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<sup>7</sup> <http://www.ncsconline.org/wc/CourTopics/statelinks.asp?id=43>.

<sup>8</sup> <http://archive1.mdarchives.state.md.us/msa/mdmanual/26excom/html/22jcomp.html>.

recommendations.<sup>9</sup> Still other states, like New York, recognize the importance of systematic review and are working toward implementing similar programs. We should adopt a similar plan of systematic review that meets the needs of our state. Planning now to systematically address judicial salaries and adjust them as needed to maintain the strength and independence of the judicial branch allows us to avoid operating in crisis mode later. We should take advantage of this opportunity and not allow Texas to be left behind.

### *Maintaining Judicial Independence*

Judicial independence is another cornerstone of our democratic system, and, in the decades to come, it will be important to maintain a fair and independent court system. Former Chief Justice William H. Rehnquist once said that a judge must be like “a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it.”<sup>10</sup> Fair and independent courts rely on that referee instinct. The court system is an integral part of our democratic system, and provides an important check and balance in our government. Judges, therefore, have a responsibility to rule fairly, impartially, and in accordance with the law – even if it means calling a foul against the home team.

A proposed constitutional amendment in South Dakota would have turned back the clock more than 400 years to allow aggrieved litigants to sue judges, making judges face civil liability for issuing judgments that are later determined to be incorrect.<sup>11</sup> In Colorado, there was a proposal to impose term limits on judges, and there are other efforts underway in other states and in the nation’s capitol that would call into question our Founder’s vision of a judiciary unaffected by political currents.<sup>12</sup> Had the South Dakota or Colorado proposals been adopted, they would have had a grave impact on the judiciary’s ability to perform its essential function as a third, co-equal, branch of the government. Fortunately, wiser heads prevailed and the proposals were soundly rejected. I am proud that Texas has not seen this level of attack on the judiciary. We must remain vigilant.

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<sup>9</sup> <http://www.legis.state.ia.us/asp/Committees/Committee.aspx?id=56>;  
<http://www.maine.gov/legis/ofpr/judicialcomp.htm>.

<sup>10</sup> Hon. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2006).

<sup>11</sup> See Proposed Amendment E, available at <http://www.sdsos.gov/>.

<sup>12</sup> Stephanie Simon, *Call of the West: Rein in the Judges*, L.A. TIMES, Oct. 15, 2006.



Courts have a key role as guardians of individual rights under the Constitution. Maintaining a fair and impartial court system requires an independent judiciary—one that respects the rule of law, and places the rule of law ahead of personal or political considerations. But an independent judiciary is still an accountable judiciary: judges must be accountable to the Constitution, the law, and, in Texas, directly to the people through their right to vote for judges. Criticism of the judiciary and of particular decisions is an important right—even a responsibility—in our free and democratic system. But unlike constructive criticism, threats of violence and attempts to restructure our government to eliminate or minimize the protections offered by the courts threaten our democracy. We must not allow the rule of law to be subsumed by popular whim, or we will lose the very system that we rely on to protect our constitutional rights.

### *Conclusion*

The state of the judiciary will remain strong long into the future if we are willing to adapt the current court system to meet the changing needs of Texas. Together the three branches of government can work to ensure that the people of Texas continue to have access to a fair, impartial, accessible, and accountable justice system that resolves disputes, adjudicates guilt, protects our children, and serves the public. Before I conclude, I would ask that all members of the armed forces, past and present, stand. I have spoken a long time this morning, but the reality is that, ultimately, the rule of law, the strength of the judiciary and of our democracy, are secured by these men and women. Let us thank them for their service.