

The STATE OF THE JUDICIARY in Texas



Chief Justice Nathan L. Hecht

Presented to the 85th Legislature

February 1, 2017
Austin, Texas

THE SUPREME COURT OF TEXAS

NATHAN L. HECHT
Chief Justice

Justices

PAUL W. GREEN
PHIL JOHNSON
DON R. WILLETT
EVA M. GUZMAN
DEBRA H. LEHRMANN
JEFFREY S. BOYD
JOHN P. DEVINE
JEFFREY V. BROWN

THE TEXAS COURT OF CRIMINAL APPEALS

SHARON KELLER
Presiding Judge

Judges

MICHAEL E. KEASLER
BARBARA PARKER HERVEY
ELSA ALCALA
BERT RICHARDSON
KEVIN YEARY
DAVID NEWELL
MARY LOU KEEL
SCOTT WALKER

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Lieutenant Governor Patrick, Speaker Straus, Members of the 85th Legislature, former Chief Justice Phillips, former Chief Justice Jefferson, Members of the Judiciary, distinguished guests, ladies and gentlemen:

I have the honor to report to you on the state of the Judiciary. I begin with a story.

Late on a Friday evening, a young man—let’s call him Will—drives his mom home from a high school football game—a Texas ritual in the fall. A trash bag blocks the driveway, so he gets out to move it. Suddenly, silently, a figure emerges from the darkness, raises a gun, then shoots through the car window at Will’s mother. Glass explodes. Shrapnel and bullet fragments rip her body. Another blast. And another. And another. I’m going to die, she thinks; my life as a mom, wife, and sister is over because of what I do for a living, because I’m a judge.

The shooter flees into the darkness as quickly as he came. The judge is rushed to the emergency room. Her condition, praise God, soon stabilizes; but healing—physical healing, family healing—takes awhile. She stays in the hospital 39 days, enduring 27 surgeries and losing a finger. All in all, it is a miracle she survives. At last, she goes home, at Christmas time.

The story is true, as most of you know from the news. The mother, wife, and sister shot outside her Austin home on November 6, 2015, was District Judge Julie Kocurek. Months later, after she felt stronger, I asked her to come by my chambers. She had wondered and prayed, she said, why me? Following an investigation, a man who had been a defendant in her court has been charged and is awaiting trial. But, she told me, God had given her a second chance. Faith and family had sustained her. “I don’t know what the reason is,” she said, “but I do believe God was waiting for me in that driveway. He prevailed. Evil did not.”

I asked Julie about her plans. She could retire, she said. But if she left the

bench, people would think you can threaten a judge and scare her off, maybe scare off other judges, intimidate them, show that justice cannot stand up to violence. She would not do that. Poised, courageous, determined, humble, faithful, she would prove that judges sworn to preserve, protect, and defend the constitution would not cower in the face of lawlessness. She would return to the courtroom—and she did, amidst great celebration.

She is here, with her son, Will, her daughter, Mary Frances, and her husband, Kelly. Ladies and gentlemen, it is my privilege to present to you one of the Texas Judiciary's heroes, Judge of the 390th District Court of Travis County, Julie Kocurek, and her family.

With judges like Judge Kocurek serving the people of Texas every day, I am proud to report to you that the state of the Texas Judiciary is strong.

Security

The attack on Judge Kocurek highlights the need for statewide improvements in judicial and courthouse security. Judges are not the only ones at risk; courthouses must be safe for staff, parties, lawyers, and jurors. Every threat must be taken seriously. Texas judges surveyed after the shooting reported four basic concerns: inadequate training, communication, and security protocols; inadequate resources; no state-level direction; and the ready availability of judges' personal information in publicly searchable government databases.

The Texas Judicial Council, which sets policy for the Judiciary and includes four members of the Legislature—Senator Zaffirini, Senator Creighton, Chairman Smithee, and Representative Murr—has made comprehensive recommendations to improve judicial security. One is to fund a new position, director of state judicial security, to oversee security plans and initiatives statewide. Another is to amend existing laws to ensure that personal information judges provide to government agencies is always, automatically, shielded from public access. Some protections exist already, but gaps should be closed. And state funding for local law enforcement and the Department of Public Safety should be increased to cover essential security costs, including personal protection for threatened judges.

The Judicial Council's recommendations are contained in Senate Bill 42 by Senator Zaffirini. I urge its passage, and I hope you will entitle it the Judge Julie Kocurek Judicial and Courthouse Security Act of 2017.

Compensation

Judge Kocurek reminds us again that judges serve at considerable personal sacrifice, including inadequate compensation. Judicial pay is a topic of almost every

State of the Judiciary address. I would like to change that.

The problem of setting judicial compensation has vexed legislatures in every state and the national Congress for, well, seemingly, forever. Ten years ago, the 80th Legislature of Texas created the Judicial Compensation Commission—nine members appointed by the Governor—to take a new, data-based, fact-driven approach. The Commission is required to compare salaries of state and federal judges and officials, as well as private sector attorneys, assess changes in the cost of living, and report before each legislative Session the proper salaries necessary to attract and keep the most highly qualified individuals, with diverse experiences.

The Commission has prepared five very thorough reports. No report has ever been faulted. None has been followed. The Commission has done all the Legislature asked, but the difficulties in setting judicial pay persist.

This year, judicial compensation must be increased merely to keep it on a par with 1991. We continue to fall further behind federal judges and judges in other states—27th overall, and last among the six largest states. The Commission also urges that its recommendations be part of the baseline budget, presumptively accepted unless rejected. The Judicial Council approves.

That would be progress, but I propose a better solution. We already agree that judicial salaries should be based on salaries of other judges, officials, and lawyers, and cost of living increases, all of which can all be quantified. Just look up the numbers. All we need is to agree on a simple mathematical formula to use from now on, then each Session, just plug in the numbers. Tie legislative retirement to the formula, or not. None of it would ever have to be debated again. A formula now would settle the matter once and for all. I urge you to consider it.

Access to Justice

You have heard me say many times, the justice system must be accessible to all. Justice only for those who can afford it is neither justice for all nor justice at all. The rule of law, so revered in this country, has no integrity if its promises and protections extend only to the well-to-do.

The Texas Legislature's funding for access to justice has been critical. For veterans returning home to the freedoms they risked their lives to protect, basic legal services can help them manage their bills, stay in their homes, keep their jobs, and sadly, resolve family frictions. Last Session, the Legislature appropriated \$3 million for basic civil legal services specifically for veterans. Please do it again. It changed many lives. Last Session, the Legislature appropriated \$10 million from the Sexual Assault Program Fund for basic civil legal services for sexual assault victims. Please do it again. In only a very short time, these funds have helped more than 4,000

victims.

Legal aid providers handled over 100,000 cases last year. In addition, they helped direct cases to lawyers willing to handle them for free, *pro bono publico*—for the public good. Every dollar for legal aid thus provides many dollars in legal services. Every year, Texas lawyers donate millions of dollars and millions of hours. A million hours, by the way, is 500 work-years. Legal aid helps the poor be productive and adds to the economy's bottom line. That's why national CEOs and general counsel support access to justice initiatives—they're good for employees, good for customers, good for communities, and good for business. And besides all that, it's the right thing to do. As much as has been done, only 10% of the civil legal needs are actually being met. Access to justice still desperately needs your help.

Justice Gap Commission

Legal fees are also beyond the means of middle-income families and small businesses. There is a justice gap in this country: people who need legal services, lawyers who need jobs, and a market that cannot bring them together. More and more people try to represent themselves out of desperation. In 2015, the Supreme Court of Texas formed a commission, chaired by my predecessor, Wallace Jefferson, to examine ways to help lawyers provide legal services at lower cost. The commission has reported its recommendations, and we will work to implement them. One way is to continue support for the State Law Library, which makes resources available to lawyers and non-lawyers free of charge.

If justice were food, too many would be starving. If it were housing, too many would be homeless. If it were medicine, too many would be sick. If it were faith, too many houses of worship would be closed. The Texas Judiciary is committed to doing all it can to close the justice gap. We are grateful for the Legislature's support.

Electronic Filing and Access to Court Records

Access to justice is also improved by easier access to court records, but we must have a statewide system. The Supreme Court has ordered that all filings in civil cases in county, district, and appellate courts be sent to clerks electronically over the Internet. Last year, more than 8.5 million court documents were filed electronically. The savings to lawyers, parties, and clerks has been monumental. In a little over two years, electronic filing will also be required in criminal cases.

The 75th Legislature created the Judicial Committee on Information Technology to develop a statewide, electronic, court document system. The Committee has now recommended that judges, clerks, and lawyers have access to electronic filings through a portal called re:SearchTX, simply by pressing a button. This convenience will greatly reduce costs and delays in litigation. Soon, the

Committee will make recommendations on public access to electronic filings, improving transparency for the justice system. The Committee will recommend ways for protecting privacy, preventing abusive data-mining, recovering costs, and providing counties revenue to establish and maintain a statewide system. A statewide system will also provide more information about how the work of courts is changing, what kinds of cases the courts are handled, and what improvements can be made. In planning for the future, this information is crucial.

Texas is a leader in technology. We have three of the world-recognized knowledge capitals: Austin, Dallas, and Houston. A 21st century statewide electronic court record system will save money, improve transparency, and increase efficiencies. The federal courts have used a similar system, PACER, throughout the country for 16 years. The Texas electronic filing and access system will be the largest in the country and will be the single most significant modernization of the Texas courts in history.

Bail Reform and Pretrial Release

In the past two Sessions, the Judiciary has joined forces with the Legislature to decriminalize truancy and student misconduct at school. Children and families have been the beneficiaries. Now it is time for us to take up reform of the bail system and criminal pretrial release.

Twenty years ago, not quite one-third of the state's jail population was awaiting trial. Now the number is three-fourths. Liberty is precious to Americans, and any deprivation must be scrutinized. To protect public safety and ensure that those accused of a crime will appear at trial, persons charged with breaking the law may be detained before their guilt or innocence can be adjudicated, but that detention must not extend beyond its justifications. Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to re-offend. And if all this weren't bad enough, taxpayers must shoulder the cost—a staggering \$1 billion per year.

Take a recent case in point, from *The Dallas Morning News*. A middle-aged woman arrested for shoplifting \$105 worth of clothing for her grandchildren sat in jail almost two months because bail was set at \$150,000—far more than all her worldly goods. Was she a threat to society? No. A flight risk? No. Cost to taxpayers? \$3,300. Benefit: we punished grandma. Was it worth it? No. And to add to the nonsense, Texas law limits judges' power to detain high-risk defendants. High-risk defendants, a threat to society, are freed; low-risk defendants sit in jail, a burden on taxpayers. This makes no sense.

Courts in five counties use readily available risk assessment tools to determine that the overwhelming majority of people charged with non-violent crimes can be

released on their personal recognizance without danger to the public or risk of flight, and at less cost to the taxpayers. The Judicial Council recommends that this be standard practice throughout Texas. Liberty, and common sense, demand reform.

Mental Health

Many who enter the criminal justice system suffer from serious mental illness. Untreated, they are eight times more likely to be incarcerated, and if released, pose problems for the communities to which they return. Like the bail system, ineffective approaches to mental illness cost defendants, the courts, the government, and society. The Judicial Council recommends changes in the Code of Criminal Procedure to allow more effective management of mentally ill criminal defendants and better procedures for obtaining treatment, medication, and restoration. I urge you to consider them.

Fines, Fees, and Costs

Last year, Texas' 2,100 justices of the peace and municipal judges handled 7 million traffic, parking, and other minor offenses. Most people ticketed just paid the fine and court costs. Others needed a little time and were put on payment plans for an extra fee. Altogether, over \$1 billion was collected. Some defendants said they couldn't pay at all. Judges believed them in about 100,000 cases, waiving the fines or sentencing them to community service. In 640,000 cases—16%—defendants went to jail for minor offenses.

Jailing criminal defendants who cannot pay their fines and court costs—commonly called debtors' prison—keeps them from jobs, hurts their families, makes them dependent on society, and costs the taxpayers money. Most importantly, it is illegal under the United States Constitution. Judges must determine whether a defendant is actually unable, not just unwilling, to pay a fine. A defendant whose liberty is at stake must be given a hearing and may be entitled to legal counsel. For the indigent, the fine must be waived and some alternative punishment arranged, such as community service or training. For those who can pay something but only by struggling, adding multiple fees threatens to drown the defendant in debt: there are extra fees for payment plans, for missed payments, for making payments—yes, there is even a fee for *making a payment*—pay to *pay*—warrant issuance fees, warrant service fees—the list goes on and on. And revoking a defendant's driver's license just keeps him from going to work to earn enough to pay the fines and fees.

A parent disciplining a child may say, this hurts me more than it hurts you. When taxpayers have to say to criminal defendants, this hurts us more than it hurts you, something's wrong. The Judicial Council has concluded that the system must be revamped. I urge you to adopt its recommendations.

Guardianship Reform and Funding

The population is aging [gesture], and the number of elderly and incapacitated Texans needing help managing their affairs is increasing. There are more than 50,000 active guardianships in Texas, involving an astounding \$5 billion. To protect the people being cared for and their assets, the law requires guardians to report regularly. The Office of Court Administration's Guardianship Compliance Project, funded in the last Session as a pilot, has reviewed more than 10,000 cases in 18 courts and 11 counties. In almost half the reviewed cases, guardians had not complied, and courts did not have the resources to monitor the cases. To protect the assets and quality of life for the elderly and incapacitated, the Judicial Council recommends that the Compliance Project be extended statewide.

Children's Commission

Working at the other end of the generational spectrum, the Supreme Court's Children's Commission has enlisted hundreds of professionals contributing thousands of hours to improve the foster care system. The Commission has provided training to judges and lawyers handling children's cases. It has shown how to improve educational outcomes for children in foster care. It has advocated for changes in the law and developed tools and best practices to prevent child fatalities and end human trafficking. At Senator Kolkhorst's request, the Commission helped implement a bill to prevent the overuse of psychotropic medication with foster children. And the Commission is working with Senator Schwertner and others this Session on legislation that will bring sweeping changes to the foster care system.

The Commission has always operated with federal grant funds. Until those grants are again funded, I must ask this Legislature to make up the difference. Any lack of support for the Commission now would be a sharp blow to improvements in the foster care system the Legislature is considering. Texas' greatest asset by far is her children. The Commission helps preserve that asset for us all.

Judicial Selection

I will say only a word about judicial selection, but it is a word of warning. In November, many good judges lost solely because voters in their districts preferred a presidential candidate in the other party. These kinds of partisan sweeps are common, with judicial candidates at the mercy of the top of the ticket. I do not disparage our new judges. I welcome them. My point is only that qualifications did not drive their election; partisan politics did. Such partisan sweeps are demoralizing to judges and disruptive to the legal system. But worse than that, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty.

There is no perfect alternative to judicial elections. But removing judges from straight-ticket voting would help some, and merit selection followed by nonpartisan retention elections would help more.

Beyond the Bench Summit on Law, Justice, and Communities

Judges across the country are concerned that recent tensions between law enforcement and communities, which have weakened our institutions, not erode public trust in the courts. Trust is the Judiciary's most important asset. People must not think the justice system is rigged. As the country works through its political and social differences, we want all to have utter confidence in the courts to be fair, to hear all sides, and to provide equal justice under law.

In December, the Supreme Court and the Court of Criminal Appeals convened a historic Summit in Dallas to discuss law, justice, and communities. We invited all stakeholders to participate: judges, prosecutors, defense lawyers, civil rights lawyers, law enforcement, educators, community activists, and the clergy. We asked them to have an authentic, frank conversation about the courts and the justice system. And we did what judges do best: we listened.

An African-American college student body president told how her brother was killed by police when she was growing up. Moments later, sitting a few feet away, a white police officer, the widow of a police officer killed in the demonstrations in Dallas last July, told how she had filed their marriage certificate earlier that day, the happiest day of her life, only to be wakened in the middle of the night by a knock at the door and word that her husband was dead. For a few hours, 200 people with opposing passions tried to hear one another and understand what it means for there to be justice for all. And we and they left vowing to get closer to that goal, justice for all. Faith in the courts, just for inviting the dialogue, and listening, was strengthened.

The Rev. Dr. Tony Evans reminded us that cracks in society, like cracks in a house, mean the foundation is weak. Trust is the courts' foundation. The Judiciary's commitment is to strengthen that foundation. We ask the Legislature's help.

Efficiency

The Judiciary is committed to doing its work efficiently. The Supreme Court of Texas now decides all argued cases by the end of June, just as the United States Supreme Court does. Lawyers now expect all decisions by June. We are processing petitions faster. The Court of Criminal Appeals is still the busiest court in the country and still timely resolves its cases. The courts of appeals are staying caught up. Those courts have had the same number of justices for 36 years, but their work is up 35%. Last year, our more than 3,000 trial court judges disposed of nearly 9.5 million cases. The courts are doing an enormous amount of work timely and efficiently. We have

not yet had to make bricks without straw, but we have certainly had to make the straw go further. Soon we will begin using technology to revamp processes in civil cases to bring public justice closer to the people.

Conclusion

As important as it is for courts to be efficient, it is more important for them to get every case right. We are committed to making all our processes serve the cause of justice. In that spirit, we ask your help with security and compensation, electronic access to court documents, and guardianship monitoring, and your continued help with access to justice for the poor and the middle class. We pledge to work with you to reform the bail system, the treatment of those with mental illness, and the imposition of fines, fees, and costs for minor offenses.

The framers of the Constitution divided the power of government among three Branches, intending them to be competitive. They succeeded. But in this State, we have proved that the Branches can work together for the people's good. That is the state of the Texas Judiciary.

God bless you, and may God bless Texas.