State of the Judiciary
Chief Justice Thomas R. Phillips, Texas Supreme Court
Message to the Legislature
April 3, 1995, in Austin, Texas

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 modem 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."

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

Administrative Initiatives

In addition to deciding lawsuits, most Texas judges have significant administrative duties. 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. Because compliance remains incomplete, 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. 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 pending further consultation with the judiciary.

♦ Lawyer Advertising. At the direction of the Seventy-Third Legislature, 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. 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. The Court has delayed the effective date of the rules until July 29, 1995 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 II 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.” The Court continues to study implementation 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. 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 modem 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. If you are not already convinced that there is a 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 bound 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. 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 district judges, and one or more elected stipendiary magistrates in each county to handle minor criminal matters. 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. 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. 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.

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.

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.

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 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.

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 efficientd1scharge 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.

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

Compiler's note: Footnotes 1-23 and appendices omitted here.