

State of the Judiciary  
Chief Justice Thomas R. Phillips, Texas Supreme Court  
Message to the Legislature  
February 24, 1997, in Austin, Texas

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

On behalf of the Judicial Department of the State of Texas, I appreciate this opportunity to deliver this, my fifth State of the Judiciary Address. It is particularly significant for me that we meet today in the Old Supreme Court courtroom, now so beautifully restored to its appearance when many landmark cases were heard and decided here.

The nature of these addresses, of course, is to focus on needed changes to improve the administration of justice. And, no doubt, we have a long way to go before every citizen has equal access to fair, affordable and timely justice. But we are making progress. On many fronts, the Legislature and the courts in their administrative capacities have been working to improve our judiciary.

In the appropriations process, for example, the Legislature has shown real insight into the needs of our court system. You provided funds for the Commission on Judicial Conduct to increase its investigative and prosecutorial staff by almost fifty percent, to restore Texas' full dues payments to the National Center for State Courts, and to modernize the appellate information management system. These increases will help make a more ethical, informed and efficient judiciary, and were wise investments for the future.

The appropriations bill also created the Commission on Judicial Efficiency, which at your direction studied judicial funding parity, staff diversity, court technology and judicial selection. Chancellor Herbert H. Reynolds of Baylor University chaired this effort with matchless dedication and energy, and Task Force Chairs Judge Jack Hightower, Dean Susana Aleman, Dean Donald Hardcastle and Tom Luce each did a remarkable job in chairing their respective groups. Anthony Haley, the general counsel, won praise from across the state for his marvelous performance. In all, more than 140 legislators, judges, attorneys and lay persons gave of their time and talents on this important project.

We hope that the Commission's report was worthy of your confidence and your appropriation. Although I will not take time to review each of the Commission's fifteen principal recommendations individually, I do want to mention the highlights from each area of inquiry.

**Funding Parity**

In Texas, local government bodies are responsible for more of the funding of the judicial system than in almost any other state. Because, as Thomas Paine aptly observed, "the more simple anything is, the less liable it is to be disordered, and the easier repaired when disordered," Thomas Paine, *Common Sense* 3 (1776), the Commission recommended that the state assume

full funding for all appellate courts in this biennium and for all district courts in the next biennium.

Like the Judicial Committee on Court Funding, the Appellate and Trial Court Legislative Committees of the Judicial Section of the State Bar of Texas, the Alliance for Judicial Funding, and the Texas Association of State Judges, the Commission also recommended that the salaries of high court justices and judges be raised to the level of the lowest-paid federal judges, with appellate justices receiving 95% and district judges 90% of that salary. Moreover, the Commission recommended that Texas join seventeen other states in establishing an independent compensation commission to set future judicial salaries, a proposal currently before you in Senate Joint Resolution 20, Senate Bill 328, House Joint Resolution 49, and House Bill 518. Finally, the Commission recommended setting comprehensive court performance measures and standards for all levels of the state judiciary. Adopting these three recommendations will enhance the stability, independence and accountability of the state judiciary for years to come.

### Staff Diversity

Recognizing the need for a diverse judicial staff, as well as a diverse judiciary, in order to enhance public confidence in the fairness of the courts, the Commission made several recommendations to encourage a broader applicant pool for judicial staff positions, clerkships and internships, with particular emphasis on securing more minority applicants. One key recommendation is that the Legislature establish a fund to assist in repaying student loans for persons with proven need who accept short-term attorney employment with the courts.

### Information Technology

Because of Texas' patchwork system of court funding, court technology has been implemented across the state in a haphazard and totally uncoordinated fashion. Now, with the advent of the Internet, e-mail, electronic bulletin boards and exciting new interactive technologies, all courts should be brought into a statewide information network. With proper planning, we can dramatically increase public access to the courts while also saving time and money for taxpayers, lawyers and litigants. Implementing a first-class system may entail substantial start-up costs, but most of this investment could be recouped over time by imposing nominal user fees and access charges. Perhaps the Telecommunications Infrastructure Fund could be modified to allow that money to be applied to courts.

The era of docket management by lined manila sheets and 3 x 5 index cards is gone forever, whether we like it or not. I attach as Exhibit A a recent National Center for State Courts memorandum outlining six existing federal statutes that require states to gather and report various types of court activity. Failure to devise an information system to capture this data will, in most instances, result in a partial loss of various federal grant funds.

The core recommendation of the Judicial Efficiency Commission is the creation of a Judicial Committee on Information Technology, appointed by the Supreme Court, to develop and oversee the building of a statewide system. This group would work closely with the Department of Information Resources to provide an efficient and effective means to use modern technology to

help achieve equal access to justice for all.

## Judicial Selection

Finally, the Commission unanimously recommended that our antiquated, even embarrassing judicial selection system be replaced by a method that better serves the needs of modern Texans. Although serious reform efforts have been mounted for more than one hundred years, the need for change has become more urgent with the increased size of the judiciary and the advent of two-party politics. Our current system may have been acceptable in 1876, when there were six appellate and twenty-six trial judges in the entire state, and nomination by the Democratic Party Convention (not primary) was tantamount to election. By 1994, in contrast, Harris County voters alone were obliged to make decisions in 45 primary (23 Republican, 22 Democratic), 8 runoff (5 Republican, 3 Democratic) and 59 general election judicial contests! It could have been worse - 16 more judicial races were unopposed.

Sadly, the results of these races are determined far more by party strength than by individual merit. At the 1994 general election, for example, 31 of the 40 incumbent opposed Democratic district and appellate judges in Texas were defeated, while all Republican incumbents prevailed. At the last general election, however, Democrats lost only 3 of 18 opposed judges, while Republicans lost 8 of 28. Thus, the shifting tides of party fortune, which have almost nothing to do with judicial performance, have caused the defeat of almost ten percent of the state judiciary in the last two years, with the prospect of further future destabilization.

Another major problem with the current system is the perception of unequal justice that inevitably arises when judges and judicial candidates accept campaign contributions from lawyers and litigants who have a stake in current or future court decisions. With such a large electorate and with so many contested elections, the sums raised and spent are enormous. As the chart attached as Exhibit B demonstrates, judicial candidates for Texas appellate courts alone received over fifty million dollars in donations between 1988 and 1994. Last session, the Legislature made a valiant effort to reduce the appearance of impropriety by passing the Judicial Campaign Fairness Act, which limited the time and amount of judicial campaign donations. While the Act served some worthwhile purposes, it has not diminished the aura of impropriety that surrounds judicial campaign solicitations. As the Austin American-Statesman noted in endorsing my re-election last year: "The way Texas elects partisan judges, and allows those who practice before them to supply the campaign money, will always fuel suspicion that justice here is for sale." That's hardly an endorsement to frame on the wall, but it's about the most a Texas judge can hope for under the current system.

These high-dollar, partisan races not only lower Texans' confidence in their courts, but also discourage out of state investment and job creation here. For example, Richard Posner, Chief Judge of the Seventh Circuit and a nationally recognized legal commentator, has opined that public distrust of state courts exceeds that of federal courts because "it is reinforced by the low professional quality and rampant politicization of many of the state judiciaries, led by Texas." Posner's critique appeared in Commentary magazine, but one could easily find similar observations in the pages of The New York Times, Forbes, The Financial Times, or numerous other sources which influence decision-makers throughout the world.

Finally, the continuing lack of diversity among the state judiciary threatens the legitimacy of the administration of justice in the eyes of many Texans. Although more than forty percent of all Texans are minorities, only one-ninth of the state judiciary is Hispanic or African American. Of course, no method of judicial selection can or should create guarantees or mandate quotas. But a successful system must encourage more minority lawyers to seek judicial positions and, once in office, afford them a more reasonable prospect of remaining there.

The Judicial Efficiency Commission's proposed solutions were the product of a full year of intense effort by a diverse and knowledgeable group of concerned Texans. If it is not politically feasible to accomplish comprehensive reform in this session, I hope that you will at least attempt to implement some of the Commission's suggestions at some levels of the court system.

In addition to the four areas of the Judicial Efficiency Commission's inquiry, the Supreme Court has been involved in many other issues of legal reform in the last two years. I will briefly report on these initiatives to you.

#### Rules of Procedure and Evidence

Our Court, together in some instances with the Court of Criminal Appeals, is nearing the end of a six-year effort to promulgate comprehensive amendments to the rules of civil procedure, appellate procedure and evidence for Texas courts.

Next month, the two high courts will publish new rules of appellate procedure for comment, with a view to final adoption this summer. These rules will remove many of the traps from the so called TRAP rules, enabling appeals to be resolved on their merits in an expeditious fashion.

Later this spring, the two courts will also publish the first ever combined Rules of Evidence, replacing the separate civil and criminal codes that now exist. These rules will become effective before the end of the year.

By summer, the Supreme Court intends to publish comprehensive amendments to the rules of civil procedure. These amendments will decrease the amount and expense of pretrial discovery and encourage the earlier resolution of all cases. If these rules are to work, however, all trial judges will have to assume an active role in managing their dockets. For those thirty to forty rural district courts that do not yet have full-time court coordinators, it is imperative that the Legislature make some provision to see that these judges have the necessary management assistance.

Later this year, the Court will consider comprehensive revisions to the civil rules governing justice of the peace and small claims courts. A task force chaired by former Judge Paul Heath Till has recently forwarded its recommendations to the Court and the Supreme Court Rules Advisory Committee.

Finally, we are contemplating the creation of a new task force to study possible amendments to Texas Rule of Civil Procedure 42, which governs class actions. Almost one hundred highly

qualified lawyers and judges have asked to be considered for appointment.

Justice Nathan Hecht and Judges Sam Houston Clinton and Paul Womack have served ably as our liaisons to the several committees and task forces that have assisted on these projects. Hundreds of lawyers, judges and professors from across the state who bring very diverse perspectives to these issues have served on the legislatively-mandated Supreme Court Rules Advisory Committee, five Court task forces, the State Bar Committees on Court Rules and on the Administration of the Rules of Evidence, and various committees of the Appellate Practice, Family Law, and Litigation Sections of the State Bar. With the help of these distinguished and creative minds, we believe that our new rules will give Texans the fairest and most efficient court procedural rules in the nation.

We are indeed proud of our efforts, but we need your help in one important respect to ensure their continued viability. Since 1989, the Legislature has, by express provision, routinely forbidden the Supreme Court from modifying or repealing any procedural provision in any new law touching on court procedure. This wording is found in 14 laws passed in the last four sessions, and appears in at least seven bills introduced so far this year.

Each time it is used, this language effects a limited repealer of the Rules Enabling Act of 1939, Tex. Gov't Code sec. 22.004. It was incorporated into the Texas Legislative Council Drafting Manual in 1987, after the Supreme Court repealed a portion of that year's tort reform package by rule. I am not here to defend that arrogant action by the Court, but I am here to remind you that no judge who supported that move remains in public service. I recognize that there may be legitimate policy reasons for limiting the Court's power in certain circumstances. But the routine inclusion of such language will in the long run substantially impair the Court's ability to keep court procedures current and efficient. Instead, we will be left with a pastiche of old and new statutes and interstitial rules, which may or may not meet the actual needs of the time.

#### Court-Annexed Mediation

At the request of the Alternate Dispute Resolution Section of the State Bar of Texas, the Supreme Court created an Advisory Committee on Court-Annexed Mediation last May. The Committee, co-chaired by non-attorney Bill Low and attorney Bruce Stratton, is charged with recommending ethical rules for court-annexed mediators and with examining whether a credentialing program should be established. Justice Priscilla Owen is our liaison to this committee.

#### Bar Examination

In October 1995, the Supreme Court adopted the recommendation of the Board of Law Examiners to modify the bar examination. Beginning in July 1999, oil and gas will be included with real property, while consumer rights and income, gift and estate taxes will be added as separate subjects. Beginning in February 1998, the Multi-State Performance Test will also be added to the bar examination. On the basis of a single problem, it will test legal and factual analysis, written communication skills, organizational abilities, and the recognition and resolution of ethical dilemmas. Justice Gonzalez now serves as our liaison to the Board.

## Foster Care Task Force

A Supreme Court Task Force on Foster Care, funded by a grant from the United States Department of Health and Human Services, will implement pilot projects in both rural and urban judicial districts to improve the quality of foster care and shorten the time that children remain in the system. The Task Force is chaired by John Specia of Bexar County, and Justice Greg Abbott serves as the liaison from our Court.

## Pro Bono Representation in Civil Cases

For the past two years, a petition to implement a mandatory program for free provision of legal services to the poor in civil cases has been pending on the Supreme Court's administrative docket. For now, the Court has been working with the State Bar of Texas to develop various initiatives to encourage more and more effective pro bono activities among Texas lawyers. Justice Owen is also serving as our liaison in this important area, which becomes even more critical as Congress reduces the funding of Legal Services Corporation and the federal courts place the constitutionality of our mandatory IOLTA program in doubt.

## Jury Task Force

Last September, the Supreme Court appointed a task force of almost one hundred legislators, judges, lawyers and lay persons to study and make recommendations to the Legislature and the Supreme Court on jury system reforms. Dean Frank Newton of the Texas Tech University School of Law and President-elect of the State Bar of Texas, chairs this effort, and Justice John Cornyn and Judge Sharon Keller serve as liaisons from the high courts.

## Gender Bias Reform Implementation Task Force

The Gender Bias Reform Implementation Task Force, co-chaired by Judge Charles Baird of the Court of Criminal Appeals and former Justice Barbara Rosenberg of Dallas, has recently submitted to the Court a Handbook of Guidelines for Gender-Neutral Courtroom Procedures. We published the text in the February 1997 Texas Bar Journal, and will review all comments before making a final determination on publication and distribution. Justice Owen has been the Court's liaison to this Task Force, which we created in 1995 upon the recommendation of the Court's Gender Bias Task Force.

## National Center for State Courts Self Study

During the last two years, the Supreme Court became the first court of last resort in America to undergo an external management study of its operation. Justice Enoch was the liaison from our Court to the authors of the study, which was conducted by the National Center for State Courts through grants to the State Bar of Texas from the State Justice Institute and the Texas Bar Foundation. Although the authors concluded that the Court is "functioning quite well," they offered numerous suggestions to further improve our internal procedures. We have already implemented several of these suggestions, while a number of others are under active

consideration.

### Prisoner Lawsuit Magistrates

Pursuant to H.B. 1343, 74th Legislature, the Supreme Court created a committee in 1995, chaired by Judge Joe Ned Dean of Trinity County, to devise a procedure for referring inmate civil litigation to magistrates for review and recommendation. The Court promulgated the rules proposed to us last December. A copy of our Order is attached as Exhibit C. As no system has been established for funding the magistrates, we are uncertain how widely these procedures will be employed.

### Conclusion

As you can see, the Supreme Court has an ambitious agenda to improve the fairness and efficiency of our legal system. But our efforts, though extensive, do not begin to tell the whole story of what our courts are doing to improve the administration of justice. Consider these initiatives:

The Court of Criminal Appeals has appointed over one hundred attorneys to represent death row inmates in applications for writ of habeas corpus, and is preparing standards of competency so that Texas may invoke the benefits of the new federal limitations on post-conviction review procedures of state capital convictions.

The Presiding Judges of the Administrative Judicial Regions are not only working hard to administer the Title IV-D child support program, but just last Friday released a comprehensive report to you on voluntary efforts to improve the quality of visiting judge assignments.

The Chief Justices of the Courts of Appeals meet regularly to discuss the voluntary equalization of their dockets and to exchange management ideas.

The district judges of Travis County have developed a mandatory mediation program for all civil cases set for jury trial or the longer non-jury docket, resulting in increased settlements and more definite settings for those cases that must be tried.

The El Paso Bar Association, working with the local judiciary, established a mandatory pro bono program requiring every local attorney to handle two domestic relations cases each calendar year. This highly successful program is now in its fifteenth year.

The Office of Court Administration has developed a model program to increase the collection of fines and costs, including the Crime Victims Compensation Fund Fee, which is being field tested in Brazoria County's three statutory county and probate courts.

These examples, which could be multiplied many times over, amply demonstrate that the bench and bar of Texas have the energy and ingenuity to meet the many challenges before us. By continuing to provide the help we need, the Legislature can help assure that we do in fact meet these challenges, and that the promise of equal justice for all becomes a reality for every citizen.

*Compiler's note: Exhibits omitted here.*