

State of the Judiciary
Chief Justice Thomas R. Phillips, Texas Supreme Court
Message to the Legislature
February 13, 2001, in Austin, Texas

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

I appreciate the honor of appearing before you again, in this historic room, to discuss the state of the Texas judiciary. This formal address is only one of many opportunities that we will have during the Seventy-Seventh Legislature to exchange information and ideas about ways to improve the administration of justice in Texas. But preparing and delivering a written report helps me consider thoroughly and systematically the needs of all our courts, and it helps to make you aware of my conclusions. By making this report available to the public through the Internet, we also gain the opportunity to learn whether my observations are inadequate, erroneous or insightful. At any rate, I have tried to prepare remarks that will meet the statutory goal of "promot[ing] better understanding between the legislative and judicial branches of government and promot[ing] more efficient administration of justice in Texas"¹

While people might regard courts and the legal process as traditional and slow to change, in fact we are changing as rapidly as the society we reflect and serve. Today's American legal system is much different from that of just twenty years ago, when I first became a judge. In 1981, there were eight big accounting firms, but law firms were local; perhaps only two or three firms in the country had less than half of their lawyers in one city. Today, law firms are not merely national, but international; and Texas firms have offices in such distant venues as Hong Kong, Singapore, and even Almaty, Kazakhstan. Globalization has strained our traditional notions of licensing lawyers to practice in a single jurisdiction, and multijurisdictional practice is an urgent topic among law reformers. Even the notion of law as a discrete discipline is under attack, as customers opt to obtain, for example, legal, accounting, and financial services from one provider.

Courts have changed dramatically as well. For today's judge, a computer and a conference room may be more important than a courtroom. New roles as docket manager, document reviewer, mediator, case worker and therapist are supplementing and often supplanting the traditional adjudicative function. While judges need highly developed "people skills" to meet these new challenges, they also need greater knowledge and sophistication than ever before to deal with the complex and novel issues that come to the bar of justice. Both federal and state courts require trial judges to be "gatekeepers" of expert testimony to ensure its scientific reliability.² Moral and philosophical issues arising out of the genetic and technological revolutions will come to the courts for resolution, with profound implications for all society.

At the same time, more and more private litigants are bypassing the courts, opting for private judging, arbitration and mediation. Some of our best judges have left the bench to seek higher pay, better hours and more challenging work in that "parallel universe," leaving the real possibility of a two-tiered system of civil justice - one for the rich, one for the poor. Our state and county courts will see more and more civil litigants attempting to appear pro se, especially in

family law cases.³ They will also see more persons who need accommodations for disabilities or who need interpreters, legitimate needs which further strain scarce local resources. And as our society continues to become more diverse, they will see more persons who either don't understand the basic underpinnings of our judicial system or who don't believe that justice is available to persons of their nationality, ethnicity, race or gender.

Time precludes my dealing with these challenges in any detail, except to say that our judges are, as never before, engaged in anticipating and planning for the future. Consistent with the statutory requirement that this speech "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,"⁴ I will devote the balance of my remarks to four issues: proper provision for indigent criminal defendants, legal assistance to the poor in civil cases, developments in our foster care and adoption system, and the urgent need to improve the way we select our judges.

Representation of Indigent Criminal Defendants

For the last few years, national and even international attention has been focused on whether Texas provides adequate legal representation to indigent persons accused of crime. While most courts have done a commendable job of appointing competent counsel to represent those who cannot afford to hire their own attorney, there have undoubtedly been some severe lapses. Some appointed counsel have been unwilling or unable to represent their clients vigorously or effectively; others have been appointed after unreasonable delay; and still others have been markedly underpaid for their services. It is time to make certain that these problems do not occur again.

The bench and bar of Texas are committed to improving the system. After issuing a much-publicized report on the issue,⁵ the State Bar Committee on Legal Services to the Poor in Criminal Matters is now preparing formal recommendations to the Bar Board of Directors on improving the appointment process, training appointed counsel, and securing additional resources. Last year, the Judicial Section of the State Bar of Texas adopted a resolution calling for minimum proficiency standards for appointed counsel, time deadlines for appointments, and state funding and compensation standards for appointed counsel.⁶ The Judicial Section was also the largest financial supporter of the Symposium on Indigent Criminal Defense, held in Austin last December. Two weeks ago, the Judicial Council unanimously called for meaningful legislation in this area.⁷ Furthermore, Presiding Judge Keller of the Court of Criminal Appeals is working with the nine regional presiding judges and the Texas Criminal Defense Lawyers Association to develop a mandatory statewide education program for counsel seeking appointments. Their model is a Harris County program initiated by the local criminal district judges in 1992. Finally, the Judicial Committee on Court Funding has urged state funding for indigent criminal defendant representation as one of its legislative priorities for this session.

Taken together, these activities demonstrate a genuine commitment by lawyers and judges to improve indigent representation. We stand ready to work with the other branches of government to ensure that all indigent defendants are accorded full and fair legal representation.

Civil Legal Services for the Poor

The bench and bar have also intensified their efforts to provide better legal services to the poor in civil matters. The Fund for Basic Civil Legal Services to the Indigent, established by the Legislature in 1997 from increased court fees, has added more than \$3,500,000 to the annual budget of the Texas Equal Access to Justice Foundation, which also distributes about \$5,000,000 each year from the Interest on Legal Trusts Accounts (IOLTA) program.

This year, the State Bar has called for legislation extending state purchasing contract provisions to legal service providers and extending loan forgiveness programs to law graduates who are employed by legal service grantees. The Attorney General has asked that legal services for crime victims be funded under the Crime Victims Compensation Act. The Supreme Court has revised the State Bar dues statement to include a voluntary \$65 annual contribution for civil legal services from each lawyer, an innovation that dramatically increased attorney support in South Carolina. We have also revised the attorney pro bono reporting forms to gather more comprehensive information about the charitable and reduced fee work that lawyers are now performing. Those forms, accompanied by a letter from all the justices of the Supreme Court, will be mailed in the next few weeks.

In addition, the Supreme Court, the state's nine accredited law schools, and several other interested groups are co-sponsoring a colloquium entitled "Legal Education and Access to Justice" on February 23. There we will explore how law schools can enhance the use of pro bono activities in their curricula, thus further inculcating a spirit of service into Texas' next generation of lawyers. Finally, the Supreme Court is planning, in cooperation with the State Bar of Texas, to create the Texas Equal Access to Justice Commission, modeled on a similar initiative in Washington State. The Commission will oversee the work of a variety of legal service delivery groups, and will develop integrated and coordinated programs to ensure that all Texans have meaningful access to legal assistance.

Foster Care and Adoption

The Texas judiciary has made substantial progress in complying with both federal and state mandates on improving foster care and speeding adoptions. Since 1994, our Foster Care Task Force, chaired by Judge John Specia of Bexar County, has worked to identify problems, improve judicial training, and establish supplementary courts in Child Protective Services cases. Using associate and visiting judges, the new "cluster courts," which serve clusters of smaller counties across the state, assist all areas of the state in meeting your mandate of restricting temporary foster care to twelve months, with one good cause extension of six months.⁸ The expansion of this program, along with continued technology funding, is the top appropriations priority of the Texas judiciary.⁹

Much of the progress in child placement has come not from statewide programs, but from the individual initiative of local judges. In El Paso County, the 65th District Court was designated in 1997 as one of twenty model courts by the National Council of Juvenile and Family Court Judges. Judges Alfredo Chavez and Patricia Macias have won national recognition for that court's dramatic increase in adoptions, reunifications and permanent placements, as well as for the innovative family drug-treatment program for parents.

Judicial Selection

While many aspects of the Texas judicial structure could be improved, the greatest systemic problem with Texas courts remains the way our judges are selected. The current system has long outlived its usefulness, and now dangerously impedes public respect for the administration of justice.

Texas first embraced popular judicial elections in the mid-nineteenth century, in the vanguard of a national reform movement to separate politics from the bench. As a prominent scholar has noted: "Proponents of popular election insisted that the appellate judiciary had suffered because governors and legislators had distributed judgeships on the basis of 'service to the party' rather than on the 'legal skills or judicial temperament' of appointees."¹⁰ Popular elections perhaps yielded more qualified and more independent judges as long as the judges were few, the candidates were all of one color, class, gender and political party, the electorate was informed, and the campaigns were inexpensive.

Those days are gone. Hundreds of judicial races are contested across the state each year; the winners do not adequately reflect the diversity of the state; all the candidates are virtually unknown to the public; and the only practical way to inform the electorate is through costly paid media. Is it still a reform to make judges raise thousands, hundreds of thousands, or millions of dollars from the bar or other interested persons to run for office? Is it still a reform to ask more than two million registered voters in Harris County to decide 55 contested judicial races, as they had to do in the 1994 general election? If opinion polls are to be credited, few people think so.

Some have answered that change really isn't needed anymore, because the pitched battles of Texas judicial politics are behind us. They note that special interest groups have moved on to wage judicial election battles in Alabama, Ohio, Michigan and Idaho, and surely won't return here. This is wishful thinking. Since 1980, 207 district and appellate judges have been tossed out of office, more often than not simply because of their party label. That trend will accelerate if we do not change the system. The 2000 general election saw Republicans win seats on the Austin and Beaumont Courts of Appeals for the first time in history, while Democrats nearly won judicial races in Dallas and Harris Counties.

As many of you know, I have long favored the adoption by constitutional amendment of an appointment-retention election system for all courts of record. In my past addresses I have made my best case for the so-called "merit selection" plan, as I truly believe it would decrease partisanship, minimize fundraising, and increase diversity on the bench.¹¹ This year, Senator Duncan has once again proposed a constitutional amendment to adopt such a plan for our appellate courts, S.J.R. 3. I hope you will allow the voters to resolve this issue.

But other remedies short of merit selection are also possible. Last December, Senator Ellis, Senator Duncan, Representative Gallego, and I attended a national Summit on Improving Judicial Selection in Chicago, where representatives from seventeen large states discussed incremental improvements to electoral systems that would enhance public confidence in the courts. Many of those suggestions were directed to courts, bar associations, print and broadcast

media, and interested citizens, but some may be accomplished only by state legislatures. Among the proposals endorsed in the Symposium's Call to Action¹² are these:

- Public funding of judicial elections. H.B. 4, by Representative Gallego, would dedicate the amount of money raised by the attorney occupation tax to fund campaigns for serious candidates for Texas' two highest courts, where candidates currently are either criticized for raising too much money from special interests (Supreme Court) or are unable to raise sufficient sums to communicate effectively with voters (Court of Criminal Appeals).
- Improve judicial campaign finance laws. H.B. 167, by Representative Gallego, would prohibit unopposed candidates from accepting campaign contributions after the filing deadline.
- Voter information guides. H.B. 59, by Representative Puente, would require the Secretary of State to prepare a judicial voters guide for dissemination on the Internet. Voter guides have been maintained on the Internet in recent years by the State Bar of Texas and the Texas Civil Justice League, but neither has been supported by extensive publicity. The Judicial Council recommends that print copies also be prepared for voluntary free distribution in the state's daily newspapers, as has been done in Washington State.¹³
- Other interesting ideas have also been advanced in Texas. Among those that I hope you will consider are:
 - Retention elections. Leave initial elections as they are, but subject all incumbent judges who have been elected and who seek re-election to a retention or "yes/no" ballot, as is currently done in Illinois and Pennsylvania.
 - Cross-filing. Amend the Texas Election Code to permit judicial candidates to file for the nomination of more than one party, as has been endorsed by the Texas Judicial Council. This would encourage judicial candidates to be non-partisan without depriving either the parties or the candidates of the benefits of organized parties. Candidates who won both major party nominations would have dramatically shorter and cheaper campaigns.
 - Signature requirements. Frivolous campaigns could be discouraged by extending the petition requirements currently in place in the four largest counties for judicial candidates¹⁴ to other counties and to statewide judicial elections, as recommended by the Texas Judicial Council.

Any one of these changes would improve Texas judicial elections, and enacting several of them would be a major step in restoring our judiciary's now-tarnished reputation.

Conclusion

Across the world, citizens of emerging countries recognize that the rule of law is essential to self-government, and that the surest guarantors of the rule of law are respected, independent courts. The separation of judicial power from legislative and executive was one of the boldest

innovations of the American experience, and it is the one part of our governmental structure that has been emulated by emerging governments ever since.¹⁵

But these new nations, like ours, have found that maintaining allegiance to the rule of law is no easy thing. When a Philadelphian asked Dr. Franklin in 1787 what form of government the Constitutional Convention had just formed, he replied: "A republic, if you can keep it."¹⁶ The great philosopher knew how hard it would be, even for freedom-loving Americans, to keep faith in the institutions of democracy in times of stress and danger. The courts, with neither the purse nor the sword to enforce their rulings, are especially dependent on the confidence and good-will of the people.

Because the courts are at once both so important and so fragile, they must be upheld and maintained by the best efforts of all Americans, whether judges, lawyers, jurors, court personnel or citizens. As Chief Justice Harlan Fiske Stone once opined: "The law itself is on trial in every case." But the rule of law is also on trial when our Court promulgates rules of evidence or procedure, or when you pass laws governing the funding, organization, and operation of the judiciary. While the judicial branch may only be a minuscule part of the state government's budget, it is absolutely essential to every person in the state. As you consider the many ways to improve our state government, I hope that your verdict on the courts will be wise and just.

NOTES:

1. TEX. GOV'T CODE § 21.004.
2. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *E.I du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).
3. Texas Judicial Council, Performance Measures: Texas District Courts 40, December 14, 2000.
4. TEX. GOV'T CODE §21.004.
5. Allan K. Butcher and Michael K. Moore, *Muting Gideon 's Trumpet: The Crisis of Indigent Criminal Defense in Texas*.
6. Judicial Section of the State Bar of Texas, Resolution, September 27, 2000, attached as Appendix A.
7. See Appendix B.
8. TEX. FAM. CODE § 263.401.
9. The complete priorities of the Judicial Committee on Court Funding as attached as Appendix C.
10. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984-85 *American Bar Foundation Research Journal* 345, 348
11. See, e.g., *State of the Judiciary Addresses* of February 14, 1989 (pp. 9-16), February 23, 1993 (pp. 3-7), April 3, 1995 (pp. 7-9), February 24, 1997 (pp. 5-7), and March 29, 1999 (pp. 9-15).
12. See Appendix D.
13. A 1996 survey by the Division of Governmental Studies and Services at Washington State University showed that more primary voters in judicial races in the state's two largest counties regarded voters' pamphlets as important and actually used them before voting than any other source. The complete question is attached as Appendix E.
14. TEX. ELECTION CODE § 172.021.

15. For a brief discussion of the comparative frequency and success of parliamentary and presidential systems in emerging countries, see "The hobbled cheerleader," *The Economist*, May 8, 1999, page 25.

16. *Documents Illustrative of the Formation of the Union of the American States* 952 (Washington, GPO 1927), quoted in Eugene C. Gerhart, *Quote It! Memorable Legal Quotations* 643 (New York, Clark Boardman 1969)

Compiler's note: Appendices omitted here.