

State of the Judiciary
Chief Justice Thomas R. Phillips, Texas Supreme Court
Message to the Legislature
March 4, 2003, in Austin, Texas

GOVERNOR PERRY, GOVERNOR DEWHURT, SPEAKER CRADDICK, DISTINGUISHED MEMBERS OF THE SEVENTY-EIGHTH LEGISLATURE, FELLOW JUDGES, AND FELLOW TEXAS:

On behalf of the judiciary of Texas, I very much appreciate the opportunity to deliver this State of the Judiciary Address, to a joint session of the Legislature. By inviting me to appear in the same manner as you invite the Governor to give the State of the State Address,¹ you demonstrate the Legislature's respect for each department of government as separate and co-equal. The judges of Texas appreciate that commitment, and we pledge ourselves ready to work with you in devising creative solutions to the problems that face our branch.

Early in the Civil War, the United States found that spiraling budget demands obliged it to start printing paper money. A cabinet officer reportedly asked President Lincoln whether the new Greenbacks should bear the motto "In God We Trust." Lincoln replied that a more appropriate Biblical inscription might be: "Silver and gold have I none, but such as I have I give thee."²

Like the beggar seeking alms at the Temple gate, the Judicial Branch has little chance of success if all we seek from the Legislature this year is new money and new programs, especially since you don't have a printing press to balance your budget. But just as the beggar received from Peter and John something far more precious than money, the ability to walk and leap, you can use the current crisis to give the Judiciary something far better. You can reduce appropriations to the Third Branch not by rationing justice, but by restructuring the judicial system. You can make our courts not merely more economical, but more efficient and responsive as well. By removing obstacle to judicial efficiency, by redistricting the trial and appellate courts, and, most of all, by permitting the voters to decide whether to change the way we choose judges, you can enhance the rule of law all across Texas.

Enhancing Judicial Efficiency

As a result of proposed reductions to judicial appropriations, appellate courts will have smaller staffs and trial courts will have less technology. We can deal with these reductions better if the Legislature will streamline our courts to eliminate work. In particular, I ask you to ensure that the statutes granting jurisdiction to the various courts of our state are clear and consistent, so that judges and litigants need not struggle over whether a case has been filed in or appealed to the proper court. And I ask you to review and amend those statutes which, for whatever reason, the courts have not satisfactorily interpreted and applied. To give but one example, our Court for nearly thirty years has had difficulty understanding that part of the Texas Tort Claims Act waiving sovereign immunity for "personal injury and death... caused by a condition or use of tangible personal or real property..."³ In both majority opinions and dissents, we have repeatedly called upon the Legislature to clarify this language, which is not found in the laws of any other

state.⁴

In recent years, the House of Representatives has asked its Committee on Civil Practices to review and report on those appellate judicial decisions that “(1) clearly failed to properly implement legislative purposes, (2) found two or more statutes to be in conflict, (3) held a statute to be unconstitutional, (4) expressly found a statute to be ambiguous, or (5) expressly suggested legislative action.”⁵ The reports generated by these charges could help you draft clarifying language which will benefit the entire legal system.

Judicial Redistricting

Trial Court Redistricting. You could greatly enhance access to justice by redistricting the state’s district and appellate courts. The Texas Constitution contemplates that the Legislature will “enact[] a statewide reapportionment of the judicial districts following each federal decennial census.”⁶ If the Legislature fails to act by the first Monday in June of the third year after the census, a series of default procedures commence that may or may not result in a new plan.

I realize how hard it is to redistrict the state’s courts, having devised one plan of my own as part of my dissent to the Order of the Judicial Districts Board in 1993.⁷ I also know that many of you, during the recent interim and a decade ago, devoted many hours to this issue. Like me, you found that counties varied widely in the budget and staff devoted to their district courts, the types of cases filed in their districts, and the extra-judicial duties imposed on their judges. You found that many judges had to travel across several counties, while others had to hear only one particular type of case within a single county. You found that some counties were served by statutory county courts with nearly equivalent jurisdiction to the district courts, while others had statutory courts of more limited jurisdiction or only a constitutional county court. You found that building a prison or closing a plant could have a large impact on the judicial workload of a smaller county.

Yet, these facts abide. First, the Legislature has not passed comprehensive judicial redistricting since 1883,⁸ so it is unlikely that another look this year would be premature. Second, some district courts have far more work than others. Last year, for example, nearly twelve times as many cases were filed in the busiest district court as the least crowded court. Thus, if you equalize judicial workloads, the state can reduce expenditures for visiting judges, who are often assigned to move the state’s most crowded dockets.

Appellate Redistricting. I also urge you to reconfigure our appellate judicial district. No new appellate judgeships have been added since 1981,⁹ no new courts of appeals have been created since 1967,¹⁰ and no comprehensive redistricting has occurred since 1927.¹¹ As a result, last year more than three times as many appeals per justice were filed in the busiest court as in the least crowded.¹² To be sure, the Legislature has alleviated this imbalance by directing the Supreme Court to transfer cases between courts under a docket equalization program.¹³ But these transfers cost time and money, particularly because justices have to travel to the place where the appeal was originally filed to hear oral argument unless all parties agree otherwise.¹⁴ Moreover, some appeals are subject to forum shopping because, unlike any other state, Texas places some counties in more than one appellate district.¹⁵

As required by law,¹⁶ the Supreme Court has submitted to this Legislature its decennial assessment of the needs for changing appellate courts, a copy of which is attached as Appendix A. While we do not recommend eliminating any courts, we strongly urge you to eliminate overlapping districts and reallocate existing courts to even out the workload.

In some parts of the state, you will find a ready consensus for change. For example, I am told that the bench and bar in both El Paso and Midland support moving Midland County from the Eighth Court of Appeals to some other court. Other changes, however, may meet with strong local resistance. But courts are not for judges, and not for lawyers, but for the public, who deserve predictability and current dockets regardless of where they live. Therefore, I ask you to redistrict the appellate courts.

Judicial Selection Reform

I have saved for last the issue which I personally believe is most critical for our courts - the question of how we elect our judges. Our partisan, high-dollar judicial selection system has diminished public confidence in our courts, damaged our reputation throughout the country and around the world, and discouraged able lawyers from pursuing a judicial career. I urge you to submit a constitutional amendment at the earliest possible date to allow the people to decide whether they would prefer another election method.

When Texas adopted judicial elections in 1850, there were only three supreme and eleven district judges in the entire state. The judicial ballot was short: citizens voted in one or perhaps two races. Candidates campaigned through stump speeches and handbills, with a few kegs of whiskey for thirsty voters being the principal expense. Reformers believed then that judges chosen by the people would be more independent, more qualified, and more accountable.

Today, long ballots, partisan sweeps and big money campaigns have completely negated the original intent of judicial elections. Only three other states - Alabama, Louisiana, and West Virginia - still choose all their trial and appellate judges, both initially and for re-election, in partisan contested elections. Most other states have concluded that the goals of an independent, qualified and accountable judiciary can better be achieved by treating judicial races differently. Many states have chosen retention elections, which require every judge to run on a non-partisan "yes" or "no" ballot at the end of each term.

Under S.J.R. 33 and H.J.R. 63, filed yesterday with bipartisan sponsorship, all current Supreme Court, Court of Criminal Appeals, Court of Appeals and District Court justices and judges would stand for retention elections at the end of their terms. When a vacancy occurs, whether by death, resignation, removal, defeat or new court creation, the Governor would appoint a successor. Although the new judge would take office immediately, his or her appointment would be subject to Senate confirmation before the retention election. The Senate could also adopt rules requiring additional approval by the Nominations Committee for appointment made between sessions.

Retention elections would preserve most of the good of electing judges while alleviating most of the bad. Far from diluting the democratic process, retention elections would actually give most voters more control over their judges than they now enjoy. Today, most Texas judicial races are

unopposed, and most incumbents therefore need only one vote to be re-elected.¹⁷ Almost half of all Texas judges are initially appointed anyway, to a new bench or to fill an unexpired term.¹⁸ Many judges, particularly in less populated counties, have never had an opponent in their judicial careers.¹⁹ With retention elections, on the other hand, every judge would face his or her employers, the people, at regular intervals. If judges who know that voters can remove them are more patient, punctual and efficient, then why not ensure that all 516 state judges are subject to a meaningful vote?

Because retention elections are non-partisan, they will encourage a more deliberate vote. Since 1980, nearly one-third of all state judges who were opposed in a general election were defeated. Most of these defeats, I submit, were more about party label than competence or qualifications. While justice should be blind, voting shouldn't be. Yet, because of rapid changes in demographics and political affiliations across many parts of Texas, judicial turnover will undoubtedly increase in the coming years if we keep the current system.

Retention elections will also minimize the need for most judges to amass million-dollar war chests and hire image consultants. With very few exceptions, retention elections in other states more closely resemble the rather genteel canvasses of the 1850's than the raucous Texas Supreme Court elections of the 1980's and 1990's. The damage to public confidence caused by these nasty contests is hard to calculate, but a 1998 survey revealed that 83% of Texans believed that Texas judicial decisions were "very" or "fairly" significantly influenced by campaign contributions.²⁰ Perhaps worse, from watching 60 Minutes or Frontline or reading the New York Times, the Financial Times, or USA Today, millions of people worldwide now believe that politics has compromised the rule of law in Texas courts.

Lawrence Sullivan Ross was right when, at the Constitutional Convention of 1875, he labeled "[t]he destruction of public confidence in the judiciary" as "the greatest curse that can befall a country."²¹ When we look at the surcharges that some reinsurers impose on customers that do business in Texas, or the lengths to which some contracting parties will go to keep their disputes away from Texas courts, is it not possible that Governor Ross' curse is already upon us?

Contested, partisan judicial elections are likely to erode public confidence even further in the wake of last year's United States Supreme Court opinion in *Republican Party of Minnesota v. White*.²² Because of that decision, the Texas Supreme Court has repealed that canon of our Code of Judicial Conduct which kept judges and judicial candidates from commenting on issues that might come before their courts.²³ Issue-oriented campaigns make it difficult for people to distinguish between legislators who make the law and judges who merely interpret it.

Last year, a lawyer stopped me on the street to share a problem: his law firm couldn't decide who to support in a high-profile race between two district judges for a seat on our Court. He very much wanted to support the winner, complaining that his firm would really be hurt if they guessed wrong. I was stunned. Weren't both candidates able jurists who put principle above politics? "Yes," he readily agreed. Then why not just support the better candidate, I inquired. "Well," he explained, "our firm wants our clients to believe that we're players. If we back a loser, we'll have no credibility."

This year, you can offer the people of Texas a judiciary where no client will have to ask their lawyer, “How are you with the judge?” You can end the years of debate on this issue by letting the people decide, once and for all, what kind of election system they prefer. We have talked about this issue enough. As Shakespeare put it, “Action is eloquence.”²⁴

NOTES:

1. Compare TEX. CONST. Art. IV § 9 (Governor’s message and recommendations) with TEX. GOV’T CODE § 21.004 (State of Judiciary Message).
2. Keith W. Jennison, *The Humorous Mr. Lincoln* (New York, 1965) 93-94. Lincoln was quoting Acts 3:6 (KJV).
3. TEX. CIV. PRAC. & REM. CODE § 101.021(2).
4. See, e.g., *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 589 (Tex. 2001)(Hecht, J., concurring); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996); *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Tex. Dep’t of MHMR v. Petty*, 848 S.W.2d 680, 683-84 (Tex. 1992); *Robinson v. Cent. Tex. MHMR Ctr.*, 780 S.W.2d 169, 170 (Tex. 1989); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 32 (Tex. 1983); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 301 (Tex. 1976) (Greenhill, C. J., concurring).
5. *Interim Charges to House Committees*, 77th Leg., 2001.
6. TEX. CONST. Art. V, § 7a.
7. See Statement of Thomas R. Phillips and William E. Moody dissenting to Order of Statewide Reapportionment of Judicial Districts (August 25, 1993).
8. Ch. XLI, 18th Leg., Reg. Session, 1883 Tex. Gen. Laws 28.
9. Ch. 728, § 2, 60th Leg., Reg. Session, 1977 Tex. Gen. Laws 1953.
10. Ch. 291, § 31, 67th Leg., Reg. Session, 1981 Tex. Gen. Laws 761.
11. Ch. 36, 40th Leg., Reg. Session, 1927 Tex. Gen. and Special Laws 50, 56.
12. In 2002, 184 appeals per justice were filed in the Ninth Court, and only 61 appeals per justice were filed in the Eleventh Court.
13. TEX. GOV’T CODE § 73.001.
14. TEX. GOV’T CODE § 73.003.
15. See, e.g., *Miles v. Ford Motor Co.*, 914 S.W.2d 135 (1995).
16. TEX. GOV’T CODE § 74.022.
17. Between 1980 and 2002, over 69% (1632 of 2363) of Texas’ incumbent judges were entirely unopposed for re-election, and almost 80% (1889 of 2363) were unopposed in the general election.
18. Since I became Chief Justice on January 4, 1988, 404 state judges have reached the bench by election and 298 by appointment.
19. Today, 104 of Texas’ 516 state judges have never been opposed for the office they hold.
20. *Texas Supreme Court et al., Public Trust and Confidence in the Courts and the Legal Profession in Texas*, p. 24 (December 1998).
21. *Seth Shepard McKay, Debates in the Texas Constitutional Convention of 1875*, p. 429 (The University of Texas Press 1930).
22. 536 U.S. 765 (2002).
23. Supreme Court Order, Misc. Docket No. 02-9167 (2002).
24. William Shakespeare, *Coriolanus*, Act III, Scene II.