

State of the Judiciary  
Chief Justice Wallace B. Jefferson, Texas Supreme Court  
Message to the Legislature  
February 11, 2009, in Austin, Texas

Governor Perry, Lt. Governor Dewhurst, Speaker Straus, members of the Legislature, to my colleagues on the bench and most importantly, to the citizens of Texas, thank you for giving me an opportunity to speak with you today.

These are critical times for Texas and for the nation. Now more than ever, the public relies on all branches of government to work together. That work begins here in the Capitol, in this chamber and in the Senate, where the Legislature crafts laws to promote the general welfare. Without the executive branch to enforce them, the laws may as well be written on sand. And unless the judiciary interprets the laws faithfully, the underpinning of our democracy – the rule of law – will falter. We each have an obligation to concentrate our energies on the first goal the United States Constitution articulates, and that is “to establish Justice.” Working together, we have made good progress toward that ideal.

With the Legislature’s help, we have greatly increased transparency in the judiciary. The public has greater access to judicial information because we now have live webcasts of Supreme Court oral arguments, with links to all of the briefs filed in each argued case.

Legislative and public members serve on judicial bodies, such as the Texas Judicial Council, which is working to improve the administration of justice for all Texans. And through your generous support, the two high courts, the fourteen courts of appeals, the 449 district courts and the entire judiciary have employed new technologies to enhance court efficiency.

I could speak of these innovations for hours, but instead I would like to take a few moments on the impressive progress the Texas judiciary has made to protect our most vulnerable Texans in times of economic crisis.

#### Access to Justice For All Texans

Alexander Hamilton said that “the first duty of society is justice,” and the first duty of justice should be the protection of our most vulnerable citizens of all – our children. In my last State of the Judiciary, I spoke of a fledgling initiative to create a commission focusing on children and families. Under the strong and passionate leadership of Justice Harriet O’Neill, that idea has evolved into the Supreme Court’s Permanent Commission on Children, Youth and Families.

The judiciary plays an integral role in the lives of children who are thrust into the legal system through no fault of their own. Only a court order can remove them from their families, or return them to their homes. Only a judge can determine who visits a child, or when to terminate a parent’s rights. And where child abuse or neglect is involved, justice is ensured only if its administration is thoughtful and swift. Our commission has been both thoughtful and swift. In just a year’s time, it has distributed over 1.4 million dollars in grants to help expand judicial and

legal training throughout the state. Because of the Commission's great work, Texas has been selected to host the third National Judicial Summit on Child Protection. In October, Austin will host judicial leaders from every state in the nation, coming together to improve the lives of children and families nationwide. Justice O'Neill has their interest at heart, and the Court commends her for her devotion to this cause.

While protecting children remains a focus of our judiciary, part of ensuring justice for all involves emergency preparedness. No one will soon forget the tragic scenes of families torn asunder in the aftermath of Hurricane Katrina. In addition to the human catastrophe, these disasters can have serious consequences to the rule of law, as vital court records are destroyed, protective orders ignored, and vested rights lost. I talked with the Louisiana Chief Justice shortly after that calamity, and he spoke emotionally about the toll on Louisiana citizens who had no access to the courts. Based on that and other examples, the Supreme Court established a Task Force to Ensure Judicial Readiness in Times of Emergency. The Task Force was charged with the identifying existing gaps in court security, ensuring continuity and examining other preparedness functions across the Texas judiciary. Chaired by Denise Davis, this task force has made great strides in developing response plans for adoption by individual courts that will continue operations in the event of hurricanes, pandemics, violence, terrorism and threats to computer systems. Fortunately, when Hurricane Ike hit, Presiding Judge Olen Underwood made sure that the task force was prepared. He helped develop interim emergency plans for counties, which were in effect in the Hurricane zone. As a result, many legal matters requiring emergency action were submitted to courts in adjacent counties, preserving the legal rights of coastal residents. In the next few weeks, the Task Force will publish its final Report and Recommendations, including a plea that the judiciary have a representative at the State Operations Center, where Texas prepares for disasters. I commend the Task Force for its work and look forward to collaborating with the Governor and Legislature to ensure the continuity of court operations.

Access to justice for low-income Texans continues to require the coordinated efforts of all branches of government. The number of those qualifying for court appointed counsel in a criminal case is on the rise, especially in light of a recent United States Supreme Court's recent ruling that requires the appointment of counsel for defendants before charges are filed. Last session the Legislature increased state funding to help ensure access to court appointed counsel for low-income Texans. The additional funding has enabled the Task Force on Indigent Defense, under the leadership of Presiding Judge Sharon Keller of the Court of Criminal Appeals, to assist a number of jurisdictions in the establishment of public defender offices. The two newest programs are a regional office serving Bowie and Red River Counties and a public defender created by Lubbock County serving sixty-five counties. And our program to provide legal services to the poor, led by a great Texan, Jim Sales, has been impaired by the national economic downturn. I hope the Legislature will help us preserve this program, upon which thousands of Texans have come to rely to protect their legal rights.

But no system of justice is successful if it leads to the incarceration of citizens who have committed no crime. I have long advocated creation of a commission to study wrongful convictions. The recent exoneration of Charles Allan Chatman, who spent twenty-seven years in jail for a crime he did not commit, and last week's posthumous exoneration of Timothy Cole,

only confirm the need to confront this issue. The Court of Criminal Appeals' Justice Integrity Unit has brought about meaningful reform through education, training, and legislative recommendations. It has achieved significant advancements in the areas of eyewitness identification procedures, collection, preservation, and storage of evidence, and writs of habeas corpus. There is even a proposal for a traveling DNA lab. While this is impressive progress, I continue to commend the creation of a commission to investigate each instance of DNA exoneration, to assess the likelihood of wrongful convictions in future cases, and to establish statewide reforms.

### Public Perception of Bias in the Judiciary

For the remainder of my time here today, I would like to continue a discourse begun 23 years ago by my Democratic predecessor, Chief Justice John Hill.

I am concerned by the public's perception that money in judicial races influences outcomes. This is an area where perception itself destroys public confidence. A month from now, the United States Supreme Court will hear argument on this very issue in a case called *Caperton v. Massey*. The Court will decide whether due process requires the recusal of an elected judge who has benefited from a litigant's campaign expenditures. Last month, retired United States Supreme Court Justice Sandra Day O'Connor gave a hint of what may be coming in that case. She said:

If I could do one thing to protect judicial independence in this country, it would be to convince those states that still elect their judges to adopt a merit selection system and — short of that — at least do something to remove the vast sums of money being collected by judicial candidates, usually from litigants who appear before them in the courtroom.

I share Justice O'Connor's concern about the corrosive influence of money in judicial elections. Polls asking about this perception find that more than 80% of those questioned believe contributions influence a judge's decision. That's an alarming figure — four out of five. If the public believes that judges are biased toward contributors, then confidence in the courts will suffer. So I ask the question — is our current judicial election system, which fuels the idea that politics and money play into the rule of law, the best way to elect judges in Texas? The status quo is broken. It is time for Texas to set a high standard for judicial selection. That is why I am so pleased to be speaking to visionaries in the House and Senate, for the judiciary is incapable of commanding such reform. Your work on this issue can bequeath to all Texans the gift of courts that need labor no longer under the assumption that judicial decrees are encumbered by political or economic motives.

### Reforming Judicial Elections

The Founding Fathers believed that the best method to secure an independent judiciary is through nomination by the President and confirmation by the Senate. That method, said Alexander Hamilton, serves at least two purposes. First, it ensures that a judge's decision is influenced less by the preferences of a majority than by the Constitution and laws. And appointment is superior to popular election, he said, because the people lack the requisite information or interest to select judges of sufficient merit and integrity. Although Texas adopted

the federal method for a few years after it joined the Union, it soon embraced the Jacksonian premise that citizens have not only the ability, but the right, to vote for the men and women who control their fate in our courts of law. We have been electing judges since 1876; only recently have those elections transitioned into truly partisan contests.

Sadly, we have now become accustomed to judicial races in which the primary determinants of victory are not the flaws of the incumbent or qualities of the challenger, but political affiliation and money. In 1994, 2006 and again in 2008, district judges lost elections due to partisan sweeps in the urban counties. We have witnessed similar partisan sweeps in our courts of appeals and high courts. I would like to claim that voters gave me the honor of continued service due to stellar credentials, but it may just as well have been tied to McCain's success in Texas. And this is the point. Justice must be blind – it must be as blind to party affiliation as to the litigant's social or financial status. The rule of law resonates across party lines.

Both of my predecessors—Chief Justices Hill and Phillips—giants from opposite political perspectives, advocated for merit selection, as have several Legislators who see the need for an independent, fair and respected judiciary.

Currently, only seven states hold partisan judicial elections. Seven. Twenty-five states either have a complete merit selection system or a system that combines merit selection with other methods. There are other proposals that call for eliminating the straight ticket vote, so that Democratic judges have a chance at statewide office, and Republican judges might be competitive in urban district-court races. So long as we cast straight ticket ballots for judges, the fate of all judges is controlled by the whim of the political tide. A merit system, in which voters later vote the judge up or down, is the best remedy, but I commend any innovation in which the goals are to recruit and retain qualified judges, and to reduce the role of money in judicial campaigns.

## Conclusion

Chief Justice Harlan Fiske Stone once said: “The law itself is on trial in every case.” Texas is blessed with talented men and women who have committed themselves to conducting that trial honorably. I am proud to serve with them, Democrats and Republicans alike. But the State of our Judiciary will be made stronger if we appoint our judges based on merit and hold them accountable in retention elections. To those who say we cannot achieve this lofty goal, I have three words: Yes we can. Thank you and God Bless Texas.