

State of the Judiciary
Chief Justice Nathan L. Hecht, Texas Supreme Court
Message to the Legislature
February 18, 2015, in Austin, Texas

LIEUTENANT GOVERNOR PATRICK, SPEAKER STRAUS, MEMBERS OF THE LEGISLATURE, MEMBERS OF THE JUDICIARY, DISTINGUISHED GUESTS, LADIES AND GENTLEMEN:

Benjamin Cardozo, a United States Supreme Court Justice in the mid-20th century, once observed that “courts and legislators work in separation and aloofness”. To bridge that division, the Chief Justice of the Texas Supreme Court is required by statute to deliver a message on the State of the Judiciary each regular legislative session “evaluating the accessibility of the courts to the citizens of the state” and the courts’ “future directions and needs”. In the Legislature’s words, the State of the Judiciary message is to “promote better understanding between the legislative and judicial branches of government and . . . more efficient administration of justice in Texas.”

Over the third of a century I have served as a judge, including 26 years as a Member of the Texas Supreme Court, I have witnessed relations between the Legislature and the Judiciary grow stronger. This has benefitted the people of Texas. In the past dozen years, for example, the Legislature has repeatedly relied on the Supreme Court’s administrative and procedural rule-making authority to implement legislative programs, translating policy into practices. For the past six years, at the Judiciary’s urging, the Legislature has provided critical financial support for the legal system’s efforts to provide basic civil legal services to the poor. And more recently, the Supreme Court has opened its courtroom to Senator Whitmire and a convocation of stakeholders interested in juvenile justice — issues from decriminalizing schoolyard misconduct and truancy to improving efforts to rehabilitate juveniles charged with criminal offenses. In these circumstances and others, the Legislature and the Judiciary, while strictly observing the separation of powers and independently carrying out their separate responsibilities, combined efforts to achieve the best for the people of Texas. At a time when the national government is widely criticized as dysfunctional, Texas government is working for the people.

The Texas Judiciary is committed to upholding the rule of law. It is committed to a court system that is fair, efficient, and just, interpreting and applying the law guided by fixed principles. And it is committed to a justice system that is accessible to all, regardless of means. That is the State of the Texas Judiciary, and my message is that the Third Branch will pursue these commitments, working together with the Legislative and Executive Branches, in every way it can for the good of the people of Texas.

During my tenure on the Supreme Court, the nature of its cases, and of civil cases in the courts of appeals, has shifted. Fewer cases involve the common law — judge-made law, like negligence and other torts, property rights, and contracts. More involve statutory interpretation. In these cases, courts do not decide for themselves what the law should be; rather, their responsibility is to give effect to the intent of the legislative body as expressed in the statutory text. Ascertaining what is meant by what is said can be difficult. Try it with your spouse. Even when a statement is

in writing, and has been carefully considered, its application in an unforeseen situation can be unclear.

Since 1992, several of the federal circuit courts of appeals have participated with the Congress in an inter-branch project aimed at improving communication and understanding regarding statutory construction. In the interim following the 76th Session of the Texas Legislature, a House Select Committee recommended implementing a similar process to better understanding of judicial interpretations of statutes. Given the likelihood that Texas courts will be called upon to interpret the laws passed by this body with even more frequency, I propose that the Legislature and the Judiciary explore mechanisms for improving their understanding of the writing and interpretation of statutes. Neither Branch can relinquish its constitutional independence or responsibility, but both should work toward a better understanding of the role of each.

The Judiciary has assisted the Legislature in passing school ticketing reform. Disruptive conduct thwarts education, and teachers and administrators must have effective means to stop it. But for years, courthouse hallways were lined with youngsters who belonged in school, not in the criminal justice system. Working to balance the interests of children, schools, and the courts, the 83rd Legislature enacted reforms with sweeping results: fiscal year 2014 saw an 83% drop in criminal filings under the Education Code — that's 90,000 fewer tickets written. Other states have followed Texas' lead. As a result, more kids are in classrooms and out of courts.

The reforms last Session did not extend to truancy and attendance laws, which, while intended to keep kids in school, often operate to keep them out. The theory is that the threat of punishment will incentivize attendance. But when almost 100,000 criminal truancy charges are brought each year against Texas schoolchildren, one has to think, this approach may not be working. Playing hooky is bad, but is it criminal? A better, more effective solution may be for schools and courts alike to provide prevention and intervention services for at-risk children to actually achieve the goal: getting them back in school. This has led the Texas Judicial Council, a policy-making body for the Judiciary, to call for decriminalizing the failure to attend school. The stakes are high. Our children are our most precious treasures and our future. Education is the key to their success.

Some 40,000 children are in state conservatorship, and courts play a critical role in determining their future. The Supreme Court's Permanent Judicial Commission for Children, Youth, and Families has recommended legislative changes to improve handling of cases involving Child Protective Services. Indigent parents are entitled to a court-appointed attorney, but when there is no conflict of interest between them and no history of family violence, the Commission recommends that judges be permitted to appoint one attorney for both parents, not an attorney for each, thereby reducing costs and improving efficiency. The Commission also recommends the creation of county or regional programs to help provide attorneys for indigent parents. And the Commission recommends improved procedures for transferring a case from one county to another so that placement of children in a stable environment is not delayed. The Texas Judicial Council has endorsed all these recommendations, and I urge you to consider them.

In most situations, the poor have no right to basic civil legal services for things like family matters, divorce and child custody, protection from domestic violence, eviction and foreclosure,

and assistance for the elderly. Legal aid lawyers and staffs dedicate themselves to this work at personal financial sacrifice, and lawyers and bar associations annually contribute millions of dollars to provide legal services to the poor. A University of North Texas study has shown that Texas lawyers annually donate more than two million hours in pro bono legal services to the poor, worth hundreds of millions of dollars. Funding for legal aid helps provide the infrastructure to connect clients needing services with lawyers willing to help.

Lawyers provide services pro bono publico — a Latin phrase meaning “for the good of the public” — as part of their professional responsibility, but the need is far too great for them to meet on their own. Legal aid providers help more than 100,000 families each year, yet they estimate that more than three out of four are turned away for lack of resources to help. Access to justice for all is a righteous cause. It is humanitarian, it is good for the economy, and most importantly, it is essential to the integrity of the rule of law. Justice for only those who can afford it is neither justice for all nor justice at all.

For three Sessions now, the Legislature has provided financial support for access to justice during hard times that have both diminished available resources, increased the number of poor, and exacerbated their needs. I thank you for that support again this Session. In addition, the 80th Legislature passed a statute imposing a \$5 fee on patrons of sexually oriented businesses to be used for legal services programs for sexual assault victims. Now that the statute has been upheld in the courts, I urge this Session to keep its promise of funding for these programs.

I must also call upon your help for a special need of access to justice: basic civil legal services for veterans. Too often, servicemen and women return from duty to find benefits delayed, families struggling, jobs scarce, homes in foreclosure, and debt collectors at the door. These enemies at home can be as real a threat to a veteran’s survival as the enemies faced in the field. We all cringe at the thought that the country has lost more active military to suicide than to combat in Afghanistan, and that 22 veterans a day commit suicide. When basic legal problems pressure veterans, lawyers can help. There are several programs already, like the State Bar’s Texas Lawyers for Texas Veterans. But as with other efforts to improve access to justice, resources are needed to support other legal services programs and to bring veterans who need help together with lawyers who can provide it. The Supreme Court has requested \$4 million for the next biennium to help provide legal aid to veterans.

The Texas Veterans Commission has endorsed the Court’s request, and in turn, the Court supports the Commission’s pledge of \$1.5 million for legal aid and for veterans criminal courts. Texas has 20 veterans courts, more than any other state, but Texas has the second highest veterans population. Veterans courts have proven effective in determining when rehabilitation is better than punishment. Veterans courts do not offer a get-out-of-jail-free card; their programs are serious and demanding. But they recognize that punishment should not always be the default.

The rule of the battlefield is leave no one behind. It is ingrained in every serviceman and woman. Our military cannot return from risking their lives in defense of our freedoms and values only to find that the justice system they fought for has left them behind. Their access to justice must be assured.

Access to justice is a struggle, not only for the poor, but for many in the middle class and small businesses who need the legal system but find the costs prohibitive and are forced to try to represent themselves. There are lawyers looking for work, and clients who need lawyers, but the cost of legal services keeps them apart. This has been called the “justice gap”, and it’s growing. Standard forms for use in court proceedings and for other purposes can help people represent themselves, and the Texas Supreme Court continues to work to provide them. But the best solution is personal legal assistance.

An important factor in the cost of legal services is the expense of a legal education. New lawyers often enter practice with a heavy load of student debt. The new UNT Dallas College of Law, under the leadership of former Judge and now Dean Royal Furgeson and Professor Ellen Pryor is trying to provide a legal education at a fraction of the cost of other public law schools. There may be other ways to encourage lawyers to provide legal services at reduced rates to people of limited means, and I know our other law schools want to help address the problem. This week, I will ask the Supreme Court to convene a select group of representatives of the courts, the law schools, the State Bar, the practicing lawyers, and the legal aid and public service communities to consider ways to encourage interested law students after their second year of law school to devote their practice to providing legal services at more affordable rates and help close the justice gap.

The Legislature and the Judiciary have partnered in efforts to improve the criminal justice system. Since 2008, the Criminal Justice Integrity Unit established by the Court of Criminal Appeals and Presiding Judge Sharon Keller, and led by Judge Barbara Hervey, has continued to take a hard look at the strengths and weaknesses of the Texas criminal justice system. Innocence commissions at each of the public law schools review cases for potential exonerations. Based on DNA evidence, Texas has exonerated 52 defendants, more than any other state. That is not, in my view, because Texas judges, prosecutors, and juries make more mistakes, but rather, because Texas has not been afraid to take a hard look at the system and own up to mistakes when they have occurred. Every conviction of an innocent person is tragic, ruining lives, destroying public confidence, threatening public safety when the guilty remain at large, and denying victims justice. Together, the Legislature and the Judiciary must continue to make all reasonable efforts to assure that any innocent person who has been convicted is exonerated, and that only the guilty are convicted.

One way is to continue to make the promise of Gideon v. Wainwright a reality. Gideon is the 1963 U.S. Supreme Court case upholding the constitutional right of indigent criminal defendants to court-appointed counsel. Since 2001, the number of Texas criminal defendants receiving court-appointed counsel has increased 45%, and the amount spent, mostly by the counties, has increased 137%. But more must be done, and the Texas Judicial Council and Texas Indigent Defense Commission have both called for an additional investment by the State in indigent criminal defense and support for expanding public defenders’ offices and assigned counsel systems. Also, Gideon’s promise is fully realized only when the court-appointed lawyer is qualified, experienced, and not too busy to give attention to each case. The State should increase its investment in these programs.

The Judiciary is ever more efficient. Last year Texas’ 3,300 judges disposed of over 10 million

cases, from traffic violations to capital murders, and from simple debt collection to complex business cases. In fiscal year 1984, the courts of appeals, with 80 Justices, disposed of a little over 8,000 cases. For more than 30 years, the number of courts of appeals justices has not changed. There are still 80. In 2014, with the same number of Justices as in 1984, the courts of appeals disposed of well over 11,000 cases — a 40% increase in workload. The high courts are also productive. The Court of Criminal Appeals is one of the busiest courts in the entire country. The Supreme Court ended the year with only four argued cases pending — as few as at any time in its history. Efficiency is important to the courts, but always the most important thing is to have the time and resources to get every case right.

One reason the appellate courts have been able to increase productivity without increasing the number of judges has been the addition of legal and clerical staff. But the gap between private and public sector legal and clerical salaries is large, and to attract the best people to court positions, law clerk, staff attorney, and clerical salaries must not fall further behind. The courts of appeals have worked together to present an almost entirely unified budget request to treat similar court positions similarly and equal to other positions in the government. The requests are modest and reasonable. They are essential to our work. Please remember that state funding for the Judiciary is barely one-third of 1% of the State's budget. I urge the Legislature to fund the courts' budget requests fully.

Another reason all the courts have increased efficiency is better technology. Most of us are accustomed to accessing information through the Internet at the click of a mouse — or at least, most of our children are accustomed to doing that. The appellate courts share a docket management system that allows judges to securely access briefs, memos, and drafts from anywhere there is Internet availability, as well as to check deadlines and timetables. The Supreme Court has mandated electronic filing in civil cases in all appellate courts and in trial courts in the 39 largest counties. E-filing is also voluntary in another 71 counties, making it available in courts where 93% of Texans reside. The e-filing system will soon be required throughout Texas in civil cases and will be available in criminal cases. A small amount of additional state funding will be needed to provide equipment and software in the less populous counties. In the end, the savings to courts, clerks, lawyers, litigants, and taxpayers will be incalculable, not to mention the increased transparency to the public. The success of the e-filing project in a State as big and diverse as Texas has been almost entirely due to the efforts of the Office of Court Administration and its director, David Slayton. A 21st century Texas will soon have a 21st century Judiciary.

New challenges loom. The Texas over-65 population is expected to double by 2040 — a “silver tsunami”. The elderly and incapacitated often need the care of a guardian appointed by the court. But a person for whom a guardian is appointed loses important rights — rights to manage finances and make personal decisions. Guardians are a godsend to some, but unfortunately, guardians can also take unfair advantage. There are already 50,000 active guardianships in Texas, and the number is climbing. Two years ago, a special committee of the Texas Judicial Council began to study ways of ensuring the safety and financial security of our elders, something that most courts lack the resources to do. One way is to monitor guardianships to protect against exploitation and abuse and to ensure that they exist only when necessary. The Council has now called for a pilot program to be implemented by the Office of Court

Administration in several areas of the State to explore best methods and practices for monitoring guardianships. I urge the Legislature to approve the small price tag for that important program. I cannot end without urging your consideration of the Judicial Compensation Commission's 2014 report. To attract and keep the qualified judges Texans want and need, they must be fairly compensated. I urge your consideration of the Commission's recommendations on the amount of judicial compensation and on handling the issue in future sessions.

I have not spoken to the problems of judicial selection because I have no consensus solution. The issue has been discussed throughout the State's history and remains mired in controversy to this day. But let me say two things. First: Texans rightly demand that judges, like all public officials, be accountable, but when voters have no way of knowing a candidate's qualifications, election results are usually the product of campaign spending, familiar names, political swings, and blind luck. The current system rarely serves the public's desire for accountability. Second: The political parties want to participate in judicial selection, and their interest is legitimate. But the increasingly harsh political pressures judges face, and to which they are not permitted as judges to respond, threaten the independence judges must maintain to wield the power to decide the people's disputes with each other and with their government. Judges try to resist those pressures. The public is understandably skeptical they can succeed.

Judges, like others, disagree about judicial selection. But in my view, the tensions in judicial selection are mounting and will tear at the Judiciary's integrity. I hope the Legislature will continue to consider paths to reform.

All people yearn for justice. The prophet Amos cried, "Let justice roll down like waters, and righteousness like an ever-flowing stream." The Texas Judiciary is committed to this sacred cause. We ask for your help.

God bless you, and God bless Texas.