

The STATE OF THE JUDICIARY in Texas



Chief Justice Wallace B. Jefferson

Presented to the 79th Legislature

February 23, 2005
Austin, Texas

THE SUPREME COURT OF TEXAS

WALLACE B. JEFFERSON
Chief Justice

Justices

NATHAN L. HECHT
PRISCILLA R. OWEN
HARRIET O'NEILL
DALE WAINWRIGHT
SCOTT A. BRISTER
DAVID M. MEDINA
PAUL W. GREEN

THE TEXAS COURT OF CRIMINAL APPEALS

SHARON KELLER
Presiding Judge

Judges

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN

Chief Justice Wallace B. Jefferson

STATE OF THE JUDICIARY

Presented to the 79th Legislature

February 23, 2005

Austin, Texas

GOVERNOR PERRY, LIEUTENANT GOVERNOR DEWHURST, SPEAKER CRADDICK, DISTINGUISHED MEMBERS OF THE SENATE AND THE HOUSE OF REPRESENTATIVES, LADIES AND GENTLEMEN:

I am honored to appear before you for my inaugural "State of the Judiciary" address, one of the unique privileges afforded to me as Chief Justice. As you know, I was appointed by Governor Rick Perry to fill the vacancy left when Chief Justice Tom Phillips retired. Tom Phillips devoted his life to the Court, and to the judiciary, and has received much-deserved praise for his service to Texas. I am sure I have the authority to order yet another plaque for this giant Texan. I choose instead to honor his example by speaking passionately about how the judiciary can best meet its responsibility to the people of Texas, to litigants in our courts, and to all who expect our halls of justice to be fair and impartial.

The state of our judiciary is strong; made strong by those, like Chief Justice Phillips, who have dedicated their lives to the great public enterprise of preserving our state and national constitutions and to protecting and defending laws that ensure we remain a government of the people. Some would say that the judiciary, lacking the power of the purse or the means of enforcement, is the weakest governmental branch. I disagree, because our legislature understands that a law construed erroneously threatens lawmaking. Our governor knows that an edict ignored is lawlessness. And I need not remind this audience, who knows of the Treaty Oak, that a weak branch often signals trouble in the roots.

Judicial Compensation

While strong, the judiciary currently faces a challenge that calls for legislative and executive action. The challenge is to fund the judiciary at a level sufficient to retain our most capable and experienced judges. Texas is losing judges at all levels of the judiciary due, at least in part, to salaries that have not kept pace with the times. Ask Judge Harvey Brown, Justice Murry Cohen, and my former colleague Craig Enoch if inadequate compensation played a role in their departures from the bench. And let us admit to ourselves that the judiciary suffers from the loss of their expertise, integrity and experience.

Teddy Roosevelt once said: “It is not befitting the dignity of the nation that its most honored public servants should be paid sums so small compared to what they would earn in private life that the performance of public service by them implies an exceedingly heavy pecuniary sacrifice.”¹ Those words are as true today as they were in 1908. Texans deserve to walk into a Texas courtroom knowing that their cases will be heard by women and men of talent and experience, judges who have been recruited from among the most capable and successful lawyers. I want all Texans in every area of the state, and all litigants from outside the state who are properly before Texas courts, to have access to a judiciary that includes the most capable, the most dedicated, and the most knowledgeable and experienced.

All too often, our brightest and most experienced judges are leaving the bench, moving on to other opportunities outside the judiciary. It is no secret that judges double or triple their salaries by returning to the private sector. Even judges who choose some other form of public service – those who teach in our public law schools or who are honored with an appointment to the federal bench – increase their salary by 40% or more.

Our most distinguished jurists accept the call to judicial service not for monetary compensation but out of devotion to the rule of law. Judges in our state willingly accept a degree of personal financial sacrifice in exchange for that privilege. But if we ask judges to sacrifice too much, Texas will be left without the experienced judiciary that it surely deserves. Today, we are asking too much. I have not been alone in noting the emergence of a developing trend. Our most experienced judges are leaving the bench, replaced by others who, although dedicated and intelligent, are not equipped to handle those cases as efficiently as their experienced predecessors. Of course, we benefit from the recruitment of new judges, who add energy and innovation to the judiciary, but a large-scale replacement leads inevitably to uncertainty and inefficiency.

A transitory judiciary *is* inevitable (I am sad to say) if a judge can serve only as long as his or her savings permit. We do not want a judiciary in which judges serve with a view toward how their rulings will advance or detract from resumes they prepare in contemplation of a short tenure in office. This, I think, is what is meant by judicial independence – the conviction to rule courageously without regard to such personal considerations.

Today, the salary of our state judges is less than even that of a first-year associate at a large firm and pales in comparison with other states: In the 1980s, Texas ranked 5th among the 50 states for judicial compensation at the courts of last resort. Today, Texas ranks 39th. Texas’s intermediate court salaries rank 34th, and trial court salaries rank 28th.

An inexperienced judiciary takes a toll on the citizens of the state: it delays justice by prolonging child custody decisions, slowing criminal trials, and necessitating new trials.

¹ Eighth Annual Message, December 8, 1908.

It also takes an economic toll: business leaders have reported, in survey after survey, that they are more likely to invest in states whose courts can offer judicial efficiency and consistency. In 2004, for example, a United States Chamber of Commerce national survey listed business leaders' top concerns about the legal environment.² They were most concerned about punitive damages, an area recently addressed by the Texas Legislature. Close behind, however, were concerns about "judicial competence" and "timeliness of decisions." These issues even outranked concerns about workers' compensation, product liability, and reform of the jury system. Because businesses invest in states with a strong judiciary, state support of the judiciary is an economically sound decision even in these days of tight budgets. A study performed by the Perryman Group, an economic research firm, reports that a relatively modest investment in judicial salaries will more than pay for itself through increased business activity and increased state revenues.

The goal of an efficient, effective judiciary was recognized from the earliest days of our Nation and of our beloved Texas. Indeed, in his message to the Sixth Congress of the Republic of Texas, President Sam Houston said: "To maintain an able, honest, and enlightened judiciary should be the first object of every people." The framers of the United States Constitution also understood the importance of an efficient, experienced judiciary; they wrote into the Constitution a provision forbidding any reduction in federal judges' salaries.³ Early on, the United States Supreme Court recognized that this constitutional provision was enacted, in its words, "not to benefit the judges, but . . . to attract good and competent [judges] to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich."⁴

John Marshall, a Revolutionary War hero and former Chief Justice of the United States, aptly noted that "[t]he Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all."⁵ Two centuries later, the statement still rings true: the judiciary handles child custody cases, criminal prosecutions, contract matters, and much more. There is not a citizen in Texas whose life has not, in some way, been touched by the judicial system.

I must pause here to recognize the progress on judicial compensation made during this legislative session. In fact, even before the session began, and before my appointment as Chief, Governor Perry expressed his concern that the current compensation structure for judges impedes his ability to recruit men and women of obvious merit when vacancies arise. The Governor's concern has recently been reflected in his proposed state budget,

² 2004 U.S. Chamber of Commerce State Liability Systems Ranking Study, March 3, 2004, *available at* <http://www.instituteforlegalreform.org/pdfs/2004%20full%20report.pdf>.

³ U.S. CONST. art III, Sec. 1.

⁴ *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933)

⁵ *Id.* (quoting DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, pp. 616, 619)

which urges restoration of adequate funding for appellate courts and an increase in judicial compensation “to maintain the quality of our judicial system” and “to attract and retain qualified judges.”⁶ Likewise, in her comprehensive analysis of judicial pay, Comptroller Carole Keeton Strayhorn recognized that “Texas should ensure that its judiciary is qualified, experienced, stable and justly compensated.”⁷ And leaders in the legislature have begun the difficult task of crafting legislation designed with one goal – to assure that justice remains in capable hands. As is so often the case, Senator Duncan⁸ has taken a leading role, for which all Texans are indebted. His counterparts in the House, Representatives Dutton⁹, Goodman¹⁰, Luna¹¹ and many others, have similarly toiled to maintain the promise of justice in our constitutional structure.

There is work to be done reconciling various proposals for reform, but Texans do not shirk from hard work. We have had remarkable success in attracting good and competent men and women to the bench, and, with your support, will continue to do so long into the future.

Technology

Our citizens need more than good judges. They also need open, accessible courts that make the most cost-effective use of tax dollars. In this regard, the judiciary has harnessed the power of technology to operate the court system more efficiently and to ensure that the courts are open to people all over Texas. Our court, for example, has placed legal briefs online and made them accessible on the web. Last fall, we also began making audio recordings of oral arguments available online on the very day of argument. There was a time, in a former era, when our citizens had no choice but to travel to Austin to view the Court’s proceedings. But today our schoolchildren, the media, our public can listen to actual courtroom dialogue and decide for themselves the merits of opposing arguments on issues of great statewide import. In the next biennium, we would like to take another step forward and provide real-time video webcasting of oral arguments, just as these proceedings are, right now, streaming across some computer screen in the hinterlands. Such a step would cost very little, but would have a huge benefit in ensuring that Court proceedings are open and visible to all who are interested, wherever they may live.

The judicial branch has worked to ensure that technology doesn’t just help people view court proceedings – it also helps them participate. In 2004, the Judicial Committee on Information Technology worked with TexasOnline to implement electronic court filing in Texas. Eight counties – Bexar, Dallas, El Paso, Fort Bend, Guadalupe, Hidalgo, Tarrant, and

⁶ Governor Rick Perry, *Proposed 2006-2007 State Budget*, January 2005.

⁷ Comptroller Carole Keeton Strayhorn, *Special Report on Judicial Pay*, December 2004.

⁸ S.B. 368

⁹ H.B. 1180

¹⁰ H.B. 1158

¹¹ H.B. 1001

Upton – successfully implemented e-filing by the end of fiscal year 2004. More than 40 other counties are preparing to join the e-filing system. E-filing allows parties to file pleadings with courts more quickly and easily. The reduction in paperwork also leads to a reduction in costs, which allows the courts to efficiently focus resources where they are most needed.

Electronic access to court records advances our state’s goal of maintaining open government. We must be careful, however, to ensure that our citizens’ right to privacy remains protected. Case-file documents, unless sealed or otherwise restricted by statute or court rule, are available under a common-law right of access at courthouses for public inspection and copying. But with the advent of the Internet and other advanced technologies, case records with sensitive or personal information – financial documents, medical records, personnel files and children’s names – may be easily accessed, duplicated and disseminated,¹² potentially putting our citizens at risk of identity theft. The Texas Judicial Council has recommended an administrative rule that would increase access to court information while still protecting the privacy interests of those appearing before the courts. The Court’s rules advisory committee is currently studying the mechanics of the proposed rule, and hopes to implement a rule within the year’s end.

Indigent Defense

A third challenge facing the judiciary – and indeed confronting all three branches of government – is the need to continue the progress we have made in the criminal justice system. Texas has increasingly recognized victims’ rights, ensuring that crime victims have a voice in the criminal justice system. Of course, it is vital not only that we convict the guilty, but that we acquit the innocent. Error, unfortunately, is a human affliction. The advance of science, in particular DNA testing, confirms that frailty but also promises a method to correct our mistakes. Judge Barbara Hervey and the Court of Criminal Appeals have worked hard to encourage the investigation of innocence claims; these projects are worthy of our support, and, during the upcoming biennium, I expect that the three branches will continue to cooperate to ensure that those who are truly innocent will be freed. Any wrongful conviction is a tragedy, because it leaves the guilty unpunished and condemns the innocent to prison, or death.

In addition, the Task Force on Indigent Defense, under the inspired leadership of Presiding Judge Sharon Keller, has worked diligently to increase meaningful interaction between state and local governments in providing representation to indigent defendants and to meet and exceed the mandates of the Texas Fair Defense Act. Statewide data shows that since the Legislature adopted the Act in 2001, nearly 100,000 more persons are receiving court appointed counsel, which represents an increase of almost 40 percent.

Last year, the Task Force administered grant programs totaling 12 million dollars,

¹² http://www.supreme.courts.state.tx.us/records_access_hearing_6.16.04.htm

benefiting 244 counties. This year the Task Force has awarded over \$13 million in grants. The highlights of this grant cycle include awards to Dallas and Limestone counties for mental health defender services and Bexar and Hidalgo counties to establish public defender offices. The creation of these public defender offices mark the first large scale offices established in Texas since the late 1980's.

Access to Justice

Finally, a fourth challenge facing our judiciary is the need to ensure that all of our citizens, rich and poor, have access to our courts. Even in the face of our human imperfections, we should aspire to the imperative of Amos, to "Let justice flow down as the waters and righteousness as a mighty stream."¹³ In that spirit, we will continue the progress made in the last decade to support the Texas Access to Justice Commission that, along with the Equal Access to Justice Foundation, has been recognized nationally as premier examples of the legal system's capacity to provide legal services to the poor. The Court has found a real hero in the exceptional leadership of James B. Sales, who heads the Commission, and a true heroine in my colleague Justice Harriet O'Neill, who serves as the Commission's liaison. The Commission is not a provider of service but rather assists the work of the various legal services providers to develop strategic alliances across the state. It recently launched an ambitious 5-year strategic plan, which includes creating an endowment fund, increasing corporate support for legal aid programs, formulating programs to expand pro bono legal services, and engaging law schools in the disbursement of legal aid to the poor. In addition, after finding that poor individuals in rural areas are chronically underserved by legal services programs, the Supreme Court (at the Commission's request) recently created the Task Force to Expand Legal Services Delivery. The task force is charged with developing recommendations to facilitate coordination with existing legal service providers and to provide a basis for increased pro bono service in those underserved areas of the state.

The Court has created a Protective Order Task Force in response to studies showing that access to the judicial system by victims of domestic abuse is often limited. The Task Force, under the leadership of Stewart Gagnon of Houston, developed a protective-order kit for use by Texans who cannot afford a lawyer or who may not otherwise have access to the courts. The Court intends to launch the kit in April, during National Crime Victims' Rights Week, with the help of First Lady Anita Perry and Attorney General Greg Abbott.

Conclusion

Let me close with a vision for the judiciary. I believe we can achieve a fully funded judicial branch of government, one that reflects the wisdom and experience of those who have chosen to serve. I want a strong relationship with the Legislature, one that respects the legislature's prerogative to set policy but entrusts the judiciary with responsibility to

¹³ Amos 5:24.

construe legislation fairly and impartially. I see our wood-paneled courthouses transformed into virtual courtrooms with unlimited seating and accountability. I am confident that, with your help, the ability to seek justice, in a criminal or civil case, for the rich or the poor, will be preserved as a cornerstone of our jurisprudence.