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# THE STATE OF THE JUDICIARY IN TEXAS

REMARKS OF CHIEF JUSTICE NATHAN L. HECHT

As Prepared for Delivery to the People of Texas

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Members of the judiciary, the Legislature, and the executive branch; distinguished guests here and viewing remotely; my fellow Texans:

Welcome to the courtroom of the Supreme Court of Texas.

September 11, 2001, dawned like any other day. By evening, the twin towers of the World Trade Center lay in rubble and nearly 3,000 were dead. It was a defining moment. The world would never be the same. We quickly took important lessons from the tragedy, terrible as it was. Airport officials admitted a 9/11 could have happened long before with security so lax. Within weeks, President Bush signed TSA into law, and you could no longer stroll through an airport to your gate. IDs, boarding passes, and searched bags became mandatory. Security screening was immediately put in place here at the Texas Capitol. Those changes and many others became normal—the new normal we now take for granted.

COVID-19 struck, not as suddenly, but unrelentingly, wringing from us life and routine month after month, with more than 100 million cases and a million deaths in the U.S. to date. The pandemic was historic, a defining moment. The world will never be the same. That's certainly true of the justice system. Texas courts kept their doors open with participants joining proceedings remotely to minimize health risks. We've had to learn how to Zoom. We've had to learn to do jury trials in make-do facilities and to reduce resulting backlogs. We've had to learn . . . many things.

Former Michigan Chief Justice Bridget McCormack put it well: "This pandemic was not the disruption we wanted but it might have been the disruption we needed in courts to accelerate change in a way that can produce a justice system that's more accessible and more transparent and more efficient." America's civil justice system is still, after 85 years, very much a product of the 1938 Federal Rules of Civil Procedure, which are foundational in Texas and most other state courts. Our criminal justice system is still deeply rooted in 19th-century practices. If we sat down to create a 21st-century justice system from scratch, it would bear little resemblance to the system we have. Lawyers and judges resist change. To their credit, stability and predictability are virtues in the law. But obstinacy is not. In my 2019 State of the Judiciary, I reported that Texas' 3,200 judges had resolved 8.6 million cases

the prior year—23 times the number of cases handled by all the federal courts in the country. In a small fraction of those—maybe one-half of 1%—procedures designed for felonies and complex civil cases assured justice. For the remaining *millions* of more straightforward cases, which also sought justice, those same procedures *impeded* a fair, cost-effective, and efficient resolution.

We have long known our justice system ill fits present realities. The public complains that going to court takes too long and costs too much. Our response has been slow and muted. By contrast, the marketplace turns on a dime. When COVID prompted many households to want food delivered to their doorsteps, the market immediately responded, offering all sorts of convenient, reasonably priced food delivery systems, not simply insisting that people go to stores. The contrast between the justice "market" and economic markets is jolting. If the justice system were a business, and its customers had any choice, it would be in bankruptcy.

The pandemic *is*—and we must see it *as*—a defining moment, like 9/11, an impetus for innovation and change. I don't mean change for change's sake. And I certainly don't mean change for the worse. But we have long known that improvements can and should be made, and we have not adequately responded. Now should be the time for taking stock and taking action. "Never," in the words of Winston Churchill, "let a good crisis go to waste."

As chief justice of the Supreme Court of Texas, I am required by law during each regular legislative session to report on the state of the Texas judiciary. This is my fifth occasion to do so. Last time, in 2021, I concluded by saying: "We will defeat the pandemic. We will return to normal. For the judiciary, it will be a new normal, one with even greater promises of justice for all." We are hard at work to fulfill that promise. We are gaining on it.

## Electronic Participation in Court Proceedings

The first measure courts took to stay open in March 2020 was to conduct proceedings with participants joining remotely by electronic means, usually Zoom, a rarity before. Within a year, Texas courts had conducted almost 1 million Zoom hearings with more than 3.5 million participants.

Courts used Zoom simply to keep dockets moving amidst health risks of congregating in-person. What we did not expect—though we certainly should have—was that if parties don't have to take off work, arrange for child care, travel across town to a courthouse they have no other reason to visit, and spend hours waiting for their case to be called, just for a few minutes to try to protect their rights, they will show up much more often. Some trial judges reported that participation rates in high-volume dockets like child-custody and traffic cases flipped from 80% no-shows to 80% appearances. A legal system that would knowingly structure proceedings to make participation impossible for those most affected should be ashamed of itself—and should change.

Electronic participation is not right for every proceeding, like most jury trials, for example. And losing the benefits of in-person exchanges and the experience of the solemn awe of the courtroom carry their own costs. But for many hearings, the efficiencies clearly outweigh the drawbacks, and electronic participation has become standard procedure. It would be virtually impossible, for example, for visiting judges and lawyers willing to assist small border counties with increased dockets in Operation Lone Star if they had to travel across the state.

To bring structure and uniformity to this developing practice, the Texas Supreme Court adopted new Rules of Civil Procedure 21d and 500.10, and amended other rules, effective February 1. The rules set out when courts can permit or require participation in court proceedings by electronic means and the factors to be considered. The rules are the product of lengthy discussions among judges, lawyers, and the public, with legislative input. They balance the benefits and detriments of electronic proceedings. And they can be nimbly modified as we gain more experience with this new normal in the justice system. The rules provide a solid foundation for its development.

### Backlogs and Jury Trials

Our appellate courts are up-to-date with their work. COVID impacted their dockets at first. No longer. Throughout the pandemic, the Texas Supreme Court has held to its practice of deciding all argued cases by the end of June. The Court of Criminal Appeals has handled its work with its usual efficiency. The Courts of Appeals have kept current with the assistance of a strong legal staff that needs increased funding, which the Legislature should provide.

Trial courts are trending current except with cases that must be tried to a jury, and even there, they are gaining ground. In 2019, Texas courts tried roughly 9,000 cases to verdict. In the first year of the pandemic, we tried 239. We went from some 186 jury trials per week to four. This was not for want of effort by courts. We could not responsibly summon to service jurors who feared for their health. But for some time now, jury trials have resumed safely. Setting trials settles cases. The clearance rate in criminal cases is now 101% in felony cases and 110% in

misdemeanors—meaning courts are disposing of more cases than are being filed. And the rate is very close to that in civil cases—97%. The criminal district court backlog has been reduced by a remarkable 32%. Harris County district courts, specifically, are making progress. Trial judges are actively using visiting judges and emergency dockets to augment their efforts. Being completely current is the goal. Efficiencies prompted by COVID are becoming the new normal.

### Data and Case Management

We need to know more about how this is happening. Texas collects aggregate, statewide court data, but data on case types, numbers of hearings, and other court operations are hard to come by. To understand where improvement or resources are needed, we must have case-level data. Courts nationwide have always lagged in collecting data on their activities. For a retailer, it would be like having monthly gross sales figures for the store versus knowing that product A is flying off the shelves while product B just sits there. Court operations and experiences vary across our very different and widespread 254 counties. Knowing how their court operations differ would help increase productivity. Funding for case-level court data collection is included in both general appropriations bills, SB 1 and HB 1. The new normal should be more information.

The Office of Court Administration, led by Megan LaVoie, recently launched a uniform case management system for counties under 20,000 population, more than half the counties in Texas. This system will allow counties to more accurately report criminal data to appropriate databases and more easily report court-level data to the state.

### Judicial Compensation

The gross inadequacy of compensation for Texas judges, a perennial issue, is once again critical. The base salary of Texas judges has not been raised since 2013. Considering inflation, it is now below 1981 levels. Texas is in next-to-last place in the nation, behind all states but West Virginia, and just behind Guam.

I was appointed to the district court in 1981, when federal district judges were paid \$2,500 more—5%—than a Dallas County district judge. Now a federal district judge is paid \$92,000 more—two-thirds—than the Texas district court base salary. One judge put it this way: dividing salary by case dispositions, federal district judges cost about \$400 per case, and Texas district judges only \$68 per case. Fault that simple formula if you will, it is an illustration of the huge discrepancy in compensation for which there is no rational basis.

The first 20 years I was on the bench, the Legislature regularly reviewed judicial compensation, raising it 11 times.

Since 2000, the judiciary has had only three pay raises. Inadequate compensation is the obvious reason for high attrition in the judiciary. Of the 579 appellate and district judges serving during the 2020-2021 biennium, 90 left the judiciary on their own volition—a turnover rate of 16%. Constitutional qualifications for judges have increased, which is positive; but to raise those standards and increase workloads without commensurate increases in compensation is not right. We cannot expect to recruit top-notch lawyers to be judges when they not only must take a substantial pay cut leaving practice, they are faced with no reasonable hope for dependable raises.

The Judicial Compensation Commission, *created by the Legislature to assess judicial pay*, has recommended an 11% increase in the base salary each year of the next biennium. SB 802 by Chair Hughes and HB 2779 by Chair Leach would adopt that recommendation. In addition, HB 438 by Rep. Schofield would institute a biennial cost-of-living increase—a COLA—for judicial compensation so that it would cease to be an issue every legislative session, just as Congress has done for federal judges. I urge the Legislature to both increase and stabilize judicial pay.

### **Business Courts**

Judicial compensation is critical to legislation providing for specialty courts for business cases. Separating court dockets by case types is standard practice in Texas courts and throughout the country. For example, we separate felony dockets from misdemeanors and family from general civil. The Civil Justice Improvements Committee of the national Conference of Chief Justices, of which I served as president through the pandemic, has recommended that cases be separated by complexity for more efficient and fairer processing, benefiting parties, and courts alike.

Business cases are often more complex than other civil cases, and handling them alongside simpler cases makes for serious inefficiencies. The costs and increased uncertainties of such litigation have led businesses to turn to arbitration and other dispute-resolution alternatives with the resulting lack of transparency and development of precedent. Many states have met this problem by providing specialized business courts.

The proposal is not without controversy here, though the Texas Judicial Council has endorsed a pilot project. SB 27 by Chair Hughes and HB 19 by Chair Leach, Chair Murr, and Chair Landgraf would provide permanent footing for the specialty courts. I believe business courts would benefit the Texas justice system, and I support their creation.

### **Judicial Work Product**

Last May, we read a draft of U.S. Supreme Court Justice Samuel Alito's majority opinion in *Dobbs v. Jackson Women's*

*Health Organization* that had been leaked to the press. The violation of confidentiality was unprecedented. Leaks of a court's internal operations disrupt deliberations, weaken judicial independence by subjecting judges to political pressure and intimidation, and threaten public trust and confidence in the courts. The Texas Judicial Council has requested the Legislature to make it a criminal offense to publicly distribute draft judicial opinions and work product before official release. SB 372 by Chair Huffman and HB 1741 by Chair Leach would do that. The Legislature should grant the Judicial Council's request. Stealing confidential court information should be criminal.

### **Bail**

Beginning in 2017, Presiding Judge Keller and I, working with Chair Whitmire, urged reforms to the bail and pretrial release system so that a defendant who posed no risk of flight or violence would not be detained, while a defendant could be detained without bond when no conditions of release could reasonably assure his appearance in court and community safety. The latter required a constitutional amendment. A special session of the 87th Legislature passed SB 6, authored by Chair Huffman and Chair Smith. It is the most important change in bail in 100 years, providing background information on a defendant that must be used in making informed decisions on bail, and also requiring that bail decisions be sent to the Public Safety Report System in the Office of Court Administration. Already, 489,000 decisions have been reported. This session, the SB 6 authors propose additional improvements to bail in SB 1318 and HB 3400, which should be enacted. And SJR 44 and HJR 181, again by the same authors, would amend the Constitution to allow detention of high-risk defendants without bond as is done in at least 27 other states, the District of Columbia, and the federal courts. The proposed amendment would complete the reform efforts begun in 2017, and I support it.

### **Clean Slate**

People charged with first-time, non-serious misdemeanors may have their records sealed, but only by court petition, an overly complex and expensive process. SB 499 by Sen. Zaffrin and Chair Perry, and HB 1737 by Chair Leach, would allow eligible individuals to obtain sealing more easily through the use of electronic processing and without going to court and should be enacted.

### **Class C Diversion**

The number of cases against juveniles in justice and municipal courts remains high with more than 36,300 non-

traffic Class C misdemeanor cases filed last year. The Texas Youth Diversion and Early Intervention Act would allow local governments to adopt youth diversion plans with a wide range of strategies on the front end of a case where they are most effective, rather than only on the back end as part of a conviction or deferred disposition. This would bring municipal and justice court practice in line with juvenile courts. The Act is set out in SB 1505 by Sen. Zaffirini and Chair Perry, and in HB 3186 by Chair Leach, which the Legislature should pass.

### NICS Reporting

The federal Bipartisan Safer Communities Act signed last summer requires that background checks by federally licensed sellers of firearms include mental health adjudications of juveniles 16 and older, but Texas has not had a centralized source for reporting such information to NICS, the national clearing house. SB 728 by Chair Huffman corrects this problem and was the first bill passed out of the Senate this session. Companion legislation is SB 1184 by Sen. Eckhardt and HB 2780 by Chair Leach. This reporting improvement will help the federal gun legislation achieve its purpose and should be enacted.

### Access to Justice

The pandemic's burdens have fallen especially hard on Texans of limited means, including children. Increasing access to justice continues to be a priority of the judiciary, joined fully by the Legislature and the executive branch. Texas efforts have been completely bipartisan. Access to justice is about good government, not politics. Texas lawyers have helped by providing free legal services *pro bono publico*—for the public good—but the need is far too great. The Legislature has included in this session's budgets, as it has before, appropriations for basic civil legal services for some five million Texans who qualify for them, including specifically veterans and victims of domestic violence. The Texas Access to Justice Commission has requested additional funding to provide legal services focused on youth, and to support kiosks located throughout the state to provide those who qualify for legal services with easier electronic access to legal aid providers and courts.

We have called the difference between the need for legal services for the poor and their availability “the justice gap.” With as many as 90% of those who qualify going unserved, it is more a justice *chasm*. The commission, with the bar's expertise and assistance, is exploring ways to expand delivery of legal services, as many other states are. As I have said, justice for only those who can afford it is neither justice *for* all nor justice *at* all. Lessons learned from the pandemic can advance us toward justice for all.

### Children's Commission

The Children's Commission established by the Texas Supreme Court in 2007 and now led by Jamie Bernstein continues to provide invaluable resources and training for lawyers and judges in child-welfare cases. Resources explain how parents can productively participate in such cases, the rights of fathers, and the roles of the various participants—attorneys ad litem, guardians ad litem, parents' attorneys, judges, and prosecutors. The commission is piloting projects for handling cases involving trauma and creating early intervention liaisons to better connect child-protection courts and service providers.

Funding, administration, and oversight of appointed counsel in the tens of thousands of child-protection cases filed every year falls almost entirely upon Texas counties, with legal representation of parents and children varying widely. The Judicial Council has called for legal representation in those cases to be funded by the state. SB 2120 by Sen. Zaffirini and Sen. Sparks would accomplish this objective and should be enacted.

The Children's Commission has for years been a “go-to” resource and authority for both the Legislature and the judiciary in cases involving families and children. I am very proud of the commission's work.

### Judicial Commission on Mental Health

The Texas Judicial Commission on Mental Health is celebrating its fifth anniversary, having been created in 2018 by a historic joint order of the Texas Supreme Court and the Court of Criminal Appeals. The commission, led by Kristi Taylor, has become a model for other states. The commission's recommendations for emergency detention and competency restoration are in SB 2479 by Sen. Zaffirini and HB 5088 by Chair Moody, and should be enacted.

Over its five years, the commission has convened annual summits attended by more than 5,000 judges and court stakeholders. It has created and distributed almost 5,500 bench books and code books. And it has developed an online forms bank with 75 mental health law forms. The commission has led in the formation of more than 38 mental health courts in Texas and has provided best practices and forms to assist with early identification of individuals with mental illness entering courts, ways to facilitate treatment, and assistance in navigating courts. The commission has urged legislative proposals focusing on youth with mental health needs in juvenile and family law cases, in collaboration with the Children's Commission. I urge the Legislature to enact these proposals. As with the Children's Commission, I am extremely proud of the Mental Health Commission's work.

### Judicial Independence

I have laid out some of the judiciary's initiatives, many

prompted by the pandemic's demands on courts and lessons learned, along with areas in which we seek the assistance of the Legislature and the executive branch. In all, the judiciary is responding to its users, to make its processes more accessible and fair to all. We have long known that the key to a better public appreciation of the function of the judiciary is stronger civics education in the schools, as former Justice Sandra Day O'Connor has advocated for many years. The public must understand the differences between the judiciary and its sister branches, how the justice system is designed, and how courts must operate differently from the political branches. SB 1954 by Sen. Zaffirini would require specific civics education on the judicial branch and should be enacted.

I must add this. I grow concerned that political divisions among us threaten the judicial independence essential to the rule of law. President Trump notably criticized a court ruling as being by "an Obama judge." Chief Justice John Roberts responded that there is no such thing, "only an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." The exchange prompted a response from Rhode Island Democratic Sen. Sheldon Whitehouse, rated one of the most liberal members of Congress. He agreed with the president, sort of: "In spite of my distaste for Trump's attacks on our judiciary," Whitehouse wrote in an op-ed piece, "on this one, the facts are with Trump." Except that, he said, the facts show that Republican judicial appointees in general, and those on the Roberts Court in particular, "show[] no respect for precedent, federalism, originalism or judicial restraint." In other words: the judiciary certainly deserves to be attacked—only by me, not you. So the left and right, and leaders in both the executive and legislative branches, are in agreement: judges are not independent, and shouldn't be; they should take sides—my side.

Last night, the most expensive state court election in American history came to an end in Wisconsin. The total spent? \$45 million—\$25 per vote. Press accounts of the race abound. One reports that the winning candidate "was especially open about her politics during the campaign" while her opponent "downplayed his political views" throughout the campaign. The same account states that the winner's campaign "relied more than any in history on the Democratic Party of Wisconsin's financial support, so much so that [she] vowed to recuse herself" from its cases. That story was by NPR, not Fox. The election of the judge is hailed or decried as a political event, not a judicial one. It will not be a one-off. The message to the public is unmistakable, loud, and clear: judges take sides, and they should.

Judges are certainly not beyond criticism. After all, we criticize each other in our opinions. Criticizing public officials is a time-honored tradition in this country. Judges are not exempt and should not be. But with much sharper rhetoric, threats of violence against judges, their families, and even their neighborhoods have also increased. Judges are not independent of the accountability all public officials owe the people for their

stewardship of power. But for the judiciary, the measure of fidelity is different. The executive and legislative branches must uphold the Constitution, of course, but they must also answer to their constituents for shaping and effectuating social policy and the popular will. Judges have no constituencies. They account to the people for their adherence to the rule of law. When judges follow the law, even against the popular will of the time—*especially* against the popular will of the time—they have done their job. When judicial accountability is measured by whether a judge decides cases the way people *like*—the way *some* people like—and what they *like* is different from what the law *is*—the pressure is on the judge to surrender independence, and the law, to popular will—to take sides. That pressure destroys the rule of law essential to justice for all. We must oppose it in every form at all costs.

## Conclusion

I am in my 42nd year of judicial service, and in my 35th on the Texas Supreme Court, the longest in Texas history. I have been elected to the court seven times. As past president of the national Conference of Chief Justices and past chair of the National Center for State Courts, I have been privileged to work every day with judges across the country to ensure the justice system is working for all. I will tell you this: the people of Texas can take deep pride in their judges—municipal judges, justices of the peace, county judges, district judges, courts of appeals justices, and my colleagues on the high courts. They have stood to the historic challenges of the COVID-19 pandemic. They are anxious to make lessons learned a reality, the new normal.

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, my fellow Texans, 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.

God bless you, and may God bless Texas. **TBJ**



### NATHAN L. HECHT

is the 27th chief justice of the Supreme Court of Texas. He has been elected to the court seven times, first in 1988 as a justice, and in 2014 and 2020 as chief justice. He is the longest-serving member of the court in Texas history.