THE CONSTITUTIONAL AMENDMENT GIVING CRIMINAL JURISDICTION TO THE TEXAS COURTS OF CIVIL APPEALS AND RECOGNIZING THE INHERENT POWER OF THE TEXAS SUPREME COURT

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I. INTRODUCTION

In the 1970s, if not earlier, the delays in the disposition of criminal appeals reached an alarming level. Between 1970 and 1978, the number of cases on the docket of the Texas Court of Criminal Appeals tripled.[1] It was estimated that by 1980 its caseload would reach approximately six thousand cases.[2] If either side requested oral argument, the probabilities were that the case would not be heard for seventeen to eighteen months, and after arguments there would be additional time before an opinion was issued.[3] To make matters worse, the court's docket grew longer as its backlog built up.[4]

This writing reviews the history of what has been done to improve the speed of the criminal justice system in Texas.[5] Much of this article is based on my experience as a Texas supreme court justice and is told from my perspective.

The constitutional amendment of 1980 is regarded by many as the most important change in our judicial structure in more than one hundred years.[6] Texas began with a unified judiciary system.[7] The Republic of Texas and the early State of Texas had one supreme court with both civil and criminal jurisdiction.[8] Trial courts also had both civil and criminal jurisdiction, and there were no intermediate courts.[9] The Texas Constitution of 1876 created the Texas Court of Appeals with both civil and criminal jurisdiction.[10]

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1. *See* Felton West, *Criminal Appeals Reform*, HOUS. POST, Feb. 1, 1979, at 3A.
2. *Id.*
3. *Id.*
4. *See* Joe Greenhill, *State of the Judiciary*, 44 TEX. B. J. 930, 932-33 (Sept. 1981).
5. *See infra* Part III.
6. *See* Carl Dally & Patricia Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 ST. MARY'S L.J. 211, 215 (1981).
7. REPUB. TEX. CONST. of 1836, art. III, § 1, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1069, 1073 (Austin, Gammel Book Co. 1898).
8. *Id.* In fact, the first case to come before the Supreme Court of the Republic of Texas was a criminal case. Republic v. McCulloch, Dallam 357 (Tex. 1840).
9. REPUB. TEX. CONST. of 1836, art. III, § 1, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1069, 1073 (Austin, Gammel Book Co. 1898).
10. TEX. CONST. art. V, § 1.

Criminal cases, however, were made final in the Texas Court of Appeals, and the jurisdiction of the Texas Supreme Court was limited to civil cases.[11]

In 1891, the constitution was amended to create three courts of civil appeals.[12] The name of the Texas Court of Appeals was changed to the Texas Court of Criminal Appeals, and criminal cases were final in the Texas Court of Criminal Appeals.[13] So from this early date, all criminal appeals went directly to one court, and there were no intermediate courts for criminal appeals.[14] As the State grew and the number of criminal appeals greatly increased, the docket of the Texas Court of Criminal Appeals became insurmountable.[15]

At the same time, the number of courts of civil appeals grew from three to fourteen.[16] The Texas Court of Criminal Appeals began as a three judge court, but it was increased to five in 1966 and nine in 1977.[17] Notwithstanding the increase in the size of the Texas Court of Criminal Appeals, its docket was overwhelming, and the situation grew much worse.[18]

II. BACKGROUND OF THE CONSTITUTIONAL AMENDMENT OF 1980

Early attempts were made to improve the judiciary by rewriting Article V of the state constitution, the judiciary article, or by rewriting the entire constitution.[19] When these failed, the solution here considered turned out to be a substantial help (*i.e.*, giving criminal jurisdiction to the courts of civil appeals).

In October of 1971, Chief Justice Calvert formed a group to rewrite Article V.[20] This "Calvert Task Force" released a tentative draft in May 1972.[21] Among other things, it proposed a unified court system: merging the Court of Criminal Appeals with the Texas Supreme Court to form one supreme court and giving criminal jurisdiction to the existing courts of civil appeals.[22] Justice Tom Reavley set out a tentative draft of the revision of

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11. *Id.*

12. TEX. CONST. art. V, § 1 interp. commentary (Vernon 1993).

13. *Id.*

14. *Id.*

15. Dally & Brockway, *supra* note 6, at 213-15.

16. C. Raymond Judice, *The Texas Judicial System: Historical Development & Efforts Towards Court Modernization*, 14 S. TEX. L. REV. 295, 302 (1973); TEX. GOV'T CODE ANN. § 22.201 (Vernon 1988).

17. Dally & Brockway, *supra* note 6, at 214.

18. *Id.* at 214-15.

19. ROBERT W. CALVERT, HERE COMES THE JUDGE 165-68 (Joseph M. Ray ed., Texian Press 1977).

20. *Id.* at at 167; Thomas M. Reavley, *Court Improvement: The Texas Scene*, 4 TEX. TECH L. REV. 269, 270 (1972); *Calvert Heads State Campaign*, DALLAS MORNING NEWS, June 21, 1975, at 4A.

21. CALVERT, *supra* note 19, at 168.

22. Robert W. Calvert, *Proposed Revision of Article V, Texas Constitution*, 35 TEX. B.J. 1001 (1972); Reavley, *supra* note 20, at 283.

Article V in the *Texas Tech Law Review*.[23] In it, he wrote that there were eight citizens' conferences throughout the state to explain the proposals in 1972.[24] Those groups included the Houston Citizens' Conference.[25]

Those early efforts did not bring about changes, but they were part of the impetus for changing the entire Texas Constitution, including a new Article V.[26] Efforts to improve the judicial article became bound up in efforts to adopt a whole new constitution.

A constitutional amendment to create a Constitutional Revision Commission was adopted in 1972.[27] The Commission's work would be submitted to the legislature to adopt or reject.[28] The legislature rejected the proposed constitution and formed itself into a Constitutional Convention.[29] However, it adopted parts of the work of the Revision Commission, including most of the provisions of the Commission's draft of a new Article V.[30] This proposed constitution was submitted to the people in 1974, but the voters rejected it and the new Article V.[31] Set out below is the background of the efforts to enact one major change in Article V—to give criminal jurisdiction to the existing courts of appeals and to change the name of the courts to "Courts of Appeals" through the adoption of a constitutional amendment (which occurred in 1980).

A. Baylor Law Review

In 1970, I gave an address to the Baylor Law School which was reduced to writing in the *Baylor Law Review* article *Judicial Reform of our Texas Courts*.[32] In it, I urged a unified trial and appellate judiciary for Texas, central court administration, and merit selection of judges with non-partisan retention elections.[33]

In July of 1960, I attended a two week seminar for state supreme court judges held at New York University Law School and hosted by a faculty led

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23. Reavley, *supra* note 20, at 289-95.

24. *Id.* at 270.

25. *See infra* Part II.B.

26. CALVERT, *supra* note 19, at 168.

27. TEX. CONST. art. XVII, § 2 (repealed 1999) (providing that the legislature in January 1973 shall establish a constitutional revision commission to recommend a new constitution). The members of the legislature then were to convene in January of 1974, as a constitutional convention which might then submit a new constitution to the people. *Id.* The Bill of Rights, however, was retained. *Id.*

28. *Id.*

29. *See infra* notes 51-52 and accompanying text.

30. *See infra* Part III.B.

31. *See infra* Part III.C.

32. Joe R. Greenhill & John W. Odem, *Judicial Reform of Our Texas Courts—A Re-Examination of Three Important Aspects*, 23 BAYLOR L. REV. 204 (1971).

33. *Id.* at 204, 204 n.1 (1971) (crediting in part Chief Justice Warren Burger of the United States Supreme Court and his 1970 State of the Judiciary Address which influenced my views on the Texas court system).

by Supreme Court Justice William J. Brennan. The seminar covered jurisdictional issues in both civil and criminal appeals, and I was impressed that other state supreme courts could, and should, handle civil and criminal cases.[34] This dual role was emphasized by the Calvert Task Force, headed by Chief Justice Robert W. Calvert and known as the Calvert Committee, which was enlarged and became a project of the Judicial Section of the State Bar of Texas.[35] Judge Truman Roberts, Chairman of the Judicial Section, appointed the Committee, and I reappointed it when I succeeded Judge Roberts as chairman.[36] The Committee continued to urge a unified judiciary, a central court administration, and the merit selection of judges.[37]

The article in the *Baylor Law Review* discussed the work of that committee and its recommendation that the constitution be amended to give jurisdiction of criminal cases to the then courts of civil appeals and to change the name of the appellate courts to the courts of appeals.[38] The question on the adoption of this idea was first presented to the members of the Judicial Section, which voted on and approved the idea 113 to 30.[39] The entire membership of the State Bar of Texas was polled in February 1973, and the members voted in favor of giving the courts of civil appeals criminal jurisdiction.[40]

B. Houston Citizens' Conference on the Courts

In September of 1972, an important conference on judicial improvement was held in Houston.[41] The conference was sponsored by the American Bar Association, the American Judicature Society, the National College of the State Judiciary, and the Houston Bar Association.[42]

The conference was a citizens' committee made up of about 106 outstanding people of the Houston area including: William (Bill) P. Hobby, Jr. of the *Houston Post* and future Lieutenant Governor; Dr. Norman Hackerman, President of Rice University; Mack Hannah, Jr., a minority activist; Rabbi Hyman Schachtel; Everett Collier, civic leader and editor of

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34. *See generally* HOUSTON CITIZENS' CONFERENCE ON THE COURTS (Sept. 12-14, 1972), at 23-24 [hereinafter 1972 CITIZENS' CONFERENCE] (stating that many states, excluding Tennessee and Oklahoma, had enlarged the jurisdiction of their intermediate appellate courts in order to relieve the burden on the states' higher courts) (keynote address by Justice Tom C. Clark).

35. *See* Greenhill & Odem, *supra* note 32, at 209.

36. *Id.*

37. *Id.* at 208-20.

38. *Id.* at 209-11, 210 n.11.

39. *Id.* at 210-11, n.12.

40. *News, Professional Headnotes: Texas Lawyers Overwhelmingly Favor Recommendations for Court Improvements*, 36 TEX. B.J. 277, 277 (1973).

41. *See* 1972 CITIZENS' CONFERENCE, *supra* note 34, at 1.

42. *Id.*

the *Houston Chronicle*; and others.[43]

Chief Justice Robert Calvert and I both spoke to give our views.[44] Chief Justice Calvert had announced his retirement, and I had been elected to succeed him.[45] I introduced the keynote speaker, Justice Tom Clark of the Supreme Court of the United States.[46] Among other things, Justice Clark urged that the courts of civil appeals be given criminal jurisdiction so that Texas would have integrated intermediate courts, as did the federal system and "as do other intermediate appellate courts throughout the United States, with the exception of . . . [Texas,] Tennessee and Oklahoma."[47]

Justice Calvert spoke and made the same recommendations.[48] He also urged that the Texas Court of Criminal Appeals be abolished and that its then five members be merged into the Texas Supreme Court, thereby granting both criminal and civil jurisdiction to the Texas Supreme Court.[49]

C. *Recommendations of the Houston Citizens' Conference on the Courts*

The Houston citizens met for two full days and came out with a consensus statement, which stated in part:

> The Texas courts must be unified, modernized and intellegently administered . . . .
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> . . .
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> All Texas courts should be organized into a single state-wide unified judicial system . . . .
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> The judicial system should include one Supreme Court, combining the present Court of Criminal Appeals and the Supreme Court. There should be but one intermediate Court of Appeals which should have jurisdiction to hear and determine both civil and criminal appeals.[50]

The Committee recommended one unified court of appeals with many divisions (the current fourteen courts of appeals) and urged a systematic unitization of trial courts.[51]

III. THE TEXAS CONSTITUTIONAL REVISION COMMISSION OF 1973

In 1972, the Texas Constitution was amended by article 17, section 2, to

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43. *Id.* at 8-9.
44. *Id.* at 1.
45. *Id.*
46. *Id.*
47. *Id.* at 23-24.
48. *Id.* at 33-39.
49. *Id.* at 37-38.
50. *Id.* at 10.
51. *Id.* at 11.

provide for a constitutional revision commission to propose a new constitution, including the judiciary article.[52]

The thirty-seven members of the commission were appointed by a committee consisting of the Governor, the Lieutenant Governor, the Attorney General, the Speaker of the House, the Chief Justice of the Texas Supreme Court, and the presiding judge of the Court of Criminal Appeals.[53] Several outstanding lawyers were selected to serve on the commission including: Robert W. Calvert (chairman), Mrs. Malcolm B. Milburn (vice chairman), Leon Jaworski, Dean Page Keeton, Senator Ralph Yarborough, James Kronzer, Jr., Leroy Jeffers, Judge Andrew Jefferson, Jr., Wales Madden, Jr., Mark Martin, Judge Barbara Culver, and Preston Shirley.[54]

There were both Democrats and Republicans, many outstanding community leaders, members of the academic community, and representatives from labor unions and the business community. If the Revision Commission drafted a satisfactory new constitution, the legislature would approve it and submit it to the people for adoption.[55] As to the Judicial Article, the Revision Commission adopted the main portions of the Houston Citizens' Committee's 1972 proposal.[56]

A. Unified Judiciary

Article V, as proposed by the Constitutional Revision Commission, provided for one supreme court consisting of a chief justice and at least eight other justices and merging the court of criminal appeals into the supreme court.[57] Further, because the proposed courts of appeals had both civil and criminal jurisdiction, Article V essentially changed the title of the courts of civil appeals to courts of appeals.[58]

The Revision Commission also urged in Article V that there be central court administration, substantial unification of courts at the trial level, and merit selection of judges with retention elections.[59] It provided for an alternative method of judicial selection (*i.e.*, non-partisan election of appellate

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52. TEX. CONST. art. XVII, § 2 (repealed 1999). Section 2 reads: "When the legislature convenes in regular session in January, 1973, it shall provide by concurrent resolution for the establishment of a constitutional revision commission. . . . The members of the 63rd Legislature shall be convened as a constitutional convention at noon on the second Tuesday in January, 1974." *Id.* The convention could submit a new constitution, except that the Bill of Rights had to be retained.

53. Robert W. Calvert, *Constitutional Revision*, 36 TEX. B.J., 1126 (1973).

54. THE TEXAS CONSTITUTIONAL REVISION COMMISSION, A NEW CONSTITUTION FOR TEXAS, at v (1973) (naming the members of the revision commission) [hereinafter CONST. REV. COMM'N].

55. TEX. CONST. art. XVII, § 2(c) (repealed 1999).

56. Tex. S.J. Res. 11, 64th Leg., R.S., 1975 Tex. Gen. Laws 3133.

57. CONST. REV. COMM'N, *supra* note 54, at 21.

58. *Id.*

59. *Id.* at 21-22.

judges).[60]

The Revision Commission also dealt with the entire constitution, holding many town-hall-type meetings across Texas and participating in television and radio talk shows during which all of the subjects in the revised constitution were debated. In each of these events, the Revision Commission afforded "equal time" to those in opposition to any of the changes. It became apparent that getting an affirmative majority on the adoption of the new constitution would be difficult.[61]

Most of the opposition focused on parts of the new constitution other than those concerning the judiciary.[62] The most vocal opposition to the proposed Judiciary Act centered on the method of selection of judges and centralized court administration.[63]

Unfortunately, the new constitution proposed by the Constitutional Revision Commission was rejected by the legislature and never voted on by the people.[64] The legislature substituted itself as a constitutional convention, and the whole process started over, beginning with hearings.[65]

B. The Constitutional Convention of 1974

The legislature, as a constitutional convention, proposed a Judicial Article, Article V, which was very similar to that of the Revision Commission.[66] As to a unified judiciary, some items it proposed were (1) one supreme court of at least nine members (abolishing the court of criminal appeals and merging it with the supreme court), (2) courts of appeal with civil and criminal jurisdictions, and (3) substantial unification of the trial courts with unified court administration.[67]

The Constitutional Convention (the legislature) also substantially rewrote other parts of the constitution. It changed portions dealing with taxation and education, provided for annual sessions of the legislature instead of every two years, and included a "right to work" provision to satisfy various business

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60. *Id.* at 22.

61. The information in this paragraph is based on my memory of the events surrounding the Constitutional Convention's proposal.

62. *See, e.g.*, Richard M. Morehead, *Constitutional Opposition*, DALLAS MORNING NEWS, Aug. 28, 1975, at 30 (discussing changes during legislative session).

63. *See, e.g.*, *Court Reform Proposed*, DALLAS MORNING NEWS, Oct. 27, 1974, at 35A.

64. *See* Joe Belden, *Constitution Stall Angers Voters*, DALLAS MORNING NEWS, Oct. 27, 1975, at 6A (reporting voters disappointment with the failed legislative attempts to revise the constitution).

65. *See* Sam Kinch, Jr., *Package OK'd: Charter Revision Goes to Senate*, DALLAS MORNING NEWS, Apr. 10, 1975, at 1A.

66. *See Final Approval of Constitution Expected Today*, AUSTIN AMERICAN-STATESMAN, Apr. 15, 1975, at 6 (stating that "[t]he document is virtually the same as the one which failed by three votes to win approval at the 1974 Constitutional Convention").

67. *See Court Reform Proposed*, *supra* note 63; Kinch, *supra* note 65.

interests.[68] Mainly because of the latter, organized labor opposed the revision of the constitution including the Judicial Article.[69] Business leaders opposed annual sessions of the legislature and other provisions.[70]

As before, there were many town-meeting-style debates. There were also many television and radio debates. Each had equal time for opponents. The League of Women Voters had public forum meetings, also with equal time.[71]

I thought that Governor Dolph Briscoe favored the new constitution. We both sat on the panel of six who appointed the thirty-seven members of the Constitutional Revision Commission. I heard no opposition to the new constitution by Governor Briscoe. During the year-long work of the Revision Commission, Governor Briscoe gave the impression that he was pleased with the work. However, he changed his views and became a leader of the opposition.[72]

C. The Overkill of Public Debate

Toward the end of the Constitutional Convention and before the vote on the new constitution, I concluded that the proposals were debated to death. The Speaker of the House, Billy Clayton, had a twin engine airplane. I flew with him to several public hearings in various parts of the state to debate the new constitution.[73] The organized opposition was always there.[74] The opposition transgressed from debate on substantial points to general ridicule.

It was much easier to find faults with anything and everything in thirty minutes than it was to explain the good points and answer all the criticisms and ridicule. Many of the speakers aroused the people by saying, "If the Texas Constitution was good enough for our forefathers, it is good enough for me."[75]

The last straw came toward the end of the debating period. Some strong business interest persuaded Governor Briscoe to come out in opposition to the

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68. *See Final Approval of Constitution Expected Today*, *supra* note 66; Carl Freund, *Gov. Briscoe Turned Off By Parts of New Constitution*, DALLAS MORNING NEWS, July 3, 1975, at 9A.

69. *See Final Approval of Constitution Expected Today*, *supra* note 66.

70. Jon Ford, *Constitution Deal Sought: Hobby, Clayton Propose Watered-Down Session*, AUSTIN AMERICAN-SATESMAN, Aug. 20, 1975, at A1.

71. The information in this paragraph is based on my memory of the events surrounding the Constitutional Convention's proposal.

72. Morehead, *supra* note 62.

73. *See* Sam Kinch, Jr., *New Constitution Backed*, DALLAS MORNING NEWS, Aug. 31, 1975, at 4A (recounting House Speaker Clayton's backing of the new constitution and his rebuttal of Senator McKnight's and the Citizens to Preserve the Texas Constitution's attack on the new constitution in a hotel conference room).

74. *See Tyler Solon Organizes Constitution Opponents*, AUSTIN AMERICAN-STATESMAN, Aug. 20, 1975, at 6 (stating that the Committee to Preserve the Texas Constitution planned on raising funds for an advertising campaign and the creation of a "speakers bureau" to challenge the proposed new constitution).

75. I can remember attending meetings during which this phrase was used to rally opposition to the proposed constitution.

new constitutional revision, including the Judicial Article.[76] A group organized by Senator Peyton McKnight was called "Citizens to Preserve the Texas Constitution."[77] Senator McKnight, from Tyler, hoped to gain Governor Briscoe's support.[78] Governor Briscoe did become part of that group, adding momentum to the movement to reject the new constitution.[79] Another opposition group was centered in Houston and called itself the "Committee to Preserve the Present Constitution."[80]

The new constitution was to be voted upon by section. The Judicial Article was one of the separate items. The "Citizens to Preserve the Texas Constitution" group, including Governor Briscoe, was really not opposed to the Judiciary Article, but they did not trust the voters to vote for adoption of some articles of a new constitution and to reject others.[81] The thing to do, they reasoned, was to oppose the whole thing—to save our old, tried-and-true constitution. Governor Briscoe and the "Citizens to Preserve the Texas Constitution" together with labor's opposition (due to the right-to-work provisions), defeated all the constitutional revisions. The Judicial Article was literally debated to death.

IV. WHERE DO WE GO FROM HERE?

Those who worked to amend the Judicial Article of the constitution were greatly disappointed. The judiciary and education articles received the most votes but failed to pass because of general opposition to the new constitution.[82]

The President of the State Bar, Lloyd Lochridge of Austin, called a meeting for August 26, 1974 of some forty-two leaders for improvement of the judiciary.[83] He envisioned a new and separate constitutional amendment to include the "merger of the high courts, [and] granting intermediate courts of appeal criminal appellate jurisdiction," as well as centralized court administration, and "improvement in the method of election . . . of the state's

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76. Jon Ford, *Constitution Deal Sought*, AUSTIN AMERICAN-STATESMAN, Aug. 20, 1975, at 3D (reporting Governor Briscoe's and business's opposition to annual legislative sessions in particular); Morehead, *supra* note 62 (reporting Governor Briscoe's opposition to annual legislative sessions).

77. *Tyler Solon Organizes Constitution Opponents*, *supra* note 74.

78. *Id.*

79. Morehead, *supra* note 62.

80. *Tyler Solon Organizes Constitution Opponents*, *supra* note 74.

81. Freund, *supra* note 68, at 9A; *see also* Morehead, *supra* note 62 (pointing out that "[t]he collective objections may bring the new constitution down, unless skeptics like Gov. Briscoe can be persuaded that the good features substantially over-balance their objections").

82. Memorandum from Kim Sherman to Joe Greenhill (June 28, 2001) (on file with the author). Proposition 2, the Judiciary Article, received 326,869 votes for and 835,639 votes against (the results are on file with the Tex. State Archives Library).

83. Letter on file with the author.

judges."[84] Lochridge's ideas were splendid, but the recent defeat was overwhelming and depressing. It was too soon to start over.

In his book, *Here Comes the Judge*, Judge Calvert wrote: "My experience on the judicial reform committee taught me that significant improvement in our judicial system would never be achieved by 'single shot' measures," and that a complete revision was required.[85] The complete revision had been tried twice and failed each time.

August 1974 was a memorable month. Lochridge set the date for his meeting for August 26. My wife Martha and I went to Honolulu earlier that August to attend a meeting of the Conference of Chief Justices. There, on August 8, 1974, we watched the resignation speech of President Nixon on a big screen television at the hotel. That August was not a good time to try to mount a new campaign for judicial reform.

The impetus for judicial improvement smoldered quietly after the major defeat in 1974. In January 1979, an opportunity arose to revive at least a part of it. The Texas Judicial Council and others continued to study the question. Judge Truman Roberts of the court of criminal appeals and former Chief Justice Calvert were supportive. In the Senate, Senator Ray Farabee was a strong supporter, and in the House, Ben Z. Grant was also a champion of the cause. The court administrator, Raymond Judice, was of great help all around. It appeared to me and others that it was time to change one part of the Judicial Article which was so badly needed—giving criminal jurisdiction to the court of appeals.

I quietly visited with Governor Bill Clements and found the Governor to be very supportive of the proposed judicial changes. We had been good friends at the University of Texas. Clements came there one year to play football and ate at the fraternity house where I was a member. Clements left to go to SMU after one year, but a feeling of friendship and trust had developed between us. Clements was a staunch Republican, and I was appointed and elected to the court as a Democrat. This demonstrated an example of bipartisan support for the proposed changes. Governor Clements could ask me quietly for advice in judicial appointments when he wanted to, and I could ask for his help in judicial improvements.

A. Single Shot

After consulting with the aforementioned people and others, I and some others decided that the best thing to do was to single shot one very major improvement: unitizing the intermediate appellate courts to give criminal appellate jurisdiction to the courts of civil appeals.[86] At the same time, there

84. Letter on file with the author.

85. CALVERT, *supra* note 19, at 167.

86. *Greenhill Favors Merger of State's High Courts*, HOUSTON POST, Oct. 26, 1974 (on file with

would be a direct appeal in death penalty cases and some writs, such as habeas corpus, to the court of criminal appeals.[87]

In the previous attempts to change all of Article V, the Judiciary Article, most of the opposition came from three proposed changes: (1) selecting the judges based on merit (the Missouri Plan); (2) centralizing court administration; and (3) abolishing the court of criminal appeals by merging it into the supreme court.[88]

During these debates, the highly vocal opposition to the merit selection of judges was that it took away from the right of the people to select judges by popular partisan election.[89] The opponents of appointed judges had a field day on this so-called denial of our God-given democratic rights.[90] To save what they could, the point was to take away that opposition.

Central court administration was opposed by some district judges of metropolitan areas, county judges, and justices of the peace. These local judges were separately elected and were autonomous in their own domain. They did not want the government in Austin telling them how to run their business. The source of that opposition was also dropped.

The merger of the court of criminal appeals with the supreme court was vigorously opposed by presiding Judge John Onion and a large number of criminal defense lawyers.[91] The group also opposed giving criminal jurisdiction to the existing courts of civil appeals, but their opposition to that proposal was not so vehement.[92]

Judge Onion and his followers proposed the creation of a separate tier of appellate courts with criminal jurisdiction only.[93] He and his spokesman in the House, Bill Heatly, urged the creation of five new intermediate criminal appellate courts called courts of criminal appeals.[94] He proposed changing the name of his court to the Texas Supreme Court of Criminal Appeals, and Texas would thereby have two chief justices.

The new appellate criminal courts would require new judges, new quarters, new libraries, new clerks, new law clerks, and new secretaries.[95] Texas already had fourteen courts of civil appeals with existing facilities.[96] Instead of creating new courts, these courts could be enlarged by adding new

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the author).

87. West, *supra* note 1.

88. *See* Greenhill & Odem, *supra* note 32, at 214-26.

89. *See id.* at 221.

90. *See id.* at 218-26.

91. *See* West, *supra* note 1 (reporting Judge Onion's response to my State of the Judiciary Address).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

judges.[97]

There were arguments that criminal appellate courts had to be staffed by specialists in criminal law.[98] The argument was fallacious. In all but three states, appellate judges heard and decided civil and criminal cases.[99] The judges of the federal courts, beginning with the Supreme Court of the United States, decide civil and criminal cases, and a large percentage of the judges on the court of criminal appeals have been district judges, hearing civil and criminal cases. Justice Clarence Guittard wrote an excellent article addressing this argument, "Unifying the Texas Appellate Courts."[100]

B. The State of the Judiciary Address of January 31, 1979

My State of the Judiciary address to the legislature in January 1979 reviewed the problem and its background.[101] It read as follows:

> Since 1970, the number of its cases (those of the Court of Criminal Appeals) have tripled, and despite diligent work, the Court has fallen farther and farther behind in its backlog. If the present rate of filings persist, that court will have a caseload of almost 6,000 cases by 1980.
>
> The situation now is . . . that on average, a case filed in the court today will not be heard for over a year. If either side requests oral argument, . . . the case will not be heard for 17 or 18 months.
>
> We must adopt, or perhaps adapt, the intermediate level court system to handle the great bulk of criminal appeals.
>
> The present intermediate appellate courts should be given criminal, as well as civil, jurisdiction. They can handle them, and the judges of the courts are willing to do so.
>
> I, therefore, respectfully request that you submit a constitutional amendment to accomplish this result. This proposal is also recommended by the Texas Judicial Council and the Judicial Planning Committee of Texas.[102]

C. The Legislative Response

Senator Ray Farabee of Wichita Falls introduced Senate Joint Resolution 36 to propose a constitutional amendment.[103] The Lieutenant Governor, who

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97. *See* Clarence Guittard, *Unifying the Texas Appellate Courts*, 37 TEX. B.J. 317, 318 (1974).

98. *See id.* I remember various people in and out of the judicial system making this argument.

99. Guittard, *supra* note 97, at 318.

100. *See id.*

101. *See* Phil Woodall, *Change Urged in Court Jurisdiction*, AMARILLO DAILY NEWS, Feb. 1, 1979, at 10C; Mike Kingston, *Shaking Up the State's Judiciary*, DALLAS MORNING NEWS, Feb. 5, 1979, at 2D.

102. Chief Justice Joe Greenhill, State of the Judiciary Message to the 66th Legislature of Texas (Jan. 31, 1979) (on file in the Legislative Reference Library in Austin, Tex.).

103. *See* Tex. S.J. Res. 36, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223.

also serves as the President of the Senate, was Bill Hobby.[104] He had been a member of the 1972 Citizens Task Force in Houston and was helpful in the passage of the constitutional amendment.[105]

1. S.J. Res. 36 in the Senate

Senate Joint Resolution 36, as relevant here, provided that all civil appeals and all criminal appeals (except death penalty cases) should go to the courts of appeals.[106] Death penalty cases would go the court of criminal appeals regardless.[107] These appeals were expedited by not having an intermediate step.[108]

Senate Joint Resolution 36 provided for a discretionary appeal to the court of criminal appeals.[109] Appeals to that court would not be, as a matter of right, but would be discretionary under rules to be promulgated by the court of criminal appeals.[110] The court also would have the power to review judgments of the courts of appeals on its own motion.[111] Thus, the court of criminal appeals could, except as to death penalty cases, control its own docket by discretionary review.[112] It could resolve conflicts of opinions between courts of appeals, and it could take criminal cases that it regarded as important to the jurisprudence of the state.[113]

The Resolution also provided for the addition of judges to the courts of appeals to take care of the added criminal cases.[114] It said that the courts of appeals should have a chief justice and at least two associates.[115] Senate Joint Resolution 36 also provided greatly increased powers in the supreme court, confirming its inherent powers, and changed the title of the Chief Justice of the Supreme Court of Texas to the Chief Justice of Texas.[116]

A two-thirds vote of each house is required to propose a constitutional amendment.[117] The Resolution passed the senate twenty-six to one.[118]

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104. *See id.* at y.
105. *See id.*
106. *Id.*
107. *Id.*
108. *See id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Dally & Brockway, *supra* note 6, at 217 (setting forth and detailing the jurisdictional changes to the Court of Criminal Appeals).
114. Tex. S.J. Res. 36, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223.
115. *Id.*
116. *Id.*
117. TEX. CONST. art. XVII, § 2.
118. Tex. S.J. Res. 36, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223. I recently asked Senator Farabee who the dissenter was. I remembered that two senators opposed the resolution. They were Oscar Mausy of Dallas and Tati Santiesteban of El Paso. He thought that one must have been absent the day of

2. *The Proposed Amendment in the House*

Representative Ben Grant sponsored the amendment in the House and currently serves as a justice on the Texarkana Court of Appeals, deciding civil and criminal cases.[119] I recently wrote Judge Grant to ask what he remembered about the amendment. By letter of February 13, 2001, he replied:

> I prepared and introduced a joint resolution giving the courts of civil appeals criminal jurisdiction in all matters except when the defendant had received the death penalty.
>
> This proposal languished for about half of the legislative session.
>
> It was my general impression that the proposal did not have the support of the Court of Criminal Appeals. About the middle of the Session, I received a call from presiding Judge Onion in which he told me something had to be done about the backlog in the Court of Criminal Appeals. He suggested that they were about three years behind, and getting further behind on a daily basis.[120]

Judge Grant recalls that Representative Bill Heatly filed an amendment to substitute a new tier of criminal intermediate courts. Grant wrote, "We were able to defeat Heatly's amendment."[121]

3. *Enlarged Powers of the Supreme Court*

The constitutional amendment did one other major thing besides

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the vote. He remembered that Santiesteban was very close to some criminal defense lawyers who opposed the amendment. Some criminal defense lawyers did not care how long it took to finalize a conviction. If a client was out on bail, the fact that it took three or four years to finalize the judgment was not all bad.

119. As head of the House Judiciary Committee, Grant was helpful in many ways. To emphasize our out-of-date, horse and buggy constitution, he rode a horse 286 miles from Marshall, Texas, to the Constitutional Convention in Austin. He was a gifted writer. Among other works, with Larry L. King, he wrote a play about Huey Long which ran in Washington D.C. and "off Broadway." LARRY L. KING & BEN Z. GRANT, THE KINGFISH (First Southern Methodist University Press 1992). I performed Grant's wedding ceremony in the rotunda of the Capitol at night.

120. Letter from Ben Z. Grant to Joe Greenhill (Feb. 13, 2001) (on file with the author).

121. *Id.* Grant stated that we received slightly more than the one hundred votes necessary to adopt the resolution. He also remembers Representative Craig Washington of Houston voted *for* the resolution by mistake. Washington had been out of the Chamber and returned as the vote was being taken. He saw his friend, Ben Grant, holding up one finger. So he held up one finger (an aye vote) without realizing that the amendment was being voted on. He was closely associated with some criminal defense lawyers who opposed the amendment. When Washington realized later that he'd made a mistake, he tried to get a reconsideration of the vote. Grant did not oppose Washington's request, but the request required a two-thirds vote. Washington did not get the necessary votes to reconsider, and the joint resolution was adopted.

Thereafter, Judge Grant said that he substituted Senator Farabee's S.J. Res. 36 for his resolution. Thus, the proposed amendment was passed and went to the people for adoption.

unitizing the courts of appeals. It made clear that the supreme court had residual powers, which translated into inherent power.

The early Texas constitutions had been interpreted to mean that the supreme court's jurisdiction and power was appellate only. In other words, it had only the specific powers delegated to it, and there are decisions to that effect.[122]

Senate Joint Resolution 36, as adopted, stated that "[t]he Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution" (now section 2 of Article V).[123] Thus, the court has judicial power, limited only by specific provisions of the constitution.[124]

Under my watch, the court exercised its inherent power on several occasions. For example, in 1978 the legislature and its staff seemed determined to abolish ("sunset") the integrated State Bar of Texas.[125] The initial report of the Sunset Advisory Commission, on July 28, 1978, recommended the following:

> "1. Except for licensing and the discipline of licensees, the State Bar should expire in 1979. Lawyers could then form a voluntary association for their professional interests.
> 2. The State Bar building and all of the property of the present State Bar should pass into . . . the Board of Control . . . ."[126]

The legislature, led by Senators Lloyd Doggett and A. R. Schwartz, was also prepared to sunset the Board of Law Examiners.[127] To counter this, the supreme court prepared instruments to create a State Bar of Texas and a Board of Law Examiners as arms of the Judiciary.[128] The court's liaison to the legislature was Justice Sam Johnson, who is now on senior status on the United States Court of Appeals for the Fifth Circuit. Justice Johnson and I had several meetings with Senators Doggett and Schwartz, and others, and a compromise was reached. The legislature enacted a new State Bar Act, which is codified in the current version of the Texas Government Code.[129]

The State Bar Act was signed by the governor on June 13, 1979.[130] Shortly thereafter, on June 19, the supreme court issued an order which

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122. *See, e.g.*, Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969); *Ex parte* Hughes, 129 S.W.2d 270, 273-76 (Tex. 1939).

123. TEX. CONST. art. V, § 2.

124. *Id.*

125. Thomas M. Reavley, *Sunset Staff Report: Pro & Con*, 41 TEX. B. J. 933, 933 (1978).

126. *Id.*

127. *Id.*

128. *Supreme Court Issues State Bar Order*, 42 TEX. B.J. 756 (1979); *see Board of Law Examiner, Bill Signed*, 42 TEX. B.J. 756 (1979).

129. TEX GOV'T CODE § 81.011 (Vernon 1998).

130. *Supreme Court Issues State Bar Order*, 42 TEX. B.J. 756 (1979).

implemented the new State Bar Act.[131] The order recites the legislative action and then says, "It is, however, the duty of this Court in the exercise of its own inherent power to regulate and control the practice of law and to provide for the proper administration of justice."[132] The court then set out supplemental orders for the conduct of the State Bar and its property.[133] The unified or integrated bar was continued.[134]

In 1987, the legislature added the following to Article 320a-1 (now Tex. Gov't Code § 81.011):

> a. The state bar is a public corporation and an administrative agency of the judicial department . . . .
> b. This chapter is in aid of the judicial department's powers *under the constitution* to regulate the practice of law, and not to the exclusion of those powers.
> c. The Supreme Court . . . on behalf of the judicial departments shall exercise administrative control over the state bar. . . .[135]

The same procedures were exercised as to the Board of Law Examiners by the court and the legislature.[136] A new Board of Law Examiners statute was enacted, recognizing the board as an arm of the judiciary under the control of the supreme court.[137] Thus, there was no sunset of that board, and the inherent power of the Supreme Court of Texas was preserved.[138] The legislature backed down and did not abolish the State Bar Association or the Board of Law Examiners, and there became two bases for these organizations: legislative and judicial.[139]

V. GETTING THE AMENDMENT PASSED

A. The Chief Justice of Texas

Senate Joint Resolution 36, as it passed the senate, changed the name of the Chief Justice of the Supreme Court of Texas to the Chief Justice of Texas.[140] At the time, I was unaware of the change, and I later requested its

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131. *See* Tex. S.B. 287, 66th Leg., R.S. (1979) (State Bar Act); *Sunset Review: Board of Law Examiners Bill Signed*, 42 Tex. B.J. 756 (1979).
132. *Supreme Court Issues State Bar Order*, 42 Tex. B.J. 756 (1979).
133. *Id.*
134. *Id.*
135. TEX. GOV'T CODE § 81.011 (Vernon 1998) (emphasis added).
136. *Board of Law Examiners Bill Signed*, 42 Tex. B.J. 768 (1979).
137. TEX. GOV'T CODE § 82.001 (Vernon 1998).
138. *See In re* Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999); State Bar v. Gomez, 891 S.W.2d 243 (Tex. 1994); Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979).
139. *See* TEX. GOV'T CODE § 82.001.
140. Tex. S.J. Res. 36, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223.

removal. I wanted the proposed amendment to pass—and with as little controversy as possible. While I strongly supported the amendment, I did not want the amendment criticized because of some alleged ego trip that I wanted to be the Chief Justice of Texas. It would have been good for the office, but I recall that it was not worth the risk of defeating the amendment. The name change was taken out in negotiations between the house and senate before final passage.[141]

Senate Joint Resolution 36 also changed the title of the associate justices of the supreme court to simply justices.[142] The word associate was misunderstood and misused. Associate was construed by some to mean Assistant. Also, all of the justices received mail from prison inmates. When I was an associate justice, the mail was sometimes addressed as "Ass Justice Greenhill." There was no period after "Ass" to indicate an abbreviation. The change from associate justice to simply justice was unopposed.

The resolution provided that the amendment should be submitted to the voters at an election on November 4, 1980, and if adopted, would become effective on September 1, 1981.[143]

B. The Campaign to Pass the Constitutional Amendment

Since I had urged the adoption of the constitutional amendment in my 1979 State of the Judiciary address, it fell to me to gain the people's support for the amendment.[144] I remember that there were many others who urged the adoption of the amendment, but there was no committee or organization to bring that about.

One huge help was the support of Governor Bill Clements. The Governor was satisfied that the appellate change was absolutely necessary to handle the huge number of criminal appeals and to bring the docket of the Court of Criminal Appeals up to date.[145] A byproduct was that the governor would get to appoint many new justices, excluding the new justices for the Austin Court of Appeals.[146]

The Governor arranged for a press conference in which he and I laid out the proposed constitutional amendment and urged its adoption. This was important, because the Republican Party was just coming into power in Texas. Before Bill Clements, almost all of the judges in Texas were Democrats, but Clements and the Republican Party brought about a change. He was the first Republican governor since Reconstruction, and Texas was becoming a

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141. *See* TEX. CONST. art. V, §2.
142. *Id.*
143. Tex S.J. Res. 36, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223.
144. *See supra* Part IV.B.
145. *Clements, Jurists Push for Appeal Amendment*, DALLAS MORNING NEWS, Oct. 4, 1980, at 19A.
146. *See infra* Part VI.A.

two-party state. The proposed amendment had bi-partisan support—at least, neither political party opposed it.

Labor unions had opposed the adoption of the new constitution in 1974.[147] In order to avoid labor opposition to this new attempt, I visited with labor leaders about the proposal. The unions were convinced that the proposed amendment was not a problem to them and, therefore, did not oppose it.

C. No Public Debate

As mentioned previously, before the election to adopt the new constitution for Texas in 1974, there were hundreds of debates, public forums, round table discussions, and the like. In all of these, each side was given equal time.[148] It was my distinct impression that the negative side always had the advantage. If the opponents found any fault with the whole constitution or any part of it—right to work, annual sessions of the legislature, election or appointment of judges—the voter would be against the new constitution. They needed to save the constitution.

The more the new constitution was debated, the worse the situation became. It was obvious to me that the judicial article was debated to death, and I did not want that to happen again. The result was that I deliberately refused to accept invitations to debate the proposed judicial amendment at any open forums or meetings. There were suggestions supporting the formation of speakers' committees to promote the amendment. I opposed these suggestions, and no committees were formed.

The same was true for radio and television talk shows, all of which required an "equal time" policy. However, there really was not much public interest in these proposed changes to the constitution. Perhaps the radio and television people expected someone to ask for time to promote the amendment, but that did not happen.

I remember that there was a politically active group who represented the rights of prisoners and was suspicious of the proposed article. The group had a lobbyist and a mailing list. In response to this opposition, I was able to show them that a prompt disposition by a court of appeals was better for innocent criminal defendants or wrongly convicted defendants than a two or three year period of delay of an appeal to the Texas Court of Criminal Appeals. The group was convinced that it was a good idea and sent letters to their members to support the amendment.

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147. Ford, *supra* note 70.

148. *See supra* Part III.

D. Positive Media Contacts

It occurred to me that many voters looked to the editorials of newspapers and news media for guidance on voting. The media editors were important because the public knew about major state officials, the mayor, and the local sheriff, but did not know about court structure.

I prepared a packet of information about the constitutional amendment, which included the positive benefits which would result from the amendment's passage and the answers to some criticism. I suggested ideas and material for editorials in the newspapers to support the amendment. I sent packets to the leading Texas daily papers and some weekly papers at my own expense because I did not want the publicity of a campaign for funds and to have to account for any funds raised and spent. I simply sought their support for the amendment.

Most papers did recommend the adoption of the amendment through the publication of positive editorials, which played an instrumental role in insuring passage of the amendment.[149] I do not remember there being opposition from any newspaper. It should be remembered that the editors, Bill Hobby and Everett Collier, of the two big Houston papers were participants in the 1972 Houston Citizens' Conference. They supported the amendment as did the Dallas Morning News, which was always alert to and generally supportive of major judicial changes.[150] No major opposition developed, and the proposed amendment passed by a comfortable margin in November 1980.

VI. IMPLEMENTING THE AMENDMENT: THE SECOND "STATE OF THE JUDICIARY" ADDRESS OF APRIL 21, 1981

At the invitation of the legislature and after the passage of the amendment in 1981, I gave my second State of the Judiciary message.[151] The message read as follows:

> In this session of the Legislature, you have a great opportunity to improve our [criminal justice] system . . . .
>
> Our major problem for years has been that all criminal appeals go to one court, the Court of Criminal Appeals.
>
> Notwithstanding diligent work . . . its backlog is outrageous; and the delay in the administration of criminal justice is shocking . . . .

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149. *See, e.g., Clements, Jurists Push for Appeal Amendment, supra* note 145 ("If Texas seriously wants to do something about crime, they will vote Nov. 4 for a constitutional amendment changing the appeal system.").

150. *See id.*

151. Chief Justice Joe Greenhill, State of the Judiciary Message to the 67th Legislature of Tex. 3-4 (Apr. 21, 1981) (on file in the Legislative Reference Library in Austin, Texas).

> At the end of 1979, there were 3,200 cases on its docket. The number increased to over 4,000 by the end of 1980. The time between conviction and oral argument is almost three years.
>
> We already have fourteen, [sic] intermediate courts which, with help from this Legislature, can handle the criminal and civil appellate case load without delay.
>
> . . . .
>
> With proper implementation, the time on new appeals, [sic] will be cut from over three years to six to nine months.[152]

The message also recommended that the Texas Court of Criminal Appeals be given the power to review decisions of the courts of appeals by discretionary review or upon its own motion and that death penalty cases go directly to the Texas Court of Criminal Appeals.[153]

A. The National Center for State Courts

As to the mechanics of implementing the new constitutional amendment, I asked for the help and advice of the National Center for State Courts.[154] The National Center was created to assist the states in matters such as this. A grant for this purpose was made by the M.D. Anderson Foundation, and the National Center made an in-depth study.[155]

Senator Ray Farabee created a bill analysis—a summary of the purposes and provisions of Senate Bill 265, which he introduced to implement the constitutional amendment.[156] It is part of the official record and reads in part:

> In the Spring of 1980, Chief Justice Greenhill requested the National Center for State Courts to conduct a study of the issues involved in the implementation of S.J. R. 36 in Texas and to make recommendations to him. The Center submitted its report in June, 1980. Most of the report and its recommendations was adopted by the House Judiciary Committee as part of their interim report. The first draft of S.B. 265 was largely based on the report.
>
> The voters approved S.J. R. 36 in November, 1980. Following the adoption of the amendment, the Chief Justice appointed several committees to further study the appropriations, personnel and statutory changes required in order to fully implement S.J. R. 36. S.B. 265 incorporates many of the recommendations of the committee on the statutory revisions necessary to

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152. *Id.*

153. *Id.*

154. *See* TEXAS APPELLATE COURT III PROJECT: A CONTINUATION STUDY ON THE IMPLEMENTATION OF S.J. RES. 36 (Nat'l Ctr. for State Courts), Aug. 31, 1982, at 1 (on file in the Legislative Reference Library in Austin, Tex.).

155. *See id.*

156. RAY FARABEE, BILL ANALYSIS, TEX. S.B. 265, 66th Leg., R.S. (1981).

implement the amendment.[157]

Senator Farabee requested a "fiscal note" from the Legislative Budget Board (LBB) to show the cost of the implementation.[158] The director of the LBB, Thomas M. Keel, estimated the annual cost at $4.5 million for twenty-eight new judges, their judicial retirement, and support staff.[159]

There was a large amount of discussion as to which courts of appeals would get new justices and how many. *The Austin American-Statesman* reported that "[t]here was more logrolling going on than at a lumberjack's convention Tuesday, as the Texas Senate passed a courts [sic] bill that would add a layer of 26 judges to the state's appellate system."[160] The paper miscalculated the number of judges, but it was correct in reporting the efforts of the courts to get additional judges.[161]

The judges of the various courts of appeals gave their views on how many new judges they needed. Senators representing the areas served by those courts of appeals were vitally concerned with how many new judges each senator's district would receive.

Houston received six new judges, for the First and Fourteenth Courts of Appeals, or six panels of three judges. The Dallas Court of Appeals was enlarged from six to twelve judges, with a thirteenth judge to be added January 1, 1983. The San Antonio court was enlarged from three to seven. The Corpus Christi and Fort Worth courts were enlarged to six judges each, and the Amarillo and El Paso courts were enlarged from three to four. The Austin Court of Appeals received three new judges; but at the insistence of Senator Lloyd Doggett (Democrat), they would not be added until later so that they could be elected rather than be appointed by the Republican governor.[162] Those elected were Democrats.[163]

B. The Flush Back of Cases

Then there was the question of how many of the approximately 4,000 cases already pending on the docket of the Texas Court of Criminal Appeals would be retained.[164] The Texas Court of Criminal Appeals would have liked for all, or the great majority of these (except for death penalty cases), to be

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157. *Id.*

158. FISCAL NOTE, TEX S.B. 265, 66th Leg., R.S. (1981).

159. *Id.* Tom Keel now teaches at the University of Texas's L.B.J. School of Public Affairs.

160. Gayle Reaves, *Senate Approves 26-Judge Bill*, AUSTIN AMERICAN-STATESMAN, Mar. 11, 1981, at B2.

161. *See id.*

162. *Id.*

163. *Id.* James C. Brady, Robert A. Cozmmeye, and Earl W. Smith were elected to the Austin Court of Appeals. *Id.*

164. *See* Greenhill, *supra* note 4, at 932-33.

sent back ("flushed back") to the courts of appeals.[165] The judges of the existing courts of appeals did not want to be overwhelmed with criminal cases and have their own dockets swamped.[166] A compromise was reached whereby the courts of appeals would get seventy-five of these cases for each new judge which that court received, or about 1,400 cases in all.[167]

C. Texas Bar Journal Article

In the September 1981 *Texas Bar Journal*, I tried to explain how the newly adopted constitutional amendment would, or should, work.[168] I tried to allay some of the lawyers' concerns.[169]

Those lawyers with a civil practice were afraid that civil cases would suffer because of the addition of many criminal cases to the dockets of the courts of appeals.[170] Federal statutes required that criminal cases be given preference in settings.[171] However, the Texas structure had no such provision; so civil and criminal cases would receive the same treatment.[172] The idea was to get both civil and criminal cases decided with all deliberate speed.[173]

Lawyers who had a criminal practice were concerned that the judges of the courts of civil appeals could not handle criminal cases properly.[174] These judges were said not to be experts in criminal law.[175] There were several reasons, previously mentioned, why this was not the case.[176] Federal judges hear both civil and criminal cases, and judges in most of our other states do the same.[177] These appellate courts have no problem with criminal cases. Nevertheless, the judges of the courts of appeals, and those newly appointed, voluntarily attended seminars on criminal law and procedure.[178]

It was and is my belief and understanding that the better view throughout the United States is that judges should be generalists, as they are in the federal system, rather than specialists. Accordingly, S.B. 265 (Senator Farabee's bill) provided that the courts of appeals should sit in panels and that the panels should rotate periodically.[179] It also provided that "permanent civil and

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165. *Id.* at 933.
166. *Id.*
167. *Id.* However, in reality, 1,637 cases were "flushed back." TEXAS APPELLATE COURT III PROJECT, *supra* note 125, at 3.
168. *See* Greenhill, *supra* note 4, at 932-33.
169. *See id.*
170. *See id.* at 932.
171. *See id.*
172. *See id.*
173. *See id.* at 932-33.
174. *See id.* at 932.
175. *See id.*
176. *See id.*
177. *See id.* at 932.
178. *See id.*
179. *Id.*

criminal panels, without rotation, shall *not* be established."[180]

D. Powers of the Supreme Court

As stated above, the 1980 amendment gave the supreme court its "judicial power of the state except as otherwise provided in this Constitution."[181] In 1985, the constitution was amended to enlarge the court's power.[182] It provided:

> The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration . . . [and] rules of procedure for all courts . . . for the efficient and uniform administration of justice . . . .[183]

VII. THE 1991 CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM

Pursuant to the 1985 amendment to Article V, which gave the supreme court responsibility for the efficient administration of justice, the court created and appointed a Citizens' Commission on the Judicial System of Texas.[184] It was, in some ways, similar to the Houston Citizens' Conference.[185] Specifically, the Commission was created to make recommendations on the organization of the court system, including the "jurisdiction and title of the trial and appellate courts of Texas."[186] The court, however, stated that the Commission's inquiry would not extend to the manner of selecting judges.[187] The purpose was to zero in on court structure and administration.[188]

I was honored to be one of the many members the court appointed to the Commission.[189] The chairman of the commission was A. Kenneth Pye, President of Southern Methodist University and former Chancellor of Duke University.[190] The Commission held many public hearings and conducted six full sessions from December 1991 to October 1992, and it made its final report to the supreme court on January 5, 1993.[191]

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180. *Id.* (quoting TEX. S.B. 265, 67th Leg., R.S. (1981)).

181. TEX. CONST. art. III, § 3.

182. *See* TEX. CONST. art V, § 31.

183. *Id.*

184. CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM: INTO THE TWENTY-FIRST CENTURY, i, 46-48 (1993) (on file with the author) [hereinafter 1993 CITIZENS' COMM'N].

185. *See* 1972 CITIZENS' CONFERENCE, *supra* note 34; *cf.* 1993 CITIZENS' COMM'N, *supra* note 184, at 47 (describing the improvements the commission recommends for the Texas judicial system).

186. 1993 CITIZENS' COMM'N, *supra* note 184, at 5.

187. *Id.*

188. *Id.*

189. *Id.* at ii, 5.

190. *Id.* at i.

191. 1993 CITIZENS' COMM'N, *supra* note 184, at i.

While the supreme court appointed the members of the Citizens' Commission, it did not attempt to control their recommendations.[192] Superficially, it appeared that the Commission's executive summary of recommendations followed those of the Houston Citizens' Conference, the Constitutional Revision Commission of 1973, and the Constitutional Convention.[193] The Commission did recommend a merger of the supreme court and the court of criminal appeals, and the continuation of the unified courts of appeals.[194]

The recommendation of the 1991 Citizens' Commission, however, was really for a merger of the two highest courts for administration purposes only.[195] The supreme court was separated for civil and criminal cases; it would have a civil division deciding only civil cases, and a criminal division deciding only criminal cases.[196] Each division would have a presiding judge.[197] "The Chief Justice should have the authority to sit on either division in appropriate circumstances, as provided by court rules."[198] That is, the court itself would decide when the Chief Justice would sit in civil or criminal cases.[199] The discussion recorded in the minutes indicate that the Chief Justice would not sit regularly with either section.[200]

According to the minutes of the Commission, I thought that the Chief Justice should not simply be an administrator.[201] Judge Frank Maloney, a member of the Commission and a judge on the court of criminal appeals, indicated that it was his opinion that several of the judges on the court of criminal appeals would not agree to the merger unless the criminal functions were kept separate.[202] The minutes of the Commission reflect that Chief Justice Phillips would go along with the Commission's final report because its proposal "was better than what we have now."[203]

Agreeing with Chief Justice Phillips, my views were that there should be one supreme court with general civil and criminal jurisdiction—not two divisions completely separate in civil and criminal cases.[204] The Chief Justice

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192. *Id.*

193. *See id.*; *cf.* 1972 CITIZENS' CONFERENCE, *supra* note 34, at 10-13 (reporting that the Court of Criminal Appeals and the supreme court should be merged).

194. 1993 CITIZENS' COMM'N, *supra* note 184, at 5.

195. *Id.* at 9-10.

196. *Id.*

197. *Id.* at 10.

198. *Id.* at 11.

199. *Id.* at 10-12.

200. Citizens' Commission on the Texas Judicial System, Minutes of September 10, 1992 Meeting, 2 (on file with the author).

201. *Id.* (the minutes attribute this stand to me instead of Phillips, although I did agree with the position).

202. *Id.* at 15-16.

203. *Id.* at 15 (quoting Chief Justice Phillips).

204. *Id.* at 1-2.

should be a full-time judge, not a part-time judge with administrative duties.[205]

A. The Executive Summary of 1991-1992 Citizens' Commission Courts of Last Resort

- A single Supreme Court with both civil and criminal jurisdiction should be established.
- Supreme Court should have two divisions, civil and criminal, each with seven justices. The Chief Justice would be selected statewide, and each division would select a presiding justice.[206]

While these recommendations provided for a chief justice and two divisions of seven justices each, all eighteen members of the courts would serve immediately.[207] The number of justices would reduce by attrition to seven justices in each division, as explained above.[208]

The separateness of the two divisions is emphasized by a lack of specific provisions for the court sitting en banc.[209] The rationale was that the court would make rules for en banc sitting.[210] Examples given for en banc situations include: resolving conflicts in the holdings of the two divisions and making rules.[211]

B. Intermediate Courts of Appeal

As to the intermediate courts of appeals, the Citizens' Commission was advised "that the current system of multiple intermediate appellate courts . . . be retained [because] . . . the Commission believe[d] that the current structure of intermediate appellate courts is working well."[212]

C. No Legislative Action on the Recommendations of the 1991-92 Citizens' Commission

According to Chief Justice Phillips, the report and recommendation of the Citizens' Conference was brought to the attention of the Texas Legislature by Senator John Montford. The response of the legislature was not enthusiastic. While Senator Montford was always helpful to the judiciary, he did not get the response given to Senator Farabee, Representative Ben Grant,

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205. *See id.* at 2.
206. 1993 CITIZENS' COMM'N, *supra* note 184, at 1-2.
207. *Id.* at 11.
208. *Id.*
209. *Id.* at 11-12.
210. *Id.*
211. *Id.*
212. *Id.* at 13-16.

or Lieutenant Governor Bill Hobby. Enthusiastic help from outside of the legislature did not develop as it did with the 1980 amendment creating the courts of appeals. Some members of the court of criminal appeals were not enthusiastic about that court's merger with the supreme court, and many were supportive of, but not enthusiastic about, a merger of the two courts for administrative purposes only. They were not enthusiastic about the actual reduction in the powers of the chief justice as a judge, as contrasted with his being a chief administrator.

According to Chief Justice Phillips, the only recommendations of the Citizens' Conference which were adopted by the legislature had to do with the structure of municipal courts of Texas, not covered here.

VIII. IS THE 1980 AMENDMENT WORKING?

There was room, of course, for reasonable difference of opinion as to whether the constitutional change to give criminal jurisdiction to the then courts of civil appeals would be a good thing. In my opinion, the change has been beneficial.[213]

The *Annual Report of the Texas Judicial System* for fiscal year 2000 was released in December 2000.[214] To me, the report showed that the docket of the court of criminal appeals is now manageable and current.

The court of criminal appeals must accept appeals in death penalty cases directly from the trial court and did so fifty-five times in fiscal year 2000.[215] By far, the greatest number of cases brought to the Texas Court of Criminal Appeals in fiscal year 2000 were petitions for discretionary review.[216] The court received 2,271 petitions for review and granted review to 170 of the cases, or seven percent of them.[217] The other cases were refused, dismissed, or moot.[218] That means that the courts of appeals ultimately disposed of at least ninety-three percent of the criminal appeals in a manner satisfactory to the court of criminal appeals.[219] The court's docket is much more manageable with such a large number of other criminal appeals being handled by the courts of appeals.

The courts of appeals are doing remarkably well. As a whole, they had a clearance rate during or in fiscal year 2000 of 102.8 %.[220] That is, they

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213. *See supra* Part V.A-C.

214. TEX. JUDICIAL COUNCIL ANNUAL REPORT OF THE TEX. JUDICIAL SYSTEM (2000) [hereinafter TEX. JUDICIAL COUNCIL].

215. *Id.* at 103.

216. *See id.* at 103.

217. *Id.* at 104.

218. *Id.*

219. *See id.*

220. *Id.* at 122.

disposed of more cases, civil and criminal, than were filed in that year.[221] Of the 5,973 criminal cases pending in the courts of appeals, fifty-two percent were disposed of in less than six months.[222] "The average lapse of time between the filing of a criminal case in a [c]ourt of [a]ppeals and its dispositions was 10.5 months."[223] That compares to three to four years it took to dispose of cases under the old system in the Texas Court of Criminal Appeals.[224] Similarly, the courts of appeals had 3,713 civil cases during this period, and forty-nine percent were left pending for less than six months.[225] In fiscal year 2000, "[t]he average length of time between the submission of a civil appeal and its disposition was 2.4 months."[226] During this period, the justices of the courts of appeals wrote 12,798 opinions, 11 more than in 1999.[227] This is a working judiciary.

The inescapable conclusion is that the constitutional amendment of 1980 was a major improvement. It has greatly accelerated the disposition of criminal cases and has not hindered the disposition of civil cases. As stated by the 1992 report of the Citizens' Commission on the Texas Judicial System, "[t]he Commission believes that the current structure of intermediate appellate courts is working well."[228]

221. *Id.*
222. *Id.* at 120.
223. *Id.* at 121.
224. *See supra* Part IV.B-C.1.
225. TEX. JUDICIAL COUNCIL, *supra* note 214, at 120.
226. *Id.* at 121.
227. *Id.*
228. 1993 CITIZENS' COMM'N, *supra* note 184, at 13.