



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Summer 2017 Vol. 6, No. 4 General Editor Lynne Liberato Executive Editor David Furlow

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### Immediate Past President's Farewell

**By Macey Reasoner Stokes**

As my term comes to a close, I would like to thank our members for the opportunity to have served this wonderful organization.

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Macey Reasoner Stokes

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**By Dale Wainwright**

The Society continues its mission to discover and preserve the Court's history and educate the public about the judicial branch of government.

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Hon. Dale Wainwright

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This *Journal* celebrates the centuries-spanning scholarship of the Texas State Historical Association, a primary partner with the Society in preserving, protecting, and publicizing Texas history. [Read more...](#)



David A. Furlow

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Old Stone Capitol

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William Marsh Rice

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Gov. Allred



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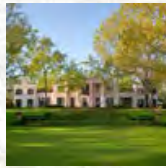


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## News & Announcements

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Judge Wood, one of the first women to clerk at the Supreme Court, will be the principal speaker at the Society's annual fundraiser in Austin in September.

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Hon. Diane P. Wood

### [Nominations Welcomed for the Texas Appellate Hall of Fame](#)

The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas. [Read more...](#)



### [Auld Lang Syne. Pat](#)

**By the Journal staff**

In May the staff thanked Pat Nester for four years' service as Executive Director of the Society by gathering at an Austin institution, Fonda San Miguel. [Read more...](#)



Pat at the farewell dinner

## Laurels

We congratulate Warren Harris and Justice Elizabeth Lang-Miers on recent well-deserved honors. [Read more...](#)



## Membership & More

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Macey Reasoner  
Stokes

# Immediate Past President's *Farewell*

**A**s my term as President of the Society comes to a close, I would like to thank our members for the opportunity to have served this wonderful organization. The Society is blessed with an extremely capable and dedicated staff, without whom I simply could not have done this job: Executive Director Sharon Sandle, former Executive Director Pat Nester, Administrative Coordinator Mary Sue Miller, and Consulting Editor Marilyn Duncan. I am also thankful for our passionate board members, who have generously volunteered their time, talent, and efforts to improving the Society. The following are just a few of the Society's notable achievements and events this year, of which we can all be justly proud.

## **E-Journal**

The Society's e-Journal, published online four times a year, is a scholarly publication of the highest quality. The success of the e-Journal is a testament to the hard work of our editorial staff: General Editor Lynne Liberato, Executive Editor David Furlow, Deputy Executive Editor Dylan Drummond, Managing Editor Marilyn Duncan, and Production Manager David Kroll.

## **Taming Texas**

The Society's ***Taming Texas*** pilot project has been a huge success, teaching some 13,500 seventh-grade students about Texas's fascinating and unique judicial history. I am grateful to our Fellows for funding this important educational project and to Warren Harris for spearheading its development. Justice Brett Busby, Richard Whitely, and David Furlow will continue to run that program as 2017-18 Co-Chairs of the Houston Bar Association's Teach Texas Committee. As an indication of the project's high profile, the American Association of State and Local Historians has asked Marilyn Duncan and David Furlow to speak about the project's creation and implementation at the Association's annual meeting in Austin on Thursday, September 7, 2017. The second textbook in the ***Taming Texas*** series, ***Law and the Texas Frontier***, will be published in the fall of 2017, and the third book, a history of Chief Justices of the Texas Supreme Court, will be published in 2018.

## John Hemphill Dinner

Please join us for our Twenty-Second Annual Hemphill Dinner on **Friday, September 8** at 6:30 p.m. at the Four Seasons Hotel in Austin. Our keynote speaker will be Diane Wood, Chief Judge of the United States Court of Appeals for the Seventh Circuit. For a table or tickets, please contact Mary Sue Miller at (512) 481-1840 or [tschs@sbcglobal.net](mailto:tschs@sbcglobal.net). Many thanks to this year's Dinner Chair Tom Leatherbury.

I'll close by welcoming our new president, Dale Wainwright, to the helm. I am confident that under Dale's stewardship, the Society will reach even greater heights than it has this past year.

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Hill Country wildflowers photo by David A. Furlow.





Dale Wainwright

# Message from the 2017-18 *President*

**T**he mission of the Texas Supreme Court Historical Society is well known to many but not to all. Founded in 1990 by three former Chief Justices of the Supreme Court of Texas—Hon. Robert W. Calvert, Hon. Joe R. Greenhill, and Hon. Jack Pope—the Texas Supreme Court Historical Society continues to fulfill its mission to discover and preserve the Court’s history and educate the public about the judicial branch of government. On behalf of the Court, the Society also acts as conservator for the judicial portrait collection and other paintings and valued historic items belonging to the Court. The Society views this mission as a labor of love. We greatly appreciate the support in this endeavor of the Texas Supreme Court and, in particular, Justice Paul Green, the Supreme Court’s liaison to the Society.

The Society fulfills its mission through the work of a dedicated board of trustees and many other volunteers. I will briefly mention projects for the coming year starting with the next major event. In subsequent messages, I’ll provide more information on the Society’s programs.

- The Twenty-Second Annual John Hemphill Dinner, named in honor of the first Chief Justice of the Supreme Court of the State of Texas, will be at the Four Seasons Hotel in Austin on September 8, 2017. Our keynote speaker will be the Honorable Diane Wood, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. If you desire to attend the Dinner, go to our website now for tickets because the Dinner regularly sells out. Tom Leatherbury is chairing the Dinner this year.
- The Society publishes a quarterly e-Journal that uncovers the history of the Texas judiciary and its role in the development of this great state.
- The Fellows-sponsored Taming Texas Judicial Civics and Court History Project will continue offering classes to seventh-grade Texas history classes. The project’s first book, *Taming Texas: How Law and Order Came to the Lone Star State*, will be supplemented by a new volume, *Law and the Texas Frontier*, which will be delivered from the printer this summer. The third volume, *The Chief Justices of Texas*, is in production and will be published next year.
- As part of its educational mission, the Society has expanded its collaboration with other historical organizations, including the Texas State Historical Association, the General Land Office, the State Library and Archives, the American Association for State

and Local History, and several others. We will be participating in a number of events with these organizations over the course of next year.

- The Society cosponsors the Texas Appellate Hall of Fame, which will announce its 2017 inductee(s) in September.
- The Society sponsors the annual Texas Supreme Court briefing attorneys breakfast, scheduled for the morning after the Hemphill Dinner. It has attracted increasing numbers of BAs and Justices in recent years.

The Society's work is facilitated by the outstanding staff of Sharon Sandle, Executive Director; Mary Sue Miller, Administrative Coordinator; and Marilyn Duncan, Consulting Editor.

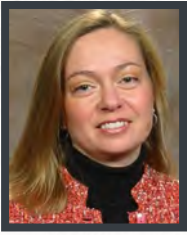
I am looking forward to serving as the Society's president for 2017-18.

**DALE WAINWRIGHT** is a shareholder with Greenberg Traurig, LLP and chairs its Texas Appellate Practice Group. He is a former Justice on the Supreme Court of Texas.

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Hill Country  
wildflowers photo  
by David A. Furlow.





Sharon Sandle

## A Few Observations about *Texas Legal History*

A few weeks ago the Texas Supreme Court Historical Society sponsored the History of Texas Supreme Court Jurisprudence CLE, and I was fortunate to be able to attend and hear presentations on topics as varied as the story of the seven men who fought in the battle of San Jacinto and later served on the Supreme Court of the Republic of Texas, the story of Theodora Hemphill and what her family history can tell us about the Texas Constitution, and the story of the ignominious and misunderstood “Semicolon Court” during Reconstruction.

The presentations were well-researched and scholarly, but more than that, they were good stories. For example, the seven jurists profiled by Dylan Drummond in *San Jacinto Justice: The Republic Supreme Court Jurists Who Won Texas Independence* were all colorful characters. Hon. Edward T. Branch, for example, was a native Virginian whose path to Texas involved being captured by pirates in the Gulf of Mexico while sailing for Cuba. After he was set ashore in Anahuac, Branch’s brief career as a schoolteacher in Liberty ended when he joined the “Liberty Volunteers.” He survived having his horse shot out from under him in a skirmish before the battle of San Jacinto. He went on to serve in the First and Second Republic Congresses and then served the Fifth Judicial District.

Judge James W. Robinson was attending a district court hearing in San Antonio in 1842 when the Mexican army invaded and took the entire court prisoner, including attorneys, jury, and bystanders. Hon. Robert McAlpin Williamson, known as “Three-Legged Willie” Williamson, left Georgia for Texas after a duel. Judge Williamson presided over the first district court proceeding in Shelby County. It was not a particularly orderly affair. One defendant demanded that his case be dismissed on the authority of the Bowie knife that he drove into the judge’s bench, stating, “This sir, is the law of Shelby County!” Judge Williamson drew his horse pistol and replied, “If that’s the law in Shelby County, then this is the Constitution of Texas that overrules your law!”

I began my own legal career as an attorney in Hobbs, New Mexico. For a girl who grew up in Houston, Texas, New Mexico seemed like the frontier, even in 1996. And although my experiences practicing law were tame in comparison to those of the early Texas lawyers and jurists, I think you can still see the influence of those early courts today. The History of Supreme Court Jurisprudence course was a fascinating sampling of the stories of the fierce men and women who laid the foundations for the state of Texas, and I came away from the course with a better grasp of where we’ve come from as Texas lawyers and as Texas citizens. I believe that history’s value is to help

us understand ourselves better once we understand how we got here. Fortunately, if you missed seeing this program live, you can still watch the online course on [texasbarcle.com](http://texasbarcle.com).

As the newest member of the staff of the Texas Supreme Court Historical Society, I'd like to add that I'm delighted to be a part of this organization and excited about continuing its work. I'm also grateful to be following Pat Nester as executive director. I've known Pat for fifteen years, a fraction of his decades-long career. He has long had a national reputation in legal education, and his influence on the Texas Supreme Court Historical Society during his years as executive director has been transformative. One of Pat's signature characteristics is that he transforms every organization that he is a part of into a better and stronger organization. Those who come after him have an easier task because he has set the organization securely on the right track. That is certainly true of the Society, and I am fortunate to be following in his footsteps. Thanks, Pat, for being an important part of Texas legal history!

**SHARON SANDLE** became the Society's executive director on June 1, 2017. She is also director of the State Bar's Law Practice Resources Division and of TexasBarBooks.

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Hill Country wildflowers photo by David A. Furlow.





# Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

Our judicial civics and court history project, *Taming Texas*, continues to expand. Coauthors Jim Haley and Marilyn Duncan are completing the manuscript for the third book in the series, entitled *The Chief Justices of Texas*. This third book offers a colorful view of the leaders of the Supreme Court of Texas from its first days to the present. Filled with fascinating stories of the individuals who shaped the Court and the legal heritage of Texas, *The Chief Justices of Texas* will educate seventh-grade readers on why the work of these justices is relevant even today.

The first *Taming Texas* book, published in 2016, covered the evolution of our state's legal system from the colonial era through the present day. You can access a free electronic copy of this book, *Taming Texas: How Law and Order Came to the Lone Star State*, and other materials at [www.tamingtexas.org](http://www.tamingtexas.org).

The second book, *Law and the Texas Frontier*, which will be published later this year, focuses on how life on the open frontier was shaped by changing laws. We are pleased that Chief Justice Hecht has written the foreword for both books. With this newest book, the series will offer an educational, entertaining, and often surprising picture of the legal development of Texas.

The Houston Bar Association (HBA) is preparing to again teach our *Taming Texas* materials in the classroom in the 2017–18 school year. We would like to thank the HBA and its President, Alistair Dawson, for partnering with us. Because of the vast resources required to teach this number of students, we could not implement such a large-scale program without the HBA. Alistair has appointed Justice Brett Busby, David Furlow, and Richard Whiteley as the HBA program co-chairs to recruit volunteer attorneys and judges to reach thousands of seventh-grade students in the upcoming school year. We appreciate their efforts to teach the history of the courts and importance of the rule of law in Texas. If you would like to join in teaching this important program in Houston-area classrooms, please contact one of the co-chairs or the HBA.

We are also working on a newly revised classroom curriculum that will be used in 2017–18. Special thanks go to Fellow Warren Harris and *Taming Texas* coauthor Marilyn Duncan for making changes to the lesson plans based on feedback from teachers and lawyers who taught last Spring. It is our current plan to take the *Taming Texas* project statewide in the Spring of 2018.

Being in the classroom and teaching students about the rule of law is one of the most important things we as lawyers can do to educate the next generation. This worthwhile project would not be possible without the Fellows. As a result of the generosity of the Fellows, we were able to produce the first two *Taming Texas* books and website, and to continue developing additional works in the series.

If you are not currently a Fellow, please consider joining the Fellows and helping us support this important work. If you would like more information or want to join the Fellows, please contact the Society office or me.

## FELLOWS OF THE SOCIETY

### Hemphill Fellows

(\$5,000 or more annually)

David J. Beck\*

Joseph D. Jamail, Jr.\* (deceased)

Richard Warren Mithoff\*

### Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander

Marianne M. Auld

S. Jack Balagia

Robert A. Black

Elaine Block

E. Leon Carter

Tom A. Cunningham\*

David A. Furlow and

Lisa Pennington

Harry L. Gillam, Jr.

Marcy and Sam Greer

William Fred Hagans

Lauren and Warren Harris\*

Thomas F.A. Hetherington

Allyson and James C. Ho\*

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.\*

David E. Keltner\*

Thomas S. Leatherbury

Lynne Liberato\*

Mike McKool, Jr.\*

Ben L. Mesches

Nick C. Nichols

Jeffrey L. Oldham

Hon. Harriet O'Neill and

Kerry N. Cammack

Hon. Thomas R. Phillips

Hon. Jack Pope\* (deceased)

Shannon H. Ratliff\*

Robert M. Roach, Jr.\*

Leslie Robnett

Professor L. Wayne Scott\*

Reagan W. Simpson\*

S. Shawn Stephens\*

Peter S. Wahby

Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter\*

\*Charter Fellow

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David A. Furlow

## Remembering Rip-Roaring Rip Ford —and the Origins of *TSHA Scholarship*

***“The proper history of Texas is yet unpublished.***

***The men who enacted the great deeds, rendering the Lone Star Republic famous, have generally died without writing what they aided in doing...***

***Where is the historian who lived in those days of trouble and danger?...***

***“The Texians have proved themselves good soldiers. If we look at their utter neglect to record what they have done in war, and in the matter of legislation, we must conclude they are not willing writers.”***

— John P. “Rip” Salmon Ford, letter to former Texas Supreme Court Chief Justice Oran Milo Roberts, March 20, 1897, *Roberts Papers, 1815–1897*, Briscoe Center for American History.<sup>1</sup>

In this issue, our *Journal* celebrates the centuries-spanning scholarship of the Texas State Historical Association (TSHA), one of the Society’s primary partners in preserving, protecting, and publicizing Texas history.<sup>2</sup> If a modern annual meeting is a feast, then John P. “Rip” Ford was one of the founders of that annual feast. As good with a pen as he was with a gun, Ford bequeathed the scholarly traditions that resulted in the TSHA Annual Meeting articles Judge Mark Davidson and Baker Botts partner Bill Kroger present in the pages that follow.

A successful physician, surveyor, state representative and senator, newspaper reporter and publisher, and Texas Ranger, Rip Ford envisioned a state historical association, worked with others to make that vision a reality, and then published an article called “Fight on the Frio, July 4,

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<sup>1</sup> John Salmon Ford (Stephen B. Oates, ed.), *Rip Ford’s Texas* (Austin: University of Texas Press, 1963, republished 1991), xlvi, citing Ford’s letter to Oran M. Roberts, March 20, 1897.

<sup>2</sup> Archie P. McDonald, “Texas State Historical Association,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/vtt06>.



Rip Ford as a colonel during the Civil War. Wikimedia.

1865" in the second issue of the *Quarterly of the Texas State Historical Association*.<sup>3</sup>

Born on May 26, 1815 in the Scots Irish back country of Greenville District, South Carolina, Ford reached Texas in June 1836, six weeks after the Battle of San Jacinto, and enlisted in the Texas Army, where he rose to the rank of first lieutenant under the command of Texas Ranger Captain John Coffee "Devil Jack" Hays. Settling in San Augustine, where Sam Houston first organized his Texas legal business, Ford practiced medicine until 1844.<sup>4</sup>

Always close to the pounding heart of Texas politics, Ford won election to the Republic of Texas's Ninth Congress, where he served in the House of Representatives and introduced the resolution to authorize annexation by the U.S. He moved to Austin in 1845 to serve as editor of the *Austin Texas Democrat*. During the Mexican War, Ford served as adjutant of Hays's regiment, winning the respect of commanding officer General Joseph Lane during the U.S. advance into Mexico City. While adjutant, Ford picked up the nickname "Rip," short for "Rest in Peace," because he included those words in the condolences he sent to parents, siblings, wives, and children grieving for the loss of soldiers and Rangers who died on campaign.<sup>5</sup>

U.S. General George M. Brooke asked Ford, in August 1849, to command a company of Texas Rangers in battle against Mexican bandits, hostile Indians, and American outlaws then terrorizing the no man's land between the Nueces River and the Rio Grande. Ford led Texas Rangers into battle against Indians in south Texas from 1849 to 1851, along the Canadian River in 1858, and beside the Rio Grande in 1859–60. A member of the Secession Convention, Ford, as colonel of the Second Texas Cavalry, led Confederate forces in their last victory of the Civil War, at the Battle of Palmito Ranch.<sup>6</sup>

While not busy making Texas history, Ford recognized the importance of writing it. In 1856 he tried to create a Texas-wide historical association to "preserve records that otherwise may be lost." After suffering from malaria and the ravages of a rough life in the saddle, Ford recognized that he better write down those stories.

<sup>3</sup> Ford, *Rip Ford's Texas*, xlvii. See also Seymour V. Connor, "Ford, John Salmon [Rip]," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/ffo11>.

<sup>4</sup> Connor, "Ford, John Salmon [Rip]," *Handbook of Texas Online*.

<sup>5</sup> Ford, *Rip Ford's Texas*, xxiii (editor Stephen B. Oates's introduction).

<sup>6</sup> *Ibid.*; Connor, "Ford, John Salmon [Rip]," *Handbook of Texas Online*.

Ford moved to San Antonio in 1874 to gain access to the records and witnesses he needed to properly tell the story of Texas. He joined the Alamo Association, authored *The Origin and Fall of the Alamo*, published features in newspapers from one end of the Lone Star State to the other, and began writing articles about the Republic, the Rangers, and Texas Indians. Again Ford and a group of like-minded “Old Texians” organized a historical association, only to watch it collapse within months for lack of funds in a state that was not then “history minded.”<sup>7</sup>

Yet Ford kept doing his best to preserve and protect Texas’s history and heritage. During a visit lubricated by flowing cups of coffee, former Governor and Texas Supreme Court Chief Justice Oran Milo Roberts convinced Ford to describe the victory at the Battle of Palmito Ranch, which Roberts included in the study he was preparing for Clement Evans’s massive history of the Confederacy’s military.

The next year, in 1896, *Harper’s New Monthly Magazine* author and Western painter Frederick Remington ventured to the Alamo City to interview Rip Ford, “one of the old originals...a very old man, with a wealth of snow-white hair and beard—bent, but not withered.” Remington described the interview for *Harper’s* readers:

“I suppose, Colonel, you have been charged by a Mexican lancer,” Remington asked.

“Oh yes, many times,” Ford answered.

“What did you generally do?”

“Well—you see,” Ford replied, “I reckoned to be able to hit a man every time with a six-shooter at one hundred and twenty-five yards.”

One Ranger with a Colt could outrange a company of Mexican lancers. What good is a lance when every man carrying one is already filled with lead?

“Then you do not think much of a lance as a weapon,” Remington continued.

“No, there is but one weapon,” Ford opined. “The six-shooter when properly handled is the only weapon—mind you sir, I say *properly*.”<sup>8</sup>

Ford knew from experience what happened when a Ranger skinned a smoke-wagon. He never came to a shootin’ iron battle armed only with a lance.

After finishing the interview, the artist told his readers that Ford could tell “stories that will make your eyes hang out on your shirt front.”<sup>9</sup> Two years later Remington depicted Ford leading the Rangers into Oklahoma to attack the Comanches on their home turf.

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<sup>7</sup> Ford, *Rip Ford’s Texas*, xlvi.

<sup>8</sup> Ford, *Rip Ford’s Texas*, xxiii, citing Frederick Remington, “How the Law Got into the Chaparral,” *Harper’s New Monthly Magazine*, XCIV (December 1896): 60–65.

<sup>9</sup> *Ibid.*, xlvi.



In 1896, Frederic Remington depicted the Battle of Little Robe Creek (May 12, 1858), where Rip Ford's Rangers and their Indian scouts defeated Comanches north of the Texas border in Indian Territory. Image available on HistoryNet website.<sup>10</sup>

When TSHA began, Ford offered it his unique first-hand experience and extensive research. Soon after his coffee-fueled discussions of Confederate military history with former Chief Justice Oran Roberts, former Governor Francis R. Lubbock and eight other history-minded Texans convened a February 13, 1897 meeting at the University of Texas to found an institution dedicated to researching, preserving, and publishing Texas history.<sup>11</sup> The resulting organization, TSHA, has remained open to academic and non-academic historians, and even to lawyers and judges, from its founding through today.

University of Texas History Professor George P. Garrison, Eugene Digges, and Charles Corner drafted a constitution for the organization and invited 250 persons to attend a general organizational meeting held in Austin on March 2, 1897. Roberts, Lubbock, former Congressman and Railroad Commissioner John H. Reagan, George T. Winston, A. J. Rose, and Garrison invited twenty-five people to the meeting in the Capitol in the office of the Commissioner of Agriculture, Insurance, Statistics, and History. They recognized that women ought to write history rather than merely endure it, so they extended membership invitations to Dora Fowler Arthur, Julia Lee Sinks, and Bride Neill Taylor.

Ford, an old-fashioned traditionalist, insisted on referring to women as "lady members" in TSHA's constitution, rather than allow them to appear just as "members." He objected that the use of the honorific term *Fellow* could never properly apply to any woman. There must be a distinction between men and women, he insisted. The women refused to accept second-class status, however. Garrison and the women were unable to change Ford's mind. He banged his cane on the floor and stormed from the meeting.

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<sup>10</sup> Mike Coppock, "Rip Ford's Risky Ranger Raid," *Wild West Magazine* (January 26, 2017), <http://www.historynet.com/rip-fords-risky-ranger-raid.htm>.

<sup>11</sup> McDonald, "Texas State Historical Association," *Handbook of Texas Online*.

Professor Garrison and Texas historian Dudley G. Wooten were not prepared to take a “No” for Ford’s final answer. A day later, they marched up to Ford’s Austin hotel room to tell him that his support was essential to the success of the new organization. Ford heard them out, but refused to budge. Then, several days later, he budged. His note to Oran Roberts stated, “I anticipate remaining with the ‘Texas Historical Society’ as long as I can do anything to promote the interests of Texas history.” TSHA’s Executive Council cinched the matter by electing Ford an honorary life member, and Ford sent Professor Garrison his contribution, “Fight on the Frio, July 4, 1865.”

TSHA’s officers met at the University of Texas to plan the first official annual meeting, which was held in Austin on June 17, 1897. Former Chief Justice Roberts told the association’s initial members that those who had been responsible for making history should “furnish the facts” necessary to write a comprehensive history of Texas “in the future.”<sup>12</sup> When TSHA’s officers published the first issues of the *Quarterly of the Texas State Historical Association* in July 1897, they included primary source materials, including diaries, letters, proclamations, journals, and memoirs. Ford’s article appeared in the second issue of the *Quarterly*, which changed its name to *Southwestern Historical Quarterly* in the 1912–13 volume. It is now the oldest continuously published learned journal in the state.<sup>13</sup>

Ford lived just long enough to see TSHA’s fulfillment of his dream to help create a Texas historical association. He suffered a debilitating stroke in October 1897, went into a coma, and died on November 3. Fellow Ranger Charles L. Martin eulogized Ford’s passing in his article “Last of the Ranger Chieftains,” where he wrote that, “He rests by the bright waters of the San Antonio in the bosom of his loved Texas, and ‘after life’s fitful fever’ he sleeps well, the perfect ending of the good man.”<sup>14</sup>

Soon after Ford’s death, TSHA began to host annual meetings in Austin in March of every year to share research, read papers, award outstanding scholarship, and raise funds through auctions of historic artifacts, papers, and books.<sup>15</sup> That tradition continued until 1968, when the association first conducted an annual meeting in San Antonio to celebrate HemisFair 68.<sup>16</sup> TSHA has conducted meetings in major cities throughout Texas in recent years, including San Antonio, Corpus Christi, Dallas, and Houston. The 122<sup>nd</sup> Annual Meeting will be held in San Marcos March 1–3, 2018.

This Society received the benefit of TSHA’s century-long scholarly traditions when former TSHA President Larry McNeill became TSCHS President in 2009 and made the Society’s History Book Project a top priority. McNeill’s strong leadership as President and then as Book Committee Chair led to the funding and publication of historian James L. Haley’s magnum opus *The Texas Supreme Court: A Narrative History, 1836–1986*.<sup>17</sup>

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<sup>12</sup> McDonald, “Texas State Historical Association,” *Handbook of Texas Online*.

<sup>13</sup> *Ibid.*

<sup>14</sup> Charles L. Martin, “Last of the Ranger Chieftains,” *The Texas Magazine* IV (January 1898): 33–41. See also Ford, *Rip Ford’s Texas*, xlvii.

<sup>15</sup> McDonald, “Texas State Historical Association,” *Handbook of Texas Online*.

<sup>16</sup> *Ibid.*

<sup>17</sup> (Austin: University of Texas Press, 2013), xxiii.

In this issue, Judge Mark Davidson, Landon Gerlich, Bill Kroger, and Stephen Pate do a fine job of carrying on Rip Ford's and TSHA's tradition of historical scholarship with their outstanding articles. This Society has held TSHA panel presentations on Texas judicial history every year since 1999. This issue's first two lead articles are based on Judge Davidson's and Bill Kroger's papers presented at the Society's session at the 2017 TSHA Annual Meeting, "Semicolons, Murder and Counterfeit Wills: Texas History through the Law's Lens." The Society will continue this tradition of scholarship next year when it presents its next panel, "Laying Down Texas Law: From Austin's Colony through the Lone Star Republic," at TSHA's 2018 Annual Meeting in San Marcos

Judge Davidson and Landon Gerlich have collaborated to publish an excellent article, "The Last Reconstruction Texas Supreme Court Was an Honorable Court," which seeks to redeem the honor, integrity, and judicial acumen of the "Semicolon Court" of Presiding Judge Wesley Ogden, Associate Judge Moses B. Walker, and Associate Judge J. D. McAdoo.

Davidson and Gerlich show that the Semicolon Court's judges were not *Gone with the Wind* carpet-baggers but men who risked their lives to fulfill the promise of the Fourteenth Amendment in the face of an armed takeover by ex-Confederates. Using logic, law, and textual analysis, they challenge the conventional wisdom that Rip Ford's friend and ally Chief Justice Oran M. Roberts shaped when he wrote that the Semicolon Court was the

only blot upon the pure, honored and exalted reputation of the Supreme Court of Texas which has marred the splendor of its history...[because in] the judicial history of no other country has there been a more lamentable, shameless prostitution of a court of justice to the interest of lawless political conspirators against constitutional government...<sup>18</sup>

In this editor's opinion, Davidson and Gerlich do a great job of proving their case.

Baker Botts partner Bill Kroger offers readers a superb paper based on his presentation at this year's TSHA Annual Meeting in Houston. In "William Marsh Rice and His Lawyers: Peter Gray, Walter Browne Botts, and Captain James Addison Baker," Kroger shares years of historical research in a rich historical essay enlivened by Baker Botts librarian Robert Downie's archival records and photos. Kroger rewards readers with the story of a dark conspiracy, an outrageous murder, an extraordinary investigation, and the origin of one of the nation's most prestigious universities. If you want to understand the history of law in Houston, read this article.

Although Cozen & O'Connor attorney Stephen Pate did not write his article to memorialize a presentation he made at the 2017 TSHA Annual Meeting, his submission satisfies the exacting scholarly standards TSHA exemplifies. In a year in which President Obama's unsuccessful U.S. Supreme Court nomination of Merrick Garland and President Trump's successful investiture of Supreme Court Justice Neil Gorsuch offer contrasting examples of the federal judicial appointment process, Pate shows how politics and personalities undermined President Franklin Delano Roosevelt's nomination of liberal Texas Governor James "Jimmie" Allred to the Fifth

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<sup>18</sup> *Ibid.*, 87.



Circuit Court of Appeals in 1943.

Photos, letters, and records paint a picture of Texas judicial politics in the 1930s and 1940s as hardball as anything that has played out in recent years. In this case, Pate's scholarly judicial history provides a useful political and legal context that enables us to better understand the controversies surrounding the appointment of a successor to U.S. Supreme Court Associate Justice Antonin Scalia.

The Davidson/Gerlich, Kroger, and Pate articles provide readers with in-depth analysis that supplements the abbreviated articles in TSHA's *Handbook of Texas Online*. Walter P. Webb and H. Bailey Carroll added *The Handbook of Texas* to TSHA's list of scholarly publications in 1952.<sup>19</sup> That work first appeared in continually updated form as *The Handbook of Texas Online* in 1997 with over 25,000 articles. In 2016 and 2017, TSHA has launched new online databases, including *The Handbook of African-American Texas*;<sup>20</sup> *The Handbook of Tejano History*;<sup>21</sup> *The Handbook of Texas Women*;<sup>22</sup> *The Handbook of Civil War Texas*;<sup>23</sup> *The Handbook of Texas Music*;<sup>24</sup> and, most recently on March 2, 2017, *The Handbook of Houston*.<sup>25</sup> TSHA publishes a calendar of dates in Texas history: *Texas Day by Day*,<sup>26</sup> that is often the source of Facebook posts and Tweets about Texas history.

TSHA has made special efforts to educate Texas students since 1939, when its President, Texas Ranger historian Walter Prescott Webb, launched the *Junior Historians of Texas* project to educate secondary school students.<sup>27</sup> This project expanded to include Texas History Day, a part of National History Day celebrations, and TSHA's Educational Services Division, which publishes the *Texas Historian*, a forum for student writers; provides educational materials and programs for teachers of Texas history; and administers the Walter Prescott Webb Historical Society for college-level students of Texas history, which publishes the undergraduate journal *Touchstone*.<sup>28</sup>

David Beck's Fellows column describes how our Society is taking Larry McNeill's tradition of scholarship in new directions. The Fellows' expansion of the Taming Texas judicial civics and court history project through coauthors Jim Haley and Marilyn Duncan's third book, *The Chief Justices of Texas*, continues a program that has benefitted from and contributed to TSHA Executive Director Brian Bollinger's leadership and Adult Education Director Charles Nugent's stewardship of educational programs that benefit students and teachers throughout Texas. Marilyn Duncan, Warren Harris, and I have all been grateful to TSHA for inviting the Society to make presentations at TSHA regional education conferences in Austin, Richardson, Dallas, and Houston during the past several years.

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<sup>19</sup> *Ibid.*

<sup>20</sup> <https://tshaonline.org/handbook/african-americans>.

<sup>21</sup> <https://tshaonline.org/handbook/tejano>.

<sup>22</sup> <https://www.tshaonline.org/texaswomen/>.

<sup>23</sup> [https://tshaonline.org/handbook/civil-war#Table\\_of\\_Contents](https://tshaonline.org/handbook/civil-war#Table_of_Contents).

<sup>24</sup> <https://tshaonline.org/handbook/texas-music>.

<sup>25</sup> <https://tshaonline.org/handbook/houston>.

<sup>26</sup> <https://texasdaybyday.com/>.

<sup>27</sup> H. Bailey Carroll, ed., *The Junior Historian Movement in Texas: A Guidebook and a History* (Austin: Texas State Historical Association, 1961); *Texas Historian*, May 1989.

<sup>28</sup> TSHA, *Junior Historians of Texas*, <https://tshaonline.org/handbook/online/articles/vtj01>.

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Our Society benefits from TSHA's sponsorship of educational  
conferences for Texas teachers and school district administrators.

TSHA's commitment to teach Texas students continues to increase. In 2008, TSHA acquired from the *Dallas Morning News* the right to publish the *Texas Almanac*, a massive tome dating back to 1857.<sup>29</sup> TSHA publishes the *Texas Almanac* biennially to provide the public with a reliable guide

<sup>29</sup> McDonald, "Texas State Historical Association," *Handbook of Texas Online*.

to the history, government, politics, counties, economics, natural resources, holidays, culture, education, recreation, and arts of the Lone Star State. During the last year, TSHA has expanded those topics to include Texas cuisine, wine, and winemaking.<sup>30</sup>

In addition, this issue of the *Journal* offers a review of a great new book about the Blanco River, a calendar of upcoming Society and other historical events, and my own feature about fine programs and events around the state that interest history lovers. These include educational programs at the Alamo, a Bayou Bend Museum of Fine Arts conference about German contributions to Texas culture, and Fourteenth Court of Appeals Justice Ken Wise's presentations about the earliest Republic of Texas judges.

Rip Ford, the quintessential Texas Ranger Captain, would be pleased and proud to learn how succeeding generations of TSHA officers, directors, and contributors have realized his dream, first expressed in 1856, that a contemporary historian would "take up his pen and record things known by living participants that future historians would not know about."<sup>31</sup> I'm betting Old Rip would fire up the bedside candle to read the fine articles Judge Mark Davidson, Landon Gerlich, Bill Kroger, and Stephen Pate have contributed to this issue saluting TSHA's outstanding record of historical scholarship.

<sup>30</sup> [https://www.tshaonline.org/home/?gclid=CjwKEAjw1PPJBRDq9dGHivbXmhcSJAATZd\\_BOZmplR17PTqG11-rYDZvGuUqPrhv0iGw1Y81DFqBUhoCsM7w\\_wcB](https://www.tshaonline.org/home/?gclid=CjwKEAjw1PPJBRDq9dGHivbXmhcSJAATZd_BOZmplR17PTqG11-rYDZvGuUqPrhv0iGw1Y81DFqBUhoCsM7w_wcB).

<sup>31</sup> Ford, *Texas State Times* (September 20, 1856); Ford, *Rip Ford's Texas*, xlvii.

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**DAVID A. FURLOW** is a First Amendment lawyer, a historian, an archaeologist, and a journalist.

Wildflowers in the Devil's Backbone.  
Photo by David A. Furlow.

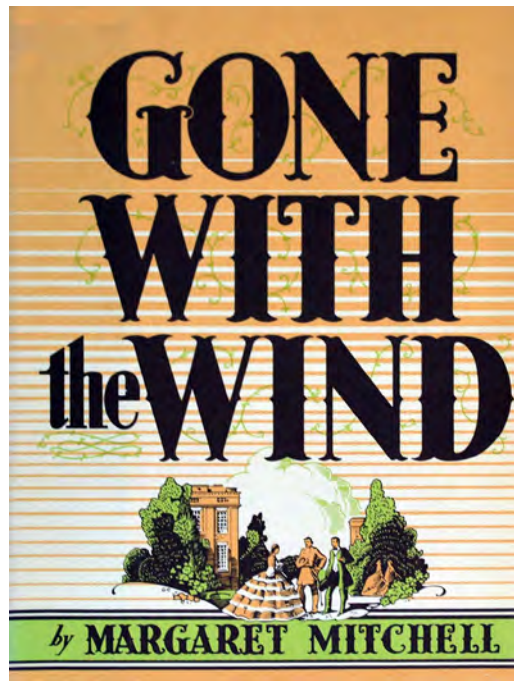


# The Last Reconstruction Texas Supreme Court Was an Honorable Court\*

By Judge Mark Davidson and Landon Gerlich

The first century of our nation's history saw three separate, but related, periods of discord that continue to have negative effects on us as a people. First, the institution of slavery, and the acquiescence to that institution by the framers of the U.S. Constitution, scarred and divided the nation from its infancy. Second, the violence of the late 1850s and the Civil War was the bloody effect of the recognition of slavery. And third, the so-called Reconstruction period was an exacerbation of the wounds of the war. The bitterness Southerners felt about the Reconstruction period led to a century and a half of regional divisiveness in our country that continues today and shows no sign of abatement.

***Gone with the Wind Reconstruction.*** Sadly, the historical lessons most of us received on Reconstruction have been subject to both regional bias and fictional distortion. The dominant images most of us have today about this era came to us through the creations of two talented individuals who were not, and did not purport to be, historians—Margaret Mitchell and David O. Selznick.<sup>1</sup>



Left: Margaret Mitchell.  
Right: *Gone with the Wind*,  
first edition cover.

\* This article is based on a presentation at the Society's joint session at the 2017 Annual Meeting of the Texas State Historical Association in Houston in March 2017. Footnote references were added by the *TSCHS Journal* editors.

<sup>1</sup> See generally Margaret Mitchell, *Gone with the Wind* (New York: McMillan Publishers, 1936); Judy Cameron and Paul J. Christman, *The Art of Gone with the Wind: The Making of a Legend* (New York: Prentice Hall, 1989); Aljean Harmetz, *On the Road to Tara: The Making of Gone with the Wind* (New York: Harry N. Abrams, 1996); Alan David Vertrees, *Selznick's Vision: Gone with the Wind and Hollywood Filmmaking* (Austin: University of Texas Press, 1997).

Left: Film poster from the 1967 re-release of *Gone with the Wind*. Right: *GWTW* producer David O. Selznick.<sup>2</sup>



The picture Margaret Mitchell and David O. Selznick painted of the poor Southerners who just wanted to get back to their prewar existence was, in my opinion, a distortion of the truth, for the most part.

Remember the “Yankee Carpetbaggers” who offered forty acres and a mule for the votes of the freed slaves?

Remember when Scarlett was forced into a loveless marriage to save Tara from the scalawags who raised the taxes on the plantation “sky high”?

While there were Southerners who were gracious during the war to their neighbors who chose to stay loyal to the Union and some who were not opposed to treating the freemen (and freed women) as fellow and equal citizens after the war, it is self-apparent that those people were in the extreme minority. The true picture was much darker and less forgiving.

But I digress from the topic—the Reconstruction Supreme Court of Texas. One way in which the scars from Reconstruction have affected Texas jurisprudence is that the cases decided by the Supreme Court of Texas and the Justices that served the Court in that era have been unfairly denigrated. There were three different forms of Reconstruction, and each had a separate and very different Supreme Court.<sup>3</sup>

<sup>2</sup> *Gone with the Wind* 1967 re-release poster, public domain (published without copyright restriction). Wikimedia Commons, [https://upload.wikimedia.org/wikipedia/en/b/b3/Gone\\_With\\_The\\_Wind\\_1967\\_re-release.jpg](https://upload.wikimedia.org/wikipedia/en/b/b3/Gone_With_The_Wind_1967_re-release.jpg), [http://www.impawards.com/1939/gone\\_with\\_the\\_wind\\_ver1.html](http://www.impawards.com/1939/gone_with_the_wind_ver1.html), originally published by Metro-Goldwyn-Mayer.

<sup>3</sup> See generally James R. Norvell, “The Reconstruction Courts of Texas, 1867–1873,” *Southwestern Historical*

**Presidential Reconstruction: 1866–67.** The short-lived “Presidential Reconstruction” Texas Supreme Court largely consisted of ex-Confederates elected in 1866 when only land-owning citizens, which largely meant white male citizens, were allowed to vote. President Andrew Johnson decreed that the vanquished Southerners be given full voting rights. They exercised those rights by giving most public offices to the Secessionists that had led them out of the union and that governed them during the war.<sup>4</sup>

The Constitution of 1866 created a five-member Supreme Court elected by the voters. Of the five justices elected, three had served in the Confederate Army and two had been judges during the Confederacy. Sitting in the aftermath of the Civil War, they had difficult decisions to make during a difficult time

One representative case was *Tippett v. Mize*, 30 Tex. 361 (1867). Mize sold a slave to Tippett in 1863. Tippett signed a note and deed of trust, using the slave as collateral. The slave escaped on May 1, 1865, six weeks before the “Juneteenth” emancipation. Tippett sued Mize on the note, since the collateral was both not findable and no longer eligible to be collateral. The Court disallowed the debt, finding that the changed legal position of the collateral prevented the debtor from paying the debt. This case, and others, reflected the prewar beliefs that the slaves were property, whose owners could dispose of them as property, subject to such common law defenses as failure of the consideration in defense to the enforcement of a note.

Presidential Reconstruction was not to last. The anti-Southern wing of the national Republican Party concluded that progress toward Reconstruction could not be made when their former enemies were running the state and local governments and that freed slaves were being kept in a *de facto* if not *de jure* slavery.

**Congressional or Military Reconstruction: 1867–70.** To remedy the problem, Congress passed laws, adopted over President Johnson’s veto, to create a governmental structure in which the Southerners had no voice, called “Congressional Reconstruction” by some and “Military Reconstruction” by others.<sup>5</sup> General Philip Sheridan was given the power to appoint all public officials and to remove any official he found to be “an impediment to reconstruction.”<sup>6</sup> This included removing all five members of the Supreme Court and appointing three new judges to take their place.

The Military Court was not elected by the people nor authorized by the Texas Constitution. As a result, its opinions have historically not been accorded any precedential value. The Court faced a number of issues arising out of the fall of the Confederacy and the devaluation of its currency (and much of the “collateral” that secured debts). Although their ideological inclinations

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*Quarterly* 62 (1958); George E. Shelley, “The Semicolon Court of Texas,” *Southwestern Historical Quarterly* 48 (1945); Hans Baade, “Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption” (1866–1882),” 40 *St. Mary’s L.J.* 17 (2008); Carl H. Moneyhon, “Reconstruction,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mzr01>.

<sup>4</sup> See James L. Haley, *The Texas Supreme Court: A Narrative History 1836–1986* (Austin: University of Texas Press, 2013), 75–76.

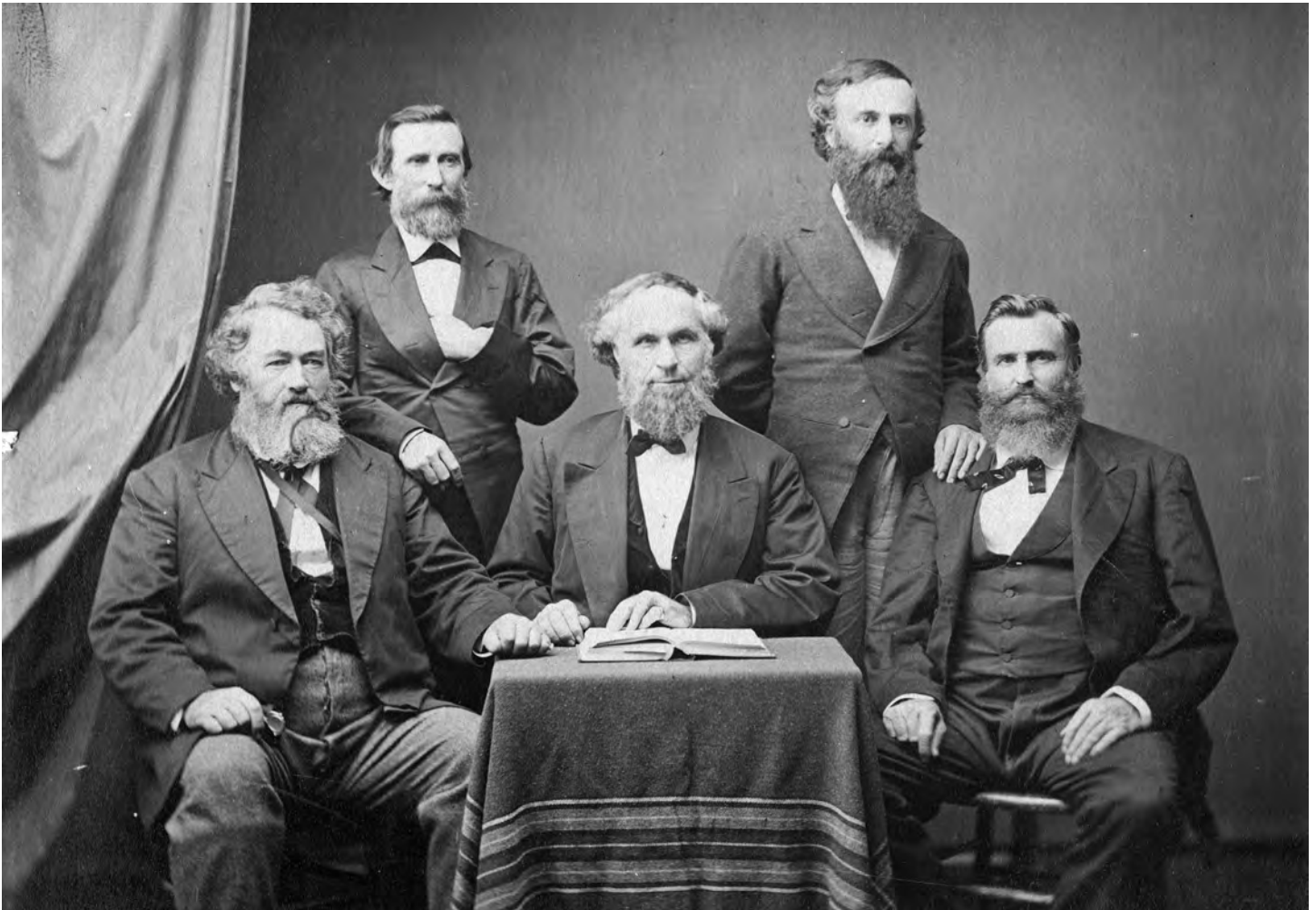
<sup>5</sup> *Ibid.* at 78–87.

<sup>6</sup> See Joseph G. Dawson III, “Sheridan, Philip Henry,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fsh26>.

might not have been to follow their predecessor court, they largely did so, probably out of a belief that their obligation as judges required them to do so.<sup>7</sup>

**Reconstruction and the Constitution of 1869.** Congressional Reconstruction expired on April 19, 1870, and the people of Texas were given authority over their government again. The Constitution of 1869, adopted by a convention dominated by Republicans and freed slaves (Confederate sympathizers could not vote), created a three-member Supreme Court appointed by the Governor for nine-year terms.

Governor E. J. Davis appointed the justices (called judges in the new Constitution), and the Texas Senate confirmed them, in accordance with the Constitution. This Court, for reasons that will be recounted below, has been referred to as the Semicolon Court, not a term used with either affection or respect. I will spend the rest of this article arguing that the Court properly decided cases on a well-reasoned basis and decided important issues wisely, including the much-derided "semicolon case," *Ex parte Rodriguez*, 39 Tex. 704 (1874).



Left to right, front row: The three members of the Semicolon Court: Associate Judge Moses B. Walker, Presiding Judge Wesley Ogden, and Associate Judge J. D. McAdoo.  
Back row: Court Reporter E. M. Wheelock and Clerk of the Court W. P. DeNormandie.  
Image courtesy of the Texas Supreme Court Archives.

<sup>7</sup> See Haley, *Texas Supreme Court*, 81.

The Justices of the “Semicolon Court” are legitimized by the case law that they produced and the way they produced it. Although Texas jurisprudence and history accord the Court’s work as a marginal footnote in the annals of Texas history, the substance of the Semicolon Court’s opinions has been validated by the Texas judiciary throughout the past century. Civil, criminal, and constitutional law the Semicolon Court provided are still good law.

As it pertains to criminal law, the most prominent remnant of the Court today is found in *Long v. State*, 36 Tex. 6 (1872). In *Long*, the Court held that, in Judge Lemuel Evans’ opinion, “every circumstance constituting a statutory offense which would affect the degree of punishment, must be alleged in the indictment.”<sup>8</sup> It is imperative to note that, at the time, indictments were the *only* pleadings of the State.<sup>9</sup> Thus, the majority in the 1997 *Brooks v. State* decision distinguished the case from *Long*, and held that a prior conviction used as a sentence enhancement could be pled apart from the indictment.<sup>10</sup> Although the strict rule set out in *Long* no longer exists, the legal analysis used in the case remains steadfast.

In *Long*, the reasoning underlying the rule is most aptly stated in Judge Moses Walker’s concurrence; that strict accordance with the rules and principles of law may only be effected by giving the defendant timely notice of the material facts to be used against him.<sup>11</sup> Otherwise, “the prisoner is not put upon his guard, and he is forced to submit without the power of resistance.”<sup>12</sup> Over a century later the Texas Supreme Court in *Brooks* reaffirmed, without questioning, the notion that “an accused is entitled to notice that the State intends to use his prior convictions for the purpose of enhancing punishment.”<sup>13</sup>

The Semicolon Court is not unaccomplished in the realm of civil law, either. The most notable case for contemporary purposes is *Lloyd v. Brinck*, 35 Tex. 1 (1872). Judge Wesley Ogden provided the opinion of the Court, which held that “when (a jury verdict) is responsive to the issues presented by the pleadings, the law, and the evidence, and when it is in due form, it is believed that court has no discretion in the matter.”<sup>14</sup> A court cannot set aside a jury verdict without valid reason, nor without stating said reason. The administrative nature of entering a jury verdict underpins today’s judiciary as well as the Fifth Amendment right to a jury trial. Deference must be given.

The Semicolon Court, not unlike the high courts of the twentieth- and twenty-first centuries, was sometimes forced to navigate “at sea without chart or compass.”<sup>15</sup> The controversy in *Fleming v. Davis*, 37 Tex. 173 (1873), was brought by the riparian owners of land through which Simpson’s Creek (a tributary to the San Saba River about 90 miles northwest of Austin) was born and flowed.<sup>16</sup> When J.W. Fleming purchased the parcel on which the headspring was located,

<sup>8</sup> *Long v. State*, 36 Tex. 6, 8 (1872).

<sup>9</sup> *Brooks v. State*, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997).

<sup>10</sup> *Ibid.* at 34.

<sup>11</sup> 36 Tex. 6, 13 (1872).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Brooks* at 34.

<sup>14</sup> *Lloyd v. Brinck*, 35 Tex. 1, 4 (1872).

<sup>15</sup> *Fleming v. Davis*, 37 Tex. 173, 200 (1873).

<sup>16</sup> *Ibid.* at 192.



he claimed “the exclusive right to the use of the headspring for irrigation purposes.”<sup>17</sup> Davis, a lower riparian landowner, was awarded \$75 in damages at trial but Fleming was awarded the right to three sevenths of the flow of water coming from the headspring.<sup>18</sup> It was previously unsettled in Texas whether Fleming enjoyed a relative or exclusive right to headspring waters for irrigation purposes.

Judge Walker penned the opinion of the Court, which consisted of an extensive analysis of common law and legal history.<sup>19</sup> The common law stated that the law requires *de minimis*, that a riparian landowner “should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream.”<sup>20</sup> The Court recognized the difficulties that lay within the application of this doctrine.<sup>21</sup> Most notably, whether an upper proprietor could *reasonably* consume the entirety of a flowing stream or river.<sup>22</sup> The California legislature had already answered this question in the affirmative, even if the waters are used for mining or irrigation purposes.<sup>23</sup>

Nevertheless, the Court quoted at length an opinion from the Supreme Court of Illinois which answered this question in the affirmative, on the sole condition that the proprietor of the headspring use the water for “natural” purposes (*i.e.*, drinking water for family and livestock), but not for the purposes of irrigation.<sup>24</sup> However, if the upper proprietor is not entitled to the entirety of the stream when water use is unrelated to sustenance, then what is a proper apportionment? That Court held that the amount of water to which the proprietor is justly entitled should be decided by the trier of fact on a case by case basis.<sup>25</sup> Presented with conflicting persuasive authority and an absence of Texas precedent, the Semicolon Court truly was “at sea without chart or compass.”<sup>26</sup>

In a show of judicial restraint, the Semicolon Court dutifully applied the foregoing common law principles through the national historical context in which they arose. The Court recognized that other states, as well as England, were environmentally and culturally juxtaposed to Texas.<sup>27</sup> Furthermore, the early American judiciary “never dreamed of a law of primogeniture.”<sup>28</sup> The Court seemed poised to stray from English common law and develop new law for the young state of Texas. Yet the Court held, “were we to attempt judicial legislation on this subject, we should find ourselves much more at fault than we are now.”<sup>29</sup> The Court ultimately held that

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at 174.

<sup>19</sup> *Ibid.* at 195.

<sup>20</sup> *Ibid.* at 196.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 197 (emphasis added).

<sup>23</sup> *Ibid.* at 187.

<sup>24</sup> *Ibid.* at 198 (citing *Evans v. Merriweather*, 4 Ill. (3 Scam.) 492, 495–97 (1842)).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 200.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

Fleming did not have an exclusive right to the headspring waters and adopted the maxim "*sic utere tuo ut alienum non lædas*" (roughly, "so use your own as not to injure another's property") as the rule of the case.<sup>30</sup> Additionally, the Court reversed the division of the waters at trial.<sup>31</sup> Rather than usurp the role of the legislature, the Court gave deference to longstanding legal principles and centuries-old notions of justice.

Notwithstanding *Ex parte Rodriguez*, the most notable case of Texas constitutional concern on the Court's docket was *Honey v. Graham*, 39 Tex. 1 (1873). In December of 1869, George W. Honey was elected from the Republican ballot to a four-year term as State Treasurer.<sup>32</sup> In early 1872, Honey said that he would be leaving the state for six weeks, and one month thereafter, Governor Davis declared the position of State Treasurer vacated.<sup>33</sup> In his place Dr. Beriah Graham was promoted, if you will, by appointment of Governor Davis from superintendent of the state mental asylum to State Treasurer.<sup>34</sup>

In *Honey v. Graham*, the Semicolon Court had to decide whether Governor Davis had legally declared the position of State Treasurer vacant on May 27, 1872.<sup>35</sup> The Court answered this question by citing the Texas Constitution.<sup>36</sup> "No citizen of this state shall be deprived of life, liberty, property or privileges, outlawed, exiled, or in a manner disfranchised except by due course of the law in the land."<sup>37</sup> The Semicolon Court held that the right to hold office is both property and privilege and thus an individual could not be stripped of that right without due process of law.<sup>38</sup>

Next, the Court vigorously defended the separation of powers, and stated that although the governor is permitted to assume an office vacant, the Constitution delegates the authority to "adjudge an office forfeited" to the judiciary.<sup>39</sup> Simply put, "judgement belongs to the judiciary."<sup>40</sup> Finally, Honey's lack of intent to abandon office provided the formal crescendo of the Court's constitutionally charged opinion. The Court held that there can be no abandonment of office without intent to abandon.<sup>41</sup> The act of abandonment implies volition, and volition was not proven by the facts of the case.<sup>42</sup> Thus, Constitutional moorings aside, the Court held that Honey was entitled to the office of State Treasurer.<sup>43</sup>

Now let's talk about the case that gave the Court its nickname. Here are some historical

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<sup>30</sup> *Ibid.* at 201.

<sup>31</sup> *Ibid.* at 202.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* at 2.

<sup>35</sup> *Ibid.* at 10.

<sup>36</sup> *Ibid.* at 11.

<sup>37</sup> TEX. CONST. art. 1 §17.

<sup>38</sup> *Graham*. 39 Tex. at 11.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* (citing *State v. Pritchard*, 36 N.J.L. 101 (1873)).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at 16.

facts. Governor Davis was not reelected in the December 2, 1873 General Election. He got his political clock cleaned by Richard Coke, who managed to get a mere 71 percent of the vote against the incumbent Governor: 85,549 to 42,663.<sup>44</sup> This was predictable, since Congress had given the ex-Confederates the right to vote in all elections that took place after 1872. Most of the Republican incumbents in legislative, judicial, and other local offices around the state joined in Davis's electoral fate.<sup>45</sup>

One of the defeated officials was Harris County Sherriff A. B. Hall. On December 13th, Hall arrested Joseph Rodriguez (also known as José Rodriguez) on a charge of having voted twice in the election.<sup>46</sup> On December 16th, a writ of habeas corpus was filed seeking Rodriguez's release from jail on the grounds that the 1873 election was void. Then all hell broke loose.

The legal basis of the petition had its origin in a bill that the Republican legislature had passed in 1873.<sup>47</sup> Prior to that time, there could only be one polling place in each county. To prevent the economy of towns outside the county seat from having to shut down on election days, elections took place over a four-day period.<sup>48</sup> The 1873 session passed a bill, which Davis signed, allowing for polling places outside of the county seat of each county, and mandating that the 1873 election would take place in one day. This was not totally unreasonable, since the justification for having a four-day polling period was the inaccessibility of the polls for many farmers. The question raised in the petition was whether the statute ran afoul of Section 6, Article 3 of the Texas Constitution which said:

All elections for state, district and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o'clock A. M. until 4 o'clock P. M. of each day.

Rodriguez's lawyers argued that since the election had taken place over only one day, rather than four, the election was neither legal nor valid, and he could not be charged with the offense of illegal voting. They claimed that the change in the statute would have been all right if it had only allowed polling places to be created outside the county seat, but the semicolon that separated the word "law" from the word "and" removed from the Legislature the ability to shorten the voting period, or the times of the opening and closing of the polls.

The Democrats smelled a rat. They quickly concluded that the charges were trumped up to enable Hall, Davis, and the other Republicans to stay in office by setting aside all election results. They started by presenting the Court with an affidavit signed by George Goldwaithe, a prominent (Democratic) lawyer from Houston, who averred that he had been told by Geronimo Perez that Rodriguez had been employed by Sheriff Hall, and was being paid one hundred dollars a month.

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<sup>44</sup> See Haley, *Texas Supreme Court*, 84 and 271n43.

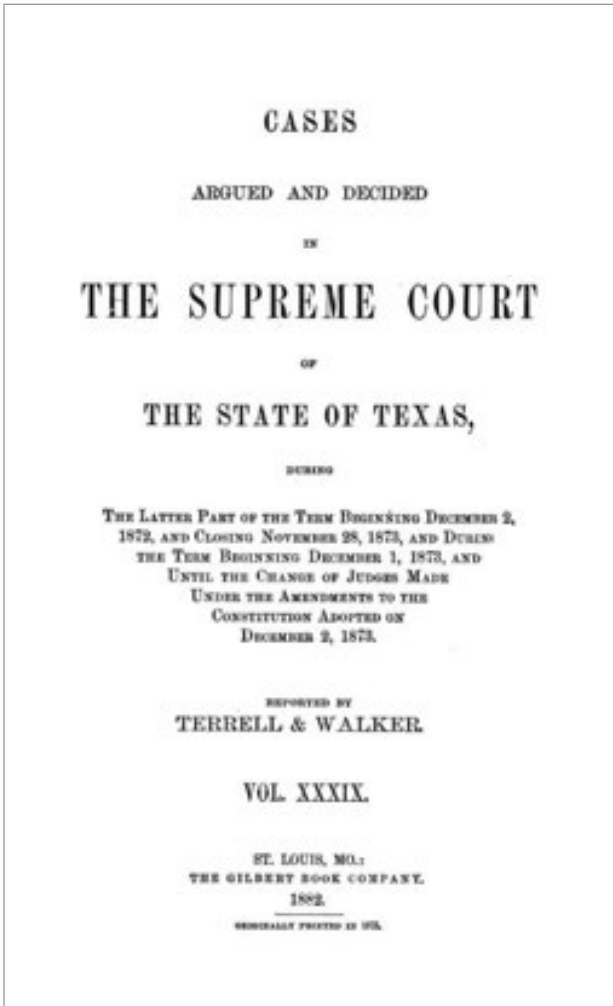
<sup>45</sup> See generally Randolph B. Campbell, *Gone to Texas: A History of the Lone Star State* (New York: Oxford University Press, 2003), 284–85. See also Carl H. Moneyhon, "Ex Parte Rodriguez," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/jre01>.

<sup>46</sup> *Ex parte Rodriguez*, 39 Tex. 705 (1874), available online at <https://case-law.vlex.com/vid/39-tex-705-tex-630484726>; see also Haley, *Texas Supreme Court*, 84.

<sup>47</sup> Act of March 31, 1873, 13th Leg., R.S., § 31, 1873 Tex. Gen. Laws 29.

<sup>48</sup> *Ibid.*; Haley, *Texas Supreme Court*, 84 and 271n44.

The newly elected Democratic District Attorney of Harris County, Frank Spenser, told the Court that he had no intention of prosecuting Rodriguez, inasmuch as there was no evidence that he had voted once, let alone twice. Of course this statement was double hearsay being offered for the truth of the matter asserted, and would not have been admissible in any court in the land. But it fueled Democratic suspicions.



Left: Alexander Watkins Terrell and Alexander Stuart Walker, *Cases Argued and Decided in the Supreme Court of the State of Texas.... etc.*, Volume 39, 1882, which reports the cases of the Semicolon Court. Image from the University of North Texas Libraries, *Portal to Texas History*. Right: General and later Governor Edmund J. Davis in his Union uniform. Photo courtesy of the Texas State Library and Archives.

The District Attorney quickly filed a motion to dismiss the application for the writ, and told the Court that the Harris County Grand Jury had declined to, and would continue to decline to, indict Rodriguez. The District Attorney, whose job would ordinarily consist of trying to prove that an offense took place, presented affidavits by four people that Rodriguez had not voted in the election. The attorneys representing Rodriguez, whose job would ordinarily be to prove him innocent of those charges, responded with affidavits from three people—Charles Wilson, John Limas, and William House—attesting that they had seen Rodriguez vote twice. The Court made a note of reporting that Wilson was “of African descent” and that House was from Austin, and was testifying based on his having been in Houston on Election Day after voting in Austin.

Bear in mind that this was before Southwest Airlines flew or Highway 71 opened. It is clear that his name or signature was not on the list of voters, since the Clerk of the Supreme Court, W. P. DeNormandie, was deputized to examine the poll list, and he reported to the Court that Rodriguez's signature appeared not at all.

The arguments before the Supreme Court of Texas all but ignored poor Rodriguez, who was sitting in jail (if he was, in fact, getting paid \$100 a day for sitting in jail, he was getting paid more money than President Grant). *Ad hominem* attacks were the order of the day. Arguing for the State, former District Judge Alexander W. Terrell asserted that:

Three times have the people of Texas since the surrender attempted to establish civil government. Once they were remanded by the federal power to a condition of territorial vassalage; once, if we may believe the eloquent adversary, they were defrauded of their choice by a military commander; and now he himself leads the van in the third assault, and attempts, by the more insidious approaches of judicial construction, to stifle again the popular voice and substitute a reign of anarchy.<sup>49</sup>

Representing Rodriguez, former Governor (and former Supreme Court Justice) A. J. Hamilton responded by attacking the Democrats' patriotism:

I do not take my lessons in patriotism from gentlemen who, in 1861, were members of a mere mob, styling itself a state convention, which was called by about forty persons, and which gloried in overthrowing the state government and tearing down the United States flag. I never fought against the flag of my country. Neither did I learn those lessons in a foreign land, in Mexico, under a carpet-bag emperor, who was afterwards shot for interfering with the constitutional rights and liberties of a free people.<sup>50</sup>

The next day, the Court, in an opinion by Judge J. D. McAdoo, issued an opinion that ignored the claim that this was a trumped-up political dispute, except to note that Rodriguez was without any doubt in jail. The Court reviewed the many precedents, starting with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and many other state precedents, and ruled that the Texas Supreme Court had the ability to declare an act of the Legislature unconstitutional, and that the statute allowing for a one-day election was contrary to the requirement of the Constitution, and ordered Rodriguez released.

Rodriguez was released, and is lost to history. The opinion was denigrated from the moment it was issued. The Democratic candidates that had been elected ignored the opinion, since they were not parties to the case, and were sworn in. For a week, the Democrats, and especially Richard Coke, their candidate for office, assumed the title of governor and ruled from the first floor of the Capitol. Governor Davis declined to leave office, and ruled from the second floor of the Capitol. The standoff continued until President Grant declined to send in any federal

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<sup>49</sup> See Haley, *Texas Supreme Court*, 85 and 271 n.49 (citing *Ex parte Rodriguez*, 39 Tex. at 742).

<sup>50</sup> See *Ibid.* at 85 and 271 n.50 (citing *Ex parte Rodriguez*, 39 Tex. at 746).



The Semicolon Court's *Ex parte Rodriguez* case ended in an armed stand-off in the Old Stone Capitol. Image courtesy of the Austin History Center.

troops to remove the Democrats from the first floor.<sup>51</sup> In all probability, the supply of whiskey ran out on the second floor as well. Davis vacated the premises, and the new Democratic legislators, calling themselves the Redeemers of Texas, swore themselves in.

The scars of the opinion, even though it was ignored, continued and continue to this day. The Court that issued the opinion has been denigrated as the Semicolon Court ever since. Two Supreme Court justices, Justice Oran Roberts in 1878 and Judge James Norvell in 1959, wrote that by tradition, cases from the Semicolon Court should not be cited to the Court, since they are given no precedential value. Even a man as erudite and scholarly as Chief Justice John Hill wrote in 1980 that "The justices were not necessarily unfair or incompetent, just unwanted." To this day, the portraits of the justices that served the people of Texas during the Reconstruction era have not been allowed to be placed in the halls of either the Texas Capitol or the Texas Supreme Court.

It is beyond the scope of this talk to discuss whether Reconstruction was a period that was justified by the efforts of the ex-Confederates to restore their antebellum life. My argument is that the *Rodriguez* case was properly decided, given the location of that pesky semicolon,

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<sup>51</sup> See Curtis Bishop, "Coke-Davis Controversy," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mqc01>.



"The Celebrated Semi-Colon Court,"  
 Presiding Judge Ogden and Associate Judges  
 McAdoo and Walker, 1873–74. Image courtesy  
 of the Texas Supreme Court Archives.

and that the Court that issued it should not be castigated throughout all time as one without honor or ability.

In a larger sense, it is apparent that it is past time for the scars of the Civil War AND of Reconstruction to be allowed to heal. The hate crimes that continue to this day as a result of those scars should stop. As Americans and as Texans, we should be one people undivided by a war that ended 153 years ago. If we do that, I swear, with God as my witness, none of us will ever be hungry again.

The Semicolon Court was not without its flaws. But perhaps this is by nature, for neither is the rule of law. The Court stated in *Fleming* that although the rules of law may not be mathematically exact, they are morally exact.<sup>52</sup> The Court by its own admission recognized "the difficulties in arriving at the moral exactitude attainable," but found solace in the "long and well-settled principles" of the judiciary.<sup>53</sup> At its core, the Semicolon Court was composed of great legal scholars, vehement defenders of the Texas Constitution, and men worthy of respect in the legal community, even if their most famous decision is only a footnote in the annals of Texas history.

<sup>52</sup> 37 Tex. 173, 200 (1874).

<sup>53</sup> *Ibid.*



**JUDGE MARK DAVIDSON** serves as the Multi-District Litigation Judge for all asbestos cases in the State of Texas, named to that position by then-Chief Justice Wallace Jefferson and the Multi-District Litigation Panel of the Texas Supreme Court. He previously served for twenty years as Judge of the Eleventh District Court in Harris County.



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Photo by Bess Garrison

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# William Marsh Rice and His Lawyers:

Peter Gray, Walter Browne Botts, and Captain James Addison Baker\*

By Bill Kroger

**W**illiam Marsh Rice was one of the leading figures of nineteenth-century Texas. Unlike many of his historical peers, he did not earn his reputation by battle, cattle trading, or political office. Rather, he was a merchant, banker, and businessman who was instrumental in laying the commercial and educational building blocks that helped make the City of Houston into one of the leading and most dynamic cities in the United States. The estate he left behind was at least as influential, and was used to endow Rice University.

Yet William Marsh Rice lived outside of Texas after 1865. Because of his diverse financial interests and out-of-state residency, Rice depended on the best lawyers in the new city to protect his interests. His main lawyers were Peter W. Gray, Walter Browne Botts, and Captain James A. Baker, and they all worked for the same law firm: Gray & Botts, later Gray, Botts & Baker, and ultimately Baker Botts. Captain Baker himself recollected, “My firm, and its predecessors, had been the counsel of Mr. Rice ever since about 1840.”<sup>1</sup> This must be the longest attorney-client relationship in the history of Texas—more than 175 years later, Baker Botts continues to represent and support Rice University, including a donation of \$1 million in 2015 to the university’s Baker Institute.

## I. William Marsh Rice

William Marsh Rice was born in Massachusetts in 1816, working as a country store clerk until he bought out his employer while in his mid-twenties.<sup>2</sup> Around 1839, he brought his grocery and dry goods business to Texas, living in Houston until 1865, the end of the Civil War.<sup>3</sup> Following the Confederacy’s defeat, with his goods business decimated by wartime economic hardship, Rice moved to New York but continued to manage many investments in Texas.<sup>4</sup> He owned many businesses, including several of the first Texas railroads, huge real estate holdings, and the Rice Hotel.<sup>5</sup>

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\* This article is a revised version of a paper presented by the author at the Texas Supreme Court Historical Society’s joint session at the 2017 Annual Meeting of the Texas State Historical Association in Houston, Texas.

<sup>1</sup> Captain James A. Baker, “The Patrick Case,” 5 in Capt. James A. Baker correspondence, clippings, and photographs MS 487, Rice University Fondren Library, Woodson Research Center (Series II: Newsclippings, scrapbooks, and published materials, 1920–1941, not dated., Item 14).

<sup>2</sup> Andrew Forest Muir, “Rice, William Marsh,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fri03>. See also J. H. Freeman, *The People of Baker Botts* (Houston: Baker Botts, 1992), 189.

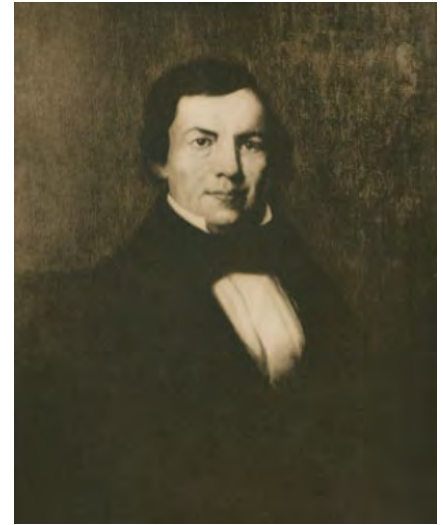
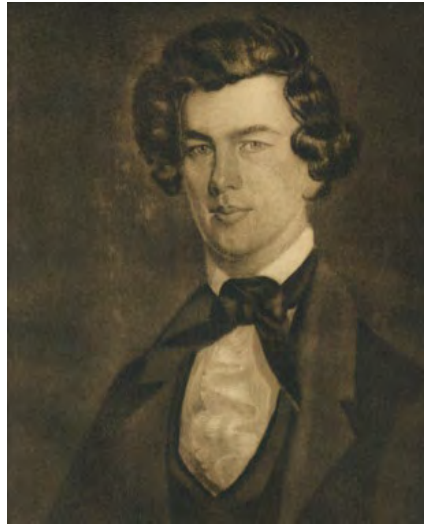
<sup>3</sup> Freeman, *People of Baker Botts*, 190.

<sup>4</sup> Muir, “Rice, William Marsh,” *Handbook of Texas Online*.

<sup>5</sup> *Ibid.*



Rice was represented by different lawyers during different periods of his life. Peter Gray represented Rice starting in the late 1840s and first ending shortly before Gray became a judge in the early 1850s. Gray's later partner, Walter Browne Botts, took over the Rice representation in the 1850s. After the Civil War ended in 1865, Gray and Botts formed their firm and continued to represent Rice thereafter. Different members of the firm worked on Rice's interests until Captain James A. Baker began handling his business in the 1890s.



William Marsh Rice as a young man and as a middle-aged man. Images courtesy of Robert Downie, Archivist of the Baker Botts Archive.

Captain Baker's work on behalf of Rice extended beyond Rice's death in 1900. In a case that garnered extensive media attention, Rice was murdered by his valet, who was found to have conspired with a lawyer from New York to forge a false will. Captain Baker was an active participant in the events that led to the convictions of the valet and lawyer and the restoration of Rice's true will. As a result of this case, Rice's vast fortune continued funding the William Marsh Rice Institute for the Advancement of Literature, Science and Art, which Rice had originally endowed in 1891.

## II. William Fairfax and Millie Gray

The lawyers who came to represent Rice could trace their happy fate to a remarkable married couple: William Fairfax and Millie Gray.

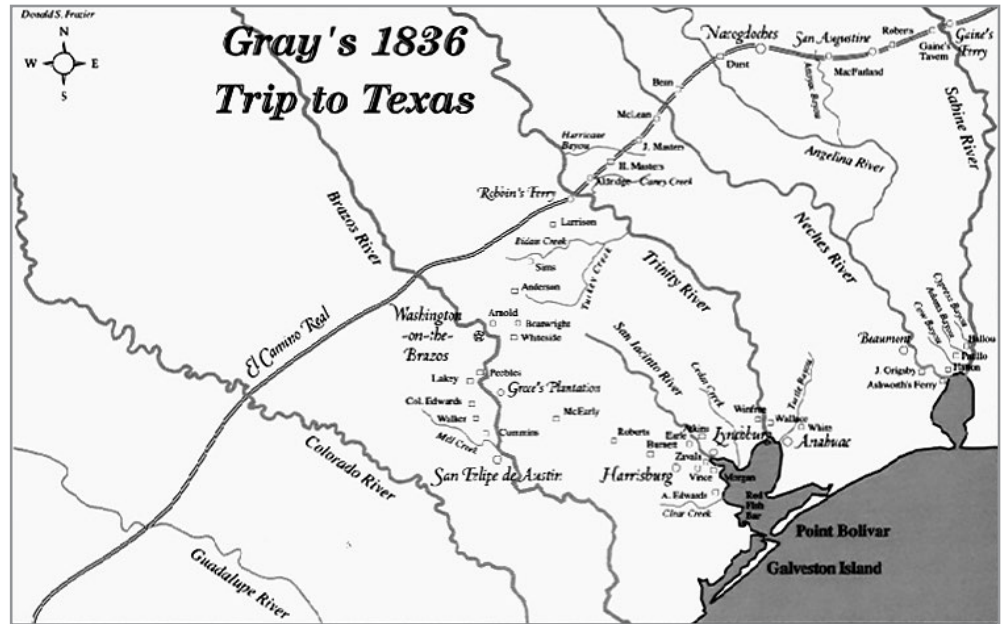
William Fairfax Gray, the father of Peter Gray, was born in Fairfax County, Virginia, in 1787. William attended school in Alexandria before settling in Fredericksburg, where he developed strong connections within Virginia society and tried his hand at a number of careers before settling on the law in his late forties.

In his twenties, he began procuring books and newspapers for his customers, who included Thomas Jefferson and James Madison. As a soldier, he was awarded the commission of captain just prior to the War of 1812 by Governor James Monroe, who later served as President of the United States.<sup>6</sup>

William worked in various occupations, including postmaster, newspaper publisher, book publisher,<sup>7</sup> and bookseller. In 1824, President Monroe invited the last living American Revolution general and hero of the republican movement in Europe, the Marquis de Lafayette, to return to

<sup>6</sup> "James Monroe," White House website, <https://www.whitehouse.gov/1600/presidents/jamesmonroe>.

<sup>7</sup> In early Texas, book publishers were also known as bookbinders. See Texas Court Records Preservation Task Force, *Report on the Preservation of Historical Texas State Court Records* (August 31, 2011), <https://www.scribd.com/document/63660766/Historic-Documents-Report>.



Left: William Fairfax Gray. Image courtesy of the Baker Botts Archive.  
 Right: William Fairfax Gray's 1836 Trip to Texas.<sup>11</sup>

America.<sup>8</sup> William hosted Lafayette during his visit to Fredericksburg.

In 1829, Andrew Jackson was elected President and issued an end to indefinite tenures for bestowed government offices. In 1834, William lost his appointment as postmaster and was forced to liquidate his bookstore inventory. To help support her family, Millie turned her genteel avocations to income-generating enterprises, teaching music and taking in sewing.<sup>9</sup>

That same year, William began attending lectures on the law and received his license to practice in May of 1835. He took Thomas Green,<sup>10</sup> and Green's partner from Washington D.C., Albert T. Burnley, as his first clients. Tasked with helping them secure a loan to acquire land in the Republic of Texas, William left for New Orleans and ultimately Texas in October 1835. He arrived in Texas just as the Republic of Texas was in revolt from Mexico, and recorded many key events in his diary, including the fall of the Alamo as recounted to him from survivors who had made their way to San Felipe—including William B. Travis's slave, Joe. He counted Sam Houston, Stephen F. Austin, and Lorenzo Zavala among his friends and was considered one of the City of Houston's early leaders.

Thanks to his warm relationship with Sam Houston, William served in a number of official capacities. In 1837 he became clerk of the Republic of Texas House of Representatives and Supreme Court; in 1838 he was named secretary of the Republic's Senate; and in 1840 he was

<sup>8</sup> William Jones, "Rekindling the Spark of Liberty: Lafayette's Visit to the United States, 1824-1825," *The Schiller Institute* (November 2007), <http://www.schillerinstitute.org/educ/hist/lafayette.html>.

<sup>9</sup> William Fairfax Gray (ed. Paul Lack), *The Diary of William Fairfax Gray From Virginia to Texas 1835-1837* (Dallas: Southern Methodist University, 1997), Introduction, xv-xvi, available online at [https://sites.smu.edu/swcenter/fairfaxgray/wg\\_cont.htm](https://sites.smu.edu/swcenter/fairfaxgray/wg_cont.htm).

<sup>10</sup> *Ibid.*

<sup>11</sup> Donald S. Frazier, *Diary of William Fairfax Gray*, Southern Methodist University Southwest Education Center, [https://sites.smu.edu/swcenter/fairfaxgray/wg\\_002.htm](https://sites.smu.edu/swcenter/fairfaxgray/wg_002.htm).

appointed district attorney of Houston and surrounding areas. The following year, he died of pneumonia.

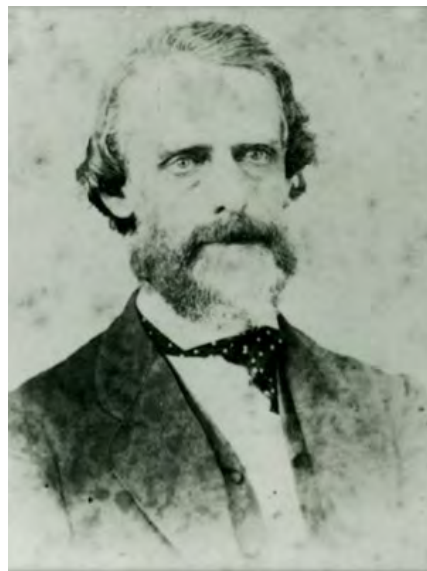
Three years earlier, in 1838, Millie had become one of the first women to move to the City of Houston, when she, her children, and her niece followed William to the bayou outpost. Her published diary captures her daily life in Fredericksburg as well as the new city of Houston, where she played a prominent civic role alongside her husband. Millie died of dysentery in 1851, ten years after her husband.

Millie's family ties were instrumental in the founding of Baker Botts and in developing the relationship with the early firm's biggest client, William Marsh Rice. In 1828,<sup>12</sup> one of her four sisters, Mary Scandrett Stone, married Fredericksburg lawyer Thomas Botts.<sup>13</sup> Their son, Walter Browne Botts, later formed the firm of Gray & Botts with his cousin Peter Gray. Millie's niece, Margaret Clayton Stone, married Ebenezer Nichols, the business partner of William Marsh Rice. The fact that Peter Gray, Walter Botts, and Margaret Clayton Stone were cousins must have been a factor in Rice's initial decision to hire Gray & Botts to represent his early business interests.



Millie Gray. Image courtesy of Baker Botts Archive.

### III. Peter W. Gray



Peter Gray as a young man and as an older man. Images courtesy of the Baker Botts Archive.

Peter W. Gray was born in Fredericksburg, Virginia, in 1819 and moved to Houston with his family in 1838.<sup>14</sup> There, he served as a captain in the Republic of Texas Army before joining his father's law practice in 1840. For the next thirty-five years, he was one of the leading lawyers of Texas.

In 1840, a local judge, John Scott, joined Peter and William Gray's law practice in Houston, Texas. When his father died in 1841, Peter was appointed District Attorney of Harris County by Sam

<sup>12</sup> Arden Gremmert and Eva Doherty, *The Family History and Genealogy of Arden Gremmert and Eva Doherty* (website), <http://www.gremmert.com/getperson.php?personID=126585&tree=ardeneva>.

<sup>13</sup> Millie Gray, *The diary of Millie Gray, 1832-1840: recording her family life before, during and after Col. Wm. F. Gray's journey to Texas in 1835; and the Small journal, giving particulars of all that occurred [sic] during the family's voyage to Texas in 1838*. See also University of Virginia Library *Guide to the Millie Richards Stone Gray Diary 1822-1829* (Charlottesville: University of Virginia Library, 2009), <http://ead.lib.virginia.edu/vivaxtf/view?docId=uva-sc/viu00027.xml>.

<sup>14</sup> Thomas W. Cutrer, "Gray, Peter W.," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fgr25>.

Houston, and served in that capacity until Texas was admitted to the United States in 1845.

Peter Gray represented Harris County in the House of Representatives in the First Legislature, and in that capacity was the primary author of the Texas Practice Act, the first rules of civil procedure in Texas. He later also served in the Texas Senate.

In 1846, using these new procedural rules, Gray represented a free woman of color, Emeline, who was wrongfully enslaved by a white landowner, Jesse Bolls. Gray personally posted the money for her bond, allowing her to go free while the case was pending. He won the case, before an all-white jury, using the discovery techniques (like depositions on written questions) that were provided for in the Practice Act.

In 1840 (according to Captain James A. Baker<sup>15</sup>), Gray began representing Ebenezer Nichols, the husband of his cousin, and Nichols's business partner, William Marsh Rice. Baker Botts has a copy of a deposition notice from the late 1840s on a case in which Gray represented Rice in Harris County. The Harris County Historical Court Records Room also contains a petition that Gray filed on behalf of Rice and Nichols in 1852 to collect on an unpaid debt.<sup>16</sup>

Gray was elected District Judge for Harris County and surrounding counties in 1854, and served until the outbreak of the Civil War, when he was elected to the House of the Confederate Congress. Chief Justice Oran Roberts, who served on the Texas Supreme Court both before and after the Civil War and later became Governor of Texas, said, "I regard Judge Gray upon the whole, the very best District Judge that ever sat on the district bench of Texas."<sup>17</sup>

Immediately after the Civil War, Gray formed a partnership with Walter Browne Botts, his cousin. The first advertisement for the Firm of Gray & Botts was published in October 20, 1865, an original copy of which is in the firm's archives. Judge James A. Baker joined the firm in 1872, which resulted in the firm's changing its name to Gray, Botts & Baker.

Peter Gray was appointed to the Supreme Court of Texas in 1874, causing him to withdraw from the firm, whereby it became known as Baker & Botts. Unfortunately, Peter Gray died of tuberculosis soon after his appointment.<sup>18</sup>

#### **IV. Walter Browne Botts**

Walter Browne Botts was born in 1835 in Fredericksburg, Virginia. As discussed, he was the son of Millie Gray's sister, Mary Scandrett Stone, and Fredericksburg lawyer Thomas Botts, making Walter a first cousin to fellow firm founder Peter Gray.

Botts came from a prominent family of lawyers. His grandfather, Benjamin G. Botts,

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<sup>15</sup> Captain James A. Baker, "The Patrick Case," 5.

<sup>16</sup> See Case 2380, styled *Rice & Nichols v. F. W. Robertson*, 7th Judicial District Court (1852).

<sup>17</sup> See Hugh Rice Kelly, "Peter Gray," *The Houston Lawyer* (January 1976), 29-35, 31, quoted in Laura Gibson, "The Difference One Man Can Make," *Texas Supreme Court Historical Society Journal* (Summer 2015): 25-34, 26.

<sup>18</sup> Cutrer, "Gray, Peter W.," *Handbook of Texas Online*.

successfully defended Aaron Burr in his 1807 trial for treason.<sup>19</sup> Botts's brother, Lawson, was appointed by the court to defend abolitionist John Brown for treason in his raid on a federal arsenal in Harpers Ferry, Virginia.<sup>20</sup>

Botts attended the Virginia Military Institute, where he studied under Thomas Jonathan "Stonewall" Jackson. After reading the law in Charleston, West Virginia,<sup>21</sup> Botts followed his cousins to Houston in 1857, where he began practicing law and represented Rice while Gray served as the Judge of the 7th Judicial District.<sup>22</sup>

During the Civil War, Botts was named a captain of Company A, Fifth Texas Infantry, before being promoted to major.<sup>23</sup> He was severely wounded at the Battle of Seven Pines in Virginia, one of the most violent battles of the Civil War. There were more than 11,000 casualties on both sides. His injury earned him a promotion to lieutenant colonel on June 1, 1862.



Walter Browne Botts. Photo courtesy of Baker Botts Archive.

Botts returned from the war to start a law practice with Peter in 1865, joining the firm that would come to be known as Baker Botts. He remained with the firm until his death in 1894.<sup>24</sup>

#### **IV. Captain James A. Baker**

It is hard to imagine an attorney more consequential to the development of the City of Houston than Captain James A. Baker. He continues to inspire generations of Houston lawyers, and left behind a legacy as lasting as any in Texas.<sup>25</sup>

The Baker family story begins in Alabama. Judge James Addison Baker, the father of Captain Baker, was born in 1821 outside Huntsville, Alabama, and moved to Huntsville, Texas, in

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<sup>19</sup> Charles F. Hobson, "The Aaron Burr Treason Trial," *Federal Trials and Great Debates in United States History Project* (Washington, D.C.: Federal Judicial Center, Federal Judicial History Office, 2006), <https://www.fjc.gov/sites/default/files/trials/burrtrial.pdf>.

<sup>20</sup> Fergus M. Bordewich, "John Brown's Day of Reckoning: The Abolitionist's Bloody Raid on a Federal Arsenal at Harpers Ferry 150 Years Ago Set the Stage for the Civil War," *Smithsonian Magazine* (October 2009), <http://www.smithsonianmag.com/history/john-browns-day-of-reckoning-139165084/>.

<sup>21</sup> Freeman, *People of Baker Botts*, 15.

<sup>22</sup> Captain James A. Baker, "The Patrick Case," 5.

<sup>23</sup> Stephanie Piefer Niemeyer, "Botts, Walter Browne," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fbobc>.

<sup>24</sup> Freeman, *People of Baker Botts*, 8.

<sup>25</sup> His definitive biography is Kate Sayen Kirkland's *Captain James A. Baker of Houston, 1857-1941* (College Station: Texas A&M University Press, 2012). Her book is a joy to read, and is one of the best biographies on the practice of law in Texas. It should be in the library of every lawyer in Houston. This article relies on her excellent book, along with materials from the Baker Botts Archives and two earlier histories written about the firm.

1852 after nearly a decade of work as a practicing lawyer.<sup>26</sup> In 1854, as a trustee of Austin College, Judge Baker began successful efforts to form Texas's first law school there.

Judge Baker was elected to the Texas Legislature in 1861 and as a district judge in 1862.<sup>27</sup> A decade later, he joined the Houston firm of founding partners Peter Gray and Walter Browne Botts. Judge Baker came to the firm with extensive railroad law expertise, an attribute that proved advantageous as a boom in railroad construction saw Texas railroad length reach 2,440 miles by the end of the 1870s.<sup>28</sup> He remained with the firm until his death in 1897.<sup>29</sup>

Judge Baker and his wife Rowena Baker, née Crawford, had five children. The oldest, also named James Addison Baker, was born in 1857 in Huntsville, Texas. He attended the Texas Military Institute in Austin in 1877 and, for many years, he served as "Captain" of the Houston Light Guard. Since then, he has been known as "Captain Baker."



Captain James A. Baker.  
Photo courtesy of Baker Botts  
Archive (cropped).

Captain Baker began practicing law with Baker Botts in 1879 and became a partner in 1887. He represented many of the early railroads and utilities in Houston, and was known in his early days as a skilled lawyer. Captain Baker is best remembered today as one of the founders of Rice University.<sup>30</sup> By the 1890s, William Marsh Rice was one of the wealthiest men in Texas. Baker had represented Rice for many years before agreeing, in 1891, to serve as trustee for a new educational institution that Rice planned to endow upon his death. Rice's plan, however, was interrupted in 1900 when Rice suddenly died in New York City.

## V. The Rice Murder and Will Litigation

Captain Baker is best known today for his work in connection with the murder of William Marsh Rice. He later gave a speech to his partners at Baker Botts regarding this phase of his life, which actually began in 1895, with the death of Rice's second wife, Julia Elizabeth Baldwin Brown Rice.



Elizabeth Baldwin Rice, second wife  
of William Marsh Rice.<sup>31</sup>

<sup>26</sup> J. H. Freeman, "Baker, James Addison, Sr. [1821–97]," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fbacs>.

<sup>27</sup> *Ibid.*

<sup>28</sup> George C. Werner, "Railroads," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/eqr01>.

<sup>29</sup> Freeman, *People of Baker Botts*, 19.

<sup>30</sup> John B. Boles, "Rice University," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/kbr05>.

<sup>31</sup> [http://timeline.centennial.rice.edu/entry/390/index.html@ONLY\\_AT\\_RICE=0.html](http://timeline.centennial.rice.edu/entry/390/index.html@ONLY_AT_RICE=0.html).

According to Baker, Rice had intended to leave the bulk of his fortune to an educational institution as far back as 1872.<sup>32</sup> In 1891, he decided that the school should be located in Houston, since that was where he had made much of his fortune. That year, he created a charter that would have seven trustees, one of whom was Captain Baker.

In 1896, Mrs. Rice died. A lawyer named Mr. O. T. Holt filed her will for probate. According to Baker, Rice was shocked by his wife's will, and "immediately wrote us to prepare his will and outlined in great detail how he wanted it prepared," which the firm promptly did. He also told Captain Baker to contest his wife's will.

Mrs. Rice had thought that she had a half interest in Rice's estate, and made a great many bequests, aggregating \$1,250,000 and stating that the bequests should be doubled if justified by the estate. Baker described her as "very, very liberal"—many people, churches, and charitable institutions were to receive money under that will. Mrs. Rice's will was challenged on the grounds that most of Rice's property was separately owned by him, as his first wife had died intestate and thus Rice was the owner of separate property when he married Mrs. Rice. One of the lawyers that Mr. Holt hired in connection with his efforts to defend the will was Mr. A. T. Patrick, a New York lawyer.

On September 24, 1900, Baker received a wire from Charles F. Jones, Rice's valet, stating that Mr. Rice had died.<sup>33</sup> A few hours later, Rice's bankers sent Baker a wire, stating that Rice had died "under very suspicious circumstances." Baker instructed the bankers to contact authorities and prevent the cremation and preserve the status quo.

Shortly after Rice had died, Patrick had presented to the bankers a check from Rice for \$250,000 payable to Patrick. When asked about it, Patrick claimed that he had been named a "residuary legatee" of Rice's estate. Rice's body was removed to the morgue and an autopsy conducted.

Baker was suspicious—why would Patrick be a legatee of Rice's will when "Patrick was acting as counsel for Mr. Holt, [there was] litigation which involved one-half of Mr. Rice's estate, and there was naturally a great deal of antagonism between Mr. Rice and Mr. Patrick?" Furthermore, he knew that Rice and Patrick had never met.

Baker hurried to New York, and when he showed up at Rice's apartment, he was surprised to be greeted by Jones, who was Rice's valet, *and* Patrick. Patrick had a story—that he and Rice had made a secret agreement to settle the litigation over Mrs. Rice's will for \$250,000, which was the reason for the check. Patrick's story continued—he also had been secretly hired by Rice to draft a new will for Mr. Rice. Patrick: "You would be surprised to know that I have prepared his will wouldn't you?" and I said 'I certainly would.'" The will left money to Jones, Patrick, and others, not to the Rice Institute.

The police investigated the disputed checks, and concluded that the signatures had

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<sup>32</sup> Captain James A. Baker, "The Patrick Case."

<sup>33</sup> Muir, "Rice, William Marsh," *Handbook of Texas Online*.



The *New York Herald* (1835-1924) covered the story of William Marsh Rice's death. The *New York Herald's* stories and illustrations are now in the public domain.



been traced. Patrick was arrested. The autopsy of Rice's stomach showed "considerable mercury in the stomach" and his lungs were inflamed.<sup>34</sup> Jones and Patrick were then arrested for murder.

Jones was subsequently visited by Captain Baker and the District Attorney, and gave a couple of sworn but false statements about what had happened. A final interview between Jones and Baker yielded the truth—Patrick and Jones had conspired to create the fraudulent will. Jones had tried to get one of the signatories of the original 1896 will—a man named Weatherby—to also sign the fraudulent will. Weatherby refused, and later corroborated Jones's story. Patrick and Jones then fabricated additional correspondence between Rice and Patrick to support the second will story.



Captain James A. Baker's testimony featured prominently in the *New York Herald's* coverage of the Rice murder trial.

Jones also confessed that, although Rice was ill, Jones and Patrick also agreed that if Rice did not die soon, they would kill him with chloroform. Jones testified that he then bought four ounces of chloroform and two ounces of laudanum, and had them delivered to him in New York. Authorities were able to independently confirm those deliveries to Jones. Jones subsequently killed Rice. Patrick was convicted. He stayed in prison for ten years, but was later pardoned.<sup>35</sup> Jones had turned state's evidence, and was released from prison after the trial. The Rice murder trial was covered nationwide by newspapers, and put Captain Baker and the firm on the national map for the first time.

<sup>34</sup> Kirkland, *Captain James A. Baker*, 105.

<sup>35</sup> *Ibid.*, 125–26.



## VI. Captain Baker in the twentieth century

In the aftermath of the Rice will litigation, Captain Baker became the first chairman of the Rice University Board of Trustees and served in that capacity until his death in 1941. The Rice University centennial website summarizes Captain Baker's critical role in creating Rice University:

Captain James A. Baker and his fellow trustees spend nearly 10 years working through the complex legal issues that result from the murder and probate cases, educating themselves about the best way to organize the William Marsh Rice Institute and selecting a president.<sup>36</sup>

Rice Institute eventually became Rice University.



Left: University's Woodson Archive contains this contemporaneous color painting of a prospective Rice University residential hall. Photo by David A. Furlow.  
Right: Postcard, Rice University Mechanical Laboratory, 1912.<sup>37</sup>

Captain Baker was a man of enormous energy, with considerable interests and passions beyond Rice University. He organized the Commercial National Bank in Houston and oversaw its merger with South Texas National Bank, forming one of the largest banks in Texas, where he served for many years (1914–26) as Chairman of the Board.<sup>38</sup> As one of Houston's leading bankers, he was instrumental in preventing the collapse of Houston banks after the Wall Street Crash of 1929.

He also was a director and later president of the Houston Gas Light Company and founder and first president of the Guardian Trust Company, the largest trust company in Houston during his time. In addition, he organized several other prominent companies, including the Galveston, Houston, and Henderson Railway, and the Southwestern Drug Company.

Captain Baker was an influential leader in the Houston community. He helped start the Houston Business League, the Houston Club, and the Houston Country Club. He wrote the charter for the DePelchin Faith Home Association. He was also involved in creating or reforming

<sup>36</sup> "1900s," *Rice Centennial* website, Rice University, <http://timeline.centennial.rice.edu/decade/1900/index.html>. See also Boles, "Rice University," *Handbook of Texas Online*.

<sup>37</sup> Hand-colored postcard: Rice University: <http://hdl.handle.net/1911/93886>.

<sup>38</sup> Kirkland, *Captain James A. Baker*, 191–94.

the Museum of Fine Arts, Glenwood Cemetery, the YMCA, and Memorial Park, as well as the expansion of the Houston Ship Channel.

A leader of the Houston legal community, Captain Baker was a president of the Houston Bar Association, one of the organizers of the Texas Bar Association in 1882, and vice president of the American Bar Association. He was an original founder of the Harris County Law Library, which, in 1915, made legal resources available to its members and, later, the public. This simple measure was a major advance that improved the quality of legal representation in Houston at the time and continues to benefit Houstonians today.



Captain James Addison Baker.  
Image courtesy of Baker Botts  
Archive.

Baker also left behind a lasting legacy by helping shape Baker Botts into one of the leading law firms of the twentieth century. He had an eye for talent, and hired many of the firm's next generation of leading lawyers. J. H. Freeman, who worked beside him at the firm during his later years, said Captain Baker's "genius for selecting people built this great law firm."<sup>39</sup> He was instrumental in authoring the first written firm partnership agreements that allowed the firm to grow by adding new partners. Every Baker Botts partner today can trace his or her ownership interest back to the shares held by Captain Baker. He also led the moves toward specialized practice groups, centralized management, and a managing partner, and emphasized ethical practices within the firm, often during meetings at his home called "The Oaks."

Captain Baker died in 1940, at the age of eighty-three. He left behind a remarkable family legacy that outlived him. His son, James A. Baker, Jr., was a World War I hero. He served along the Western Front in France during World War I, becoming a captain in the 90th Infantry Division. There, during nightly patrols across enemy lines, he earned a reputation as an officer "who never failed to bring back a prisoner."<sup>40</sup> During 1918, his unit was positioned at the front near Verdun and was under fire from August 20 until November 4—seventy-five days with no relief. Baker, Jr. was the only officer in his unit who was unharmed.<sup>41</sup> After the war was over, Baker, Jr. joined the firm in 1919 and became a partner in 1927. He had mainly an office practice. He died in 1973 at the age of eighty, and was remembered for his kindness and generosity.

Baker, Jr.'s son, and Captain Baker's grandson, James A. Baker III, had a long career in public service. He served as President Ronald Reagan's White House Chief of Staff and then Secretary of the Treasury. After Reagan's two terms, Baker managed George H.W. Bush's successful presidential campaign and served as his Secretary of State from 1989 to 1992 and as White House chief of staff in 1992. He joined Baker Botts as a partner in 1993.

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<sup>39</sup> Freeman, *People of Baker Botts*, v.

<sup>40</sup> George Wythe, *History of the 90th Division* (Washington, D.C.: 90th Division Association, 1920), 66 (available online through Google Books, <https://archive.org/details/ahistorythdivis00assogooq>).

<sup>41</sup> Kirkland, *Captain James A. Baker*, 261.



The William Marsh Rice portrait in the Rice University Quadrangle. Photo courtesy of Baker Botts Archive.

Secretary Baker was strongly influenced by the legacy of his grandfather. The title of one of his books came from a famous saying of Captain Baker's, "work hard, study, and stay out of politics." And there was the impact of a final letter that Captain Baker wrote shortly before he died. In June 1941, Captain Baker wrote to his eleven-year-old grandson Jimmy, who was attending summer camp, imparting advice to the future Secretary of State:

"You must mingle freely with your companions, learn to know all of them intimately, sufficiently so to call each by his first name, where they live .... [T]ake good care of yourself, don't eat too much, nor play too hard, but do everything within reason, necessary or desirable to improve your physical condition, and come home fully prepared to continue your studies here."<sup>42</sup>

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<sup>42</sup> *Ibid.*, 142.



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# A Perfect Storm: FDR, Pappy O'Daniel, Huey Long's Ghost, and the Failed Fifth Circuit Nomination of James V Allred

By Stephen Pate

**T**exas politics is a blood sport. Sometimes those politics bleed over into the area of federal judicial nominations. Such was the case in 1943 when James V Allred (V was a name, not an initial), one of the most respected former governors and attorney generals of Texas, who had already won Senate confirmation as a U.S. District Judge, was denied an opportunity to become a judge of the Fifth Circuit Court of Appeals. The blame for blocking the nomination of a man with a sterling reputation has traditionally been attributed to Texas's U.S. Senator W. Lee "Pappy" O'Daniel, who had recently defeated Allred in a Senate race.

But the story is not so simple. It involves alleged violations of the Hatch Act made by Senator Carl Hatch, the author of that act, allegations by Louisiana's U.S. Senators of a promise made by the U.S. Attorney General for the nomination of a Huey Long crony, and Republicans seeking to slap back at the New Deal. At the end of the day, all of these factors meant that a qualified man never served on the Fifth Circuit. Fortunately, Allred returned to his federal district court bench six years after his failed Fifth Circuit nomination.

James V "Jimmie" Allred was Governor of Texas from 1935 to 1939.<sup>1</sup> He may be a forgotten eagle today, but he is an eagle nonetheless. Allred was the protégé of one American President, Franklin D. Roosevelt, and the mentor of another, Lyndon B. Johnson.<sup>2</sup> His family came to Texas in 1837.<sup>3</sup> Born into near poverty in Bowie, Texas in 1899,<sup>4</sup> he served in World War I, obtained a law degree from the Cumberland School of Law, and began a private law practice before serving as a District Attorney in North Texas.<sup>5</sup> In 1930 he ran for Attorney General and defeated the incumbent.<sup>6</sup> In 1934 he was elected to the first of two terms as Governor of Texas.

Allred was a fervent New Dealer and firm supporter of Franklin D. Roosevelt.<sup>7</sup> In turn, FDR commended Allred highly for his cooperation in the nation's recovery from the Great Depression.<sup>8</sup> Allred's gubernatorial administration saw passage of a teacher retirement system,

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<sup>1</sup> Floyd F. Ewing, "Allred, James Burr V," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fal42>.

<sup>2</sup> *Ibid.* See also Robert Caro, *The Path to Power: The Years of Lyndon Johnson* (New York: Knopf Publishing Co., 1982), 405.

<sup>3</sup> George Manning, "Public Services of James V. Allred," Master's Thesis, Texas Tech Univ., 1950, 1.

<sup>4</sup> L. Patrick Hughes, "Private Trials of a Public Man—Jimmie Allred and the Vicissitudes of Family," *East Texas Historical Journal* 47, no. 2, art. 12 (2009): 61.

<sup>5</sup> See Ewing, "Allred," *Handbook of Texas Online*.

<sup>6</sup> *Ibid.*

<sup>7</sup> Caro, *Path to Power*, 395.

<sup>8</sup> See Ewing, "Allred," *Handbook of Texas Online*.

social security and welfare provisions, additional funding for education, and increased compensation for state officials.<sup>9</sup> Notably, he appointed Sarah T. Hughes as the first woman district court judge in Texas.<sup>10</sup>

As Governor, Allred occupied the forefront of Texas politics, where his relationship with Roosevelt was helpful to Texas. As leader of the Texas Democratic Party, Allred was also able to sponsor the career of several young Texas politicians, including Lyndon B. Johnson. In April 1937, with Allred's help, Johnson won a special election to become a U.S. Congressman.<sup>12</sup> In May 1937, FDR visited Texas on a tarpon-fishing trip, where Allred introduced Johnson to FDR.<sup>13</sup>

Allred did not seek reelection as Governor in 1938.<sup>14</sup> But this would not end his career. On a whistle-stop train tour of Texas, FDR announced from the back of the train that he was appointing Allred to a newly created U.S. District Court position for the Southern



Governor Jimmie Allred.  
Image courtesy of Texas Legislative Reference Library. Image courtesy of the Texas State Preservation Board.<sup>11</sup>

Former Governor Allred served as U.S. District Judge in the former federal courthouse now preserved as the U.S. Custom House in downtown Houston. The building ceased to serve as a courthouse in 1962. It has been on the National Register of Historic Places since 1974. Image courtesy of Wikimedia Commons.



<sup>9</sup> *Ibid.*

<sup>10</sup> Robert S. LaForte, "Hughes, Sarah Tilghman," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fhu68>.

<sup>11</sup> "James V. Allred," *Legislators and Leaders, Legislative Reference Library of Texas*, <http://www.lrl.state.tx.us/legeLeaders/governors/govPage.cfm?governorID=31>.

<sup>12</sup> See Caro, *Path to Power*, 405.

<sup>13</sup> *Ibid.*, 446.

<sup>14</sup> See Ewing, "Allred," *Handbook of Texas Online*.

District of Texas.<sup>15</sup> It did not matter to the President that Allred did not live in the Southern District. Nor did it matter that the President had not consulted either of Texas's two U.S. Senators, Tom Connally and Morris Sheppard.<sup>16</sup>

Allred was confirmed by the Senate easily and began service as a United States District Judge in February 1939.<sup>17</sup> His seat was in Houston, but he traveled all over the vast Southern District.<sup>18</sup> As noted below, he began to compile a good record as a judge. Perhaps because Allred had been primarily involved in politics, the Southern District Bar had low expectations for him as a judge. Claude Carter of Harlingen (who would become State Bar President) stated that “[h]e sure fooled us when he got on that bench. He made a hell of a good judge...; he worked hard and diligently and tried hard and fairly to understand the cases and he made a wonderful judge....We knew he would make a pretty good judge. We didn't expect him to make tops.”<sup>19</sup>



FDR shakes hands with young LBJ, with Governor Allred of Texas in between in Galveston, Texas on May 12, 1937. Image courtesy of Wikimedia Commons.

When Allred left the governor's office, W. Lee "Pappy" O'Daniel took over. In contrast to Allred's reputation as a public servant, O'Daniel's record is regarded today as a black mark. Indeed, historian Robert Caro refers to O'Daniel's "ignorance of government"<sup>20</sup> and devotes many pages to O'Daniel's antics in his books on Lyndon Johnson.<sup>21</sup> Born in Ohio and raised in Kansas, O'Daniel was an early-day media star because of his regular noontime radio show that advertised his own Hillbilly Flour Company and featured musicians such as Bob Wills.<sup>22</sup> At the beginning of the show, a female voice would say, "Please pass the biscuits, Pappy."<sup>23</sup> This was the origin of his nickname.

O'Daniel ran for Governor as a populist, promising to fight a sales tax and to raise pensions. The other 1938 candidates believed him to be a joke. They did not recognize the

<sup>15</sup> *Ibid.*

<sup>16</sup> Patricia Tidwell, "James V. Allred of Texas: A Judicial Biography," Master's Thesis, Rice University, 1991.

<sup>17</sup> "James V. Allred," *Biographical Directory of Federal Judges*, <https://www.fjc.gov/history/judges/allred-james-v>.

<sup>18</sup> Tidwell, "James V. Allred", 40.

<sup>19</sup> Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 78th Congress, First Session, on the Nomination of Judge James V. Allred for Judgeship of the Fifth Circuit, March 1943, 58.

<sup>20</sup> Caro, *Path to Power*, 702.

<sup>21</sup> *Ibid.*, 695–703.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, 697. In fairness to O'Daniel, he did write *Beautiful Texas*, a wonderful song. There are many versions available on YouTube, including one by Willie Nelson.



Pappy O'Daniel's popularity rested on his showmanship, including his song *Beautiful Texas*. Image available online through the Texas State Library and Archives.

power of his radio show and failed to note the immense crowds that attended his campaign rallies where he gave folksy speeches with little substance, while accompanied by his children, including his attractive daughter Molly.<sup>24</sup> He won the Democratic Party primary without a runoff. At that time in Texas, this was tantamount to election.<sup>25</sup>

O'Daniel did have a special magic as a campaigner, even to these Texans who did not listen to him on the radio. The author's father remembers as a nine-year-old riding with his Uncle into Buffalo, Texas from the family farm in Leon County on the Sunday after the 1938 primary election. The farm did not have electricity, and would not have it until Roosevelt's Rural Electrification Administration Program reached it in 1944. Thus, there was a need to drive six miles "to town" to the Buffalo gas station, which did have electricity, to get news. There, they found a group of rural Texans listening to the election results, happy to find Pappy elected.

O'Daniel was ineffective as Governor and was accused of abandoning his campaign promises. Many believed he was a tool of business interests.<sup>26</sup> He could not pass his

pension plan and attempted to pass a sales tax.<sup>27</sup> Believing the press was unfair to him, he started his own newspaper, *The W. Lee O'Daniel News*.<sup>28</sup> He also believed that there was a communist conspiracy afoot in Texas, though he lacked any proof. Despite these problems, he was reelected Governor in 1940.<sup>29</sup>

In April 1941, Texas's U.S. Senator Morris Sheppard died. O'Daniel wanted the seat. In May 1941 he announced his candidacy. As it developed, his main opponent in the Democratic primary was young Congressman Lyndon Johnson. O'Daniel had made it clear that he was an isolationist and anti-New Deal. FDR gave Johnson, his young protégé, all the help that he could. This infuriated O'Daniel. After a nasty campaign, O'Daniel was declared the winner. The results of the election are disputed to this day. Biographer Robert Caro firmly believes that O'Daniel

<sup>24</sup> Caro, *Path to Power*, 702.

<sup>25</sup> *Ibid.*

<sup>26</sup> "W. Lee O'Daniel Former Senator and Governor of Texas is Dead," *New York Times* (May 12, 1969), 57.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Caro, *Path to Power*, 703.

stole the election from Johnson.<sup>30</sup> O'Daniel remains the only man to defeat LBJ in an election.

It had been a special election for the unexpired portion of the late Senator Sheppard's term. That term would soon expire, so in only one year O'Daniel would have to run another reelection campaign. At first it was believed that Johnson would run again.<sup>31</sup> Yet Pearl Harbor intervened and Johnson went on active service.<sup>32</sup> Without Johnson in the race, Allred, though a sitting judge, decided to run.<sup>33</sup> On May 13, 1942, Roosevelt accepted James Allred's resignation as a U.S. District Court Judge<sup>34</sup> and Allred filed in the Democratic Primary to run against O'Daniel.<sup>35</sup>

Why did Allred give up the certainty of a lifetime appointment to throw his hat in the ring against an incumbent U.S. Senator? His own father had told him about "a bird in the hand being worth two in the bush."<sup>36</sup> Unquestionably Allred was an ambitious man.<sup>37</sup> But this ambition was tempered by Allred's belief that Pappy O'Daniel was not fit to hold office. After his defeat in the Senate race, Allred wrote a letter to his father on April 2, 1943 in which he explained that,

I frankly felt and still feel that this man is a definite threat to decent government; in fact to the proper prosecution of the war and to the peace we hope will follow...he has mortified our state almost beyond endurance. I couldn't imagine men like Houston or Hogg sitting on an easy chair allowing a man of that type to misrepresent the Lone Star State. That's why I ran.<sup>38</sup>

Allred referred to Sam Houston and Governor Jim Hogg, the popular, late nineteenth century reformer known as "the People's Governor" of Texas.<sup>39</sup>

Yet even before he left the bench, allegations were already circulating that would return to haunt Allred. On May 12, 1942, the *Dallas News* reported:

Former Governor James V. Allred who leaves the Federal Bench Friday to campaign for the United States Senate has been assured he will again be appointed to a Federal District Judgeship if he fails to win the Senate place. . .<sup>40</sup>

By May 18th, only six days after Roosevelt accepted his resignation, Allred was denying rumors that he had been promised a future federal judgeship if he lost the Senate election.<sup>41</sup> Another *Dallas News* article stated the issue plainly:

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<sup>30</sup> *Ibid.*, 736–40.

<sup>31</sup> Robert A. Caro, *Means of Ascent: The Years of Lyndon Johnson* (New York: Knopf Publishing Co., 1991), 208.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Franklin D. Roosevelt, correspondence with Allred, May 13, 1942, Allred Papers, University of Houston.

<sup>35</sup> "Allred Hits the Campaign Trail in West Texas," *Kerrville Times* (June 11, 1942), 2.

<sup>36</sup> Letter, James Allred to his father, April 2, 1943, Box 19 (67-001), Allred Papers, University of Houston.

<sup>37</sup> Tidwell, "James V. Allred," 89.

<sup>38</sup> Letter, Allred to his father, April 2, 1943, Box 19 (67-001), Allred Papers, University of Houston.

<sup>39</sup> Robert Cotner, *James Stephen Hogg: A Biography* (Austin: University of Texas Press, 1959), vii.

<sup>40</sup> Hearings, 104.

<sup>41</sup> *Ibid.*, 112.





The Fifth Circuit Court of Appeals' U.S. Courthouse and Post Office was picture postcard pretty. Goddesses of commerce, industry, agriculture, and education crowned the building. Photo from the *Louisiana Bar Journal*, April/May 2002. Images provided to David A. Furlow by Fifth Circuit Librarian Amy Hale-Janeke.

It has been understood since Allred resigned that there was a mutual understanding that the President would take care of the former judge in case his race for the Senate was unsuccessful.<sup>42</sup>

There were three main candidates in the 1942 Democratic Party's senatorial primary: another ex-Governor, Dan Moody, Allred, and O'Daniel.<sup>43</sup> Moody was eliminated during the first round of voting, leaving Allred and O'Daniel to face off in a runoff.

Allred ran on a program of support for the war and for FDR's administration. O'Daniel claimed that Allred was simply an FDR "yes man" and had been promised a federal judgeship should he lose the Senate race.<sup>44</sup> O'Daniel also said that Allred entered into the race because communists and labor leaders paid him to quit his job and run, promising him more money if he was successful.<sup>45</sup> O'Daniel claimed that Allred's candidacy was part of a communist conspiracy.<sup>46</sup>

During the campaign the allegations by O'Daniel that Allred had been promised another federal judgeship if he was defeated caused President Roosevelt to swiftly appoint another man, Allen Hannay, to Allred's vacant position. The Senate swiftly confirmed Hannay, a well-respected attorney, before the primary vote.<sup>47</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> J. B. Krueger, "O'Daniel Hurls New Accusations as Allred Promises to Back FDR," *Pampa Daily News* (August 12, 1942), 3.

<sup>45</sup> *Dallas News* (July 18, 1942), quoted in Tidwell, "James V. Allred," 85.

<sup>46</sup> *Ibid.*

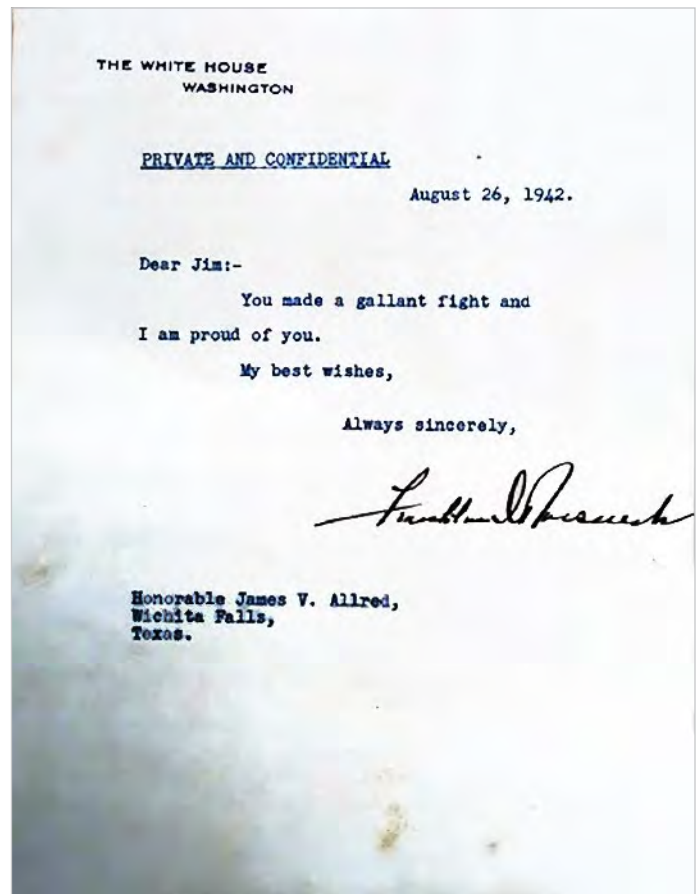
<sup>47</sup> Hannay was confirmed on August 12, 1942. "Hannay, Allen Burroughs," *Biographical Directory of Federal Judges*, <https://www.fjc.gov/history/judges/hannay-allen-burroughs>.

The Roosevelt administration's support for Allred loomed large during the campaign. Officially, the Roosevelt administration was neutral. Late in the campaign, Allred's friends supposedly appealed to Roosevelt for actual open support and were angered when this did not occur.<sup>48</sup> Despite the lack of active support, there is no question who Franklin Roosevelt preferred. A letter labeled "Private and Confidential," dated August 26, 1942, from Roosevelt to Allred, still survives in the Allred Papers. This letter was written three days after the election loss. Roosevelt wrote, "Dear Jim. You made a gallant fight and I am proud of you."<sup>49</sup>

Allred ran an uphill race that was ultimately unsuccessful. He believed that he would have won if he had had two more weeks to campaign.<sup>50</sup> At the end of the day, however, O'Daniel narrowly edged Allred by some 18,000 votes.<sup>51</sup>

The primary election was held on August 22, 1942. The next day, Judge Rufus Foster of the Fifth Circuit Court of Appeals died in New Orleans, Louisiana, leaving a vacant spot. Judge Foster had been in poor health for some time and, in fact, had not been able to sit on the court since April 1942. Later, there were those who alleged that FDR's administration knew that a vacancy would soon occur.<sup>52</sup> After resigning a federal judgeship, losing a U.S. Senate race, and returning to private practice, a possible Fifth Circuit judgeship must have seemed like a lifeline to Allred.

In the fall of 1942, Allred's friends began trying to persuade the President to nominate Allred for the Fifth Circuit position.<sup>53</sup> Supreme Court Justice William O. Douglas wrote a letter to Roosevelt urging the nomination.<sup>54</sup> More importantly, Lyndon Johnson wrote a letter in support.<sup>55</sup> Allred indicated his own desire for the spot to Elliott Roosevelt, Franklin Roosevelt's controversial son, who had moved to Texas in the 1930s to operate a ranch and had become



Franklin Roosevelt wrote Jimmie Allred a letter congratulating him on a "gallant fight" on August 26, 1942. Allred Papers, University of Houston.

<sup>48</sup> Tidwell, "James V. Allred," 85.

<sup>49</sup> Franklin Roosevelt to James Allred, Box 19 (1967-001), Allred Papers, University of Houston.

<sup>50</sup> Tidwell, "James V. Allred," 85-86.

<sup>51</sup> Manning, "Public Services of James V. Allred," 142.

<sup>52</sup> Hearings, 4.

<sup>53</sup> Sheldon Goldman, *Picking Federal Judges, Lower Court Selections from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), 42.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

Allred's friend. Allred had appointed Elliot Roosevelt to the Texas A&M Board of Regents.<sup>56</sup> In the fall of 1942, when Elliott Roosevelt was on his way to active duty. Allred asked that Elliott mention to his father that Allred wanted the Fifth Circuit position.<sup>57</sup>

There would be competition. On August 24, 1942, the day after Judge Foster's death, the two United States Senators from Louisiana, Senator Allen Ellender and Senator John Overton, wrote to Attorney General Francis Biddle stating that they would be submitting a recommendation of a Louisiana lawyer, a judge, to fill the Fifth Circuit vacancy.<sup>58</sup>



U.S. Attorney General Francis Beverley Biddle, shown here in 1945, met with two Louisiana Senators about filling a vacancy on the Fifth Circuit. That meeting created problems for former Texas Governor Jimmie Allred. Image courtesy of the Library of Congress and Wikimedia.

The Fifth Circuit was a different entity than today. Before its 1981 split into the Fifth and Eleventh Circuits, the Fifth Circuit included six states: Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida.<sup>59</sup> In 1942 the Circuit consisted of exactly five judges. Each state except Florida was represented by a judge. At various times since its 1891 creation, other states in the Circuit had not had representation on the Court. Louisiana had not had a judge since a short period in the 1920s. A Texan did not hold a judgeship on the Fifth Circuit for twelve years, 1919–31.<sup>60</sup>

In late 1942 a bill was introduced in Congress that added another judgeship for the Fifth Circuit. Both Ellender and Overton stated that their support for this additional judgeship was contingent upon a new Fifth Circuit judge being appointed from Louisiana.<sup>61</sup> The bill passed and Roosevelt made a nomination from Florida, leaving one additional Fifth Circuit nomination available.<sup>62</sup> The Louisiana Senators, confident that they would select the judge, spoke with Attorney General Francis Biddle and suggested their own candidate, Louisiana Supreme Court Justice Archie Higgins.<sup>63</sup>

Perhaps Archie Higgins was not the best nomination to put forward, since he was part of the Huey Long political machine. Although Huey Long, the "Kingfish,"<sup>64</sup> the controversial Governor and Senator from Louisiana, had been assassinated in

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<sup>56</sup> Hearings, 3.

<sup>57</sup> *Ibid.*, 105.

<sup>58</sup> *Ibid.*

<sup>59</sup> See *Bonner v. Pritchard*, 661 Fed. 1206, 1209 (11th Cir. 1981).

<sup>60</sup> Hearings, 65.

<sup>61</sup> *Ibid.*, 5.

<sup>62</sup> The Florida judgeship went to Senator Claude Pepper's former law partner.

<sup>63</sup> "Overton, Ellender Name Choice for Appeals Court," *Alexandria Daily Town Talk* (October 5, 1942).

<sup>64</sup> William Ivy Hair, *The Kingfish and His Realm: The Life and Times of Huey P. Long* (Baton Rouge: LSU Press, 1991), 211.

1935,<sup>65</sup> his legacy lived on, and his political machine's cronies were notorious for corruption.<sup>66</sup> Roosevelt and Long had loathed each other.<sup>67</sup> The Roosevelt administration sought to reconcile with Long's machine in the late 1930s and early 1940s, but there was still great concern about Louisiana corruption. This stigma did not help any potential Louisiana nominee to the Fifth Circuit. But T. Harry Williams, the Pulitzer Prize-winning biographer of *Huey Long*, wrote that Archie Higgins was a "well respected Court of Appeals judge."<sup>68</sup>

Nevertheless, Drew Pearson, a Washington, D.C. reporter famous in 1943 for his "Washington Merry-Go-Round" columns, would write that, "Judge Higgins, whom Ellender wants appointed instead of Allred, is an old Huey Long man who has leaned toward the Kingfish's friends on political decisions."<sup>69</sup> There was an anecdote going around about Archie Higgins: when Huey Long appointed him to the Louisiana Court of Appeals, the Kingfish supposedly said, "Archie, I performed a miracle today. I took a broken down lawyer and made a judge out of him."<sup>70</sup>

During a meeting that Senators Ellender and Overton conducted with Attorney General Biddle, both Louisiana Senators stated that they had raised the issue of Allred's nomination with the Attorney General, after hearing it was being discussed. Both claimed that Biddle told them that he would not recommend Allred to the President because that appointment would be seen as too political. They also said Biddle stated he would recommend Higgins.<sup>71</sup> Biddle vigorously denied that this conversation ever occurred. Despite the letters to FDR, it appears that the nomination was being left in the Attorney General's hands. Biddle claimed that he did not discuss the Allred nomination with President Roosevelt before February 18, 1943, when Roosevelt agreed to make the nomination.<sup>72</sup>



Senator Huey P. Long of Louisiana, between 1933 and 1935. Image courtesy of the Library of Congress and Wikimedia.

<sup>65</sup> *Ibid.*, 323.

<sup>66</sup> See generally Harnett T. Kane, *Huey Long's Louisiana Hayride: The American Rehearsal for Dictatorship 1928-1940* (New Orleans: Pelican Publishing, 1971).

<sup>67</sup> Hair, *Kingfish*, 254-55.

<sup>68</sup> T. Harry Williams, *Huey Long* (New York: Knopf Publishing Co., 1969), 723.

<sup>69</sup> Drew Pearson, "Washington Merry-Go-Round," *Long Beach Independent* (March 23, 1943), 2.

<sup>70</sup> Hair, *Kingfish*, 138.

<sup>71</sup> Hearings, 127-28.

<sup>72</sup> *Ibid.*, 82.

On February 18, 1943, James V Allred was nominated to the vacant seat on the Fifth Circuit, a court one step below the U.S. Supreme Court. In any other circumstance Allred could have foreseen quick confirmation based on his record in the Southern District of Texas, his past service as Governor of Texas, his work as Attorney General of Texas for two terms, and as a former District Attorney. Yet these were not normal times. Only a few days after the nomination, the *New York Times* ran an article headlined, "Ellender Attacks Choice of Allred" with the sub-headline, "Senator says unadulterated politics caused President to name Texan for bench."<sup>73</sup> The article stated that Ellender "asserts he was assured Judge Higgins of New Orleans met the requirements."<sup>74</sup>

Despite what Louisianans thought, the nomination was popular in Texas. On February 19, the day after the nomination, telegrams poured into the offices of Senator Tom Connally and O'Daniel endorsing the nomination. Telegrams came from all three sitting Justices of the Texas Supreme Court as well as from all six members of the Texas Commission of Appeals.<sup>75</sup> Almost all telegrams were received by Senator Connally, the senior Texas U.S. Senator. Four telegrams were received by Senator O'Daniel, three for the appointment and one against.<sup>76</sup> Connally, who had not been consulted about the nomination, and was aware of the Louisianans' preferences, was ready to announce his support. He stated that:

The appointment was personally made by the President. It had generally been expected that it would go to Louisiana and I had made no recommendations. However, Texas has about 1/3 of the business of the Circuit and this appointment will give Texas a third of the Judges. I shall not oppose the confirmation.<sup>77</sup>

Texas newspapers favored Allred's appointment. One wrote that, "[w]hile Texas gave Senator W. Lee O'Daniel a majority over Allred in the race last summer[,] there was little rancor in the hearts of most of the voters. Many voted against Allred with regret. The race itself left surprisingly few wounds. Return of this distinguished son of Texas to a high federal bench is a recognition of his ability that would be most pleasing to Texans."<sup>78</sup>

The *Houston Post's* editors strongly endorsed Allred's nomination, writing that:

The only objection raised to his confirmation is that there was an understanding that if he quit the Federal District bench to run for the United States Senate and lost the President would take care of them. Not a scintilla of evidence has been presented in support of that charge. On the contrary, the circumstantial evidence points the other way. If Mr. Roosevelt had wanted to purge W. Lee O'Daniel from the Senate by getting Allred elected in his place as O'Daniel charges, wouldn't

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<sup>73</sup> *New York Times* (February 25, 1943), 11.

<sup>74</sup> *Ibid.*

<sup>75</sup> "Messages from Texas Favor Appointment," *Corsicana Sun Times* (February 19, 1943), 2.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> "The Allred Appointment," newspaper clipping, unidentified newspaper, February 21, 1943, Box 20 (67-001), Allred Papers, University of Houston.

you think Roosevelt would have helped him in his race? It was a matter of general report hereabouts that some of Allred's friends, though not himself, hoped to get a boost from the President believing it would put Allred over, as it probably would have. But the Chief Executive kept strictly hands off.<sup>79</sup>

The newspaper noted that the vacancy only occurred after Allred had been defeated and Judge Foster had died.<sup>80</sup> It stated that, "South Texas lawyers have universally praised the ability with which Judge Allred presided over the federal district court. They are now applauding his appointment to the Circuit Bench ... these testimonials indicate that Judge Allred's performance and demonstrated ability as District Judge qualify him for the Circuit Court."

Yet politics and spite raised their ugly heads. Along with the Louisiana Senators' opposition, Pappy O'Daniel did not want Allred confirmed. At first, O'Daniel stated that he would be guided by the wishes of his constituents in voting on Allred's confirmation<sup>81</sup> Indeed, it might have been a politically wise move to allow a defeated opponent to go on a court and remove him from the political scene. It would have been a unifying gesture in wartime. However, Pappy O'Daniel could not do that. It soon became obvious that he would fight Allred's confirmation tooth and nail.<sup>82</sup>

Things moved differently with federal judicial nominations in the 1940s. Allred's nomination had been made by the President on February 18. The chair of the Senate Judiciary Committee appointed a subcommittee to conduct a hearing on the Allred nomination to conduct a hearing less than two weeks after the nomination on March 2, 1943. The subcommittee consisted of Senators Carl Hatch, Joseph O. Mahoney, and Homer Ferguson—two Democrats and one Republican. Other Senators were present as well.

It was ironic that Senator Carl Hatch would be the chair of the subcommittee. There were allegations by Allred's opponents that his resignation as a federal judge to run for the Senate had been a violation of the Hatch Act,<sup>83</sup> which of course had been authored by Senator Hatch. In its broadest definition, the Hatch Act prohibits political campaign activities by federal employees.<sup>84</sup>

Allred and his supporters came to Washington for the subcommittee hearing. Ellender and Overton, the Louisiana Senators, though they had plenty to say in opposition to his nomination, focused more on the alleged promise to Louisiana.<sup>85</sup> Indeed, years later, Senator Ellender told two of Allred's sons that he only blocked Allred's nomination because "it was Louisiana's turn—I had nothing against your father."<sup>86</sup> In contrast, Senator O'Daniel, in an astonishing act of pettiness, refused to shake Allred's hand at the hearing.<sup>87</sup> Despite the undisguised opposition of the two Louisiana Senators, and the soon-revealed opposition of the junior U.S. Senator from

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<sup>79</sup> "Allred's Confirmation," *Houston Post* (March 5, 1943), 4.

<sup>80</sup> *Ibid.*

<sup>81</sup> "James Allred Nomination Meets Snag," *Abilene Reporter News*, February 19, 1943, 1.

<sup>82</sup> Hearings, 46.

<sup>83</sup> *Ibid.*, 4.

<sup>84</sup> See *United States Civil Service Comm. v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

<sup>85</sup> Hearings, 2-20, 126, 127-128.

<sup>86</sup> Tidwell, "James V. Allred," 86.

<sup>87</sup> Hearings, 53.

Texas, Allred would soon find an unlikely advocate in the senior Texas Senator, Tom Connally. Connally would shepherd Allred's cause through nomination hearings and beyond to the best of his ability.

It was unlikely that Tom Connally would undertake this task, for he had no personal stake in doing so. He had every right to feel insulted by Allred's nomination. Yet Tom Connally was everything that Pappy O'Daniel was not: the epitome of what a Texas U.S. Senator should be. If he had been placed in a toga and been seen in the Roman Curia, he would not have seemed out of place. Connally had first been elected to the U.S. House of Representatives in 1916.<sup>88</sup> In 1928, he defeated Senator Earl Mayfield, the "Klan" Senator, to take a place in the U.S. Senate.<sup>89</sup>

At first Connally was a stalwart New Dealer, but as time went on, he parted from Roosevelt. Like many other Senators, he split bitterly with FDR over the 1937 court-packing plan. What happened after that split is the reason that would have led other men to reject Allred's nomination.

For all of his many qualities, Franklin Roosevelt had a vengeful streak. In his autobiography *My Name is Tom Connally*, Senator Connally remembered that after he did not support the court-packing plan, Roosevelt sought revenge against him. In 1938, there was a judicial vacancy in the Southern District of Texas. Connally recommended his friend, Walton Taylor, for the position. He had heard nothing. Senator Connally was asked to join the same whistle-stop train tour that Roosevelt was making through Texas with Jimmie Allred.

At a stop in Wichita Falls, Elliot Roosevelt, the President's son, asked Connally to join the President and Allred at the back of the train. There, Franklin Roosevelt publicly announced that he was nominating Allred for the judgeship that Connally sought for his friend. Though Connally regarded this as a public humiliation, he did not oppose Allred in the confirmation process. Nevertheless, he and Roosevelt did not speak for a year.<sup>90</sup> Connally had not been consulted regarding Allred's Fifth Circuit nomination. By all rights, he might have actively opposed to Allred's nomination or at least sat on the sidelines.

Yet Connally put his country above partisan politics and his personal feelings. He had consulted his constituents about Allred's nomination. Not only that, but he had consulted with his fellow attorneys. Before he went into politics, Connally had been a very good lawyer. He had been Falls County District Attorney and a successful plaintiffs' attorney. Even today, lawyers remember *Western Union v. Chamberlain*,<sup>91</sup> his early attempt as a plaintiff's attorney to establish the tort of mental anguish even in the absence of physical injury. Tom Connally knew a good lawyer and a good judge when he saw one.

Moreover, it seems likely that Connally took the measure of his junior colleague, O'Daniel, and did not like what he saw. Throughout his lengthy autobiography detailing his Senate life,

<sup>88</sup> George N. Green, "Connally, Thomas Terry," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fco36>.

<sup>89</sup> *Ibid.*

<sup>90</sup> Tom Connally, *My Name is Tom Connally* (New York: Thomas Y. Crowell Publishing Co., 1954), 194-95.

<sup>91</sup> 169 S.W. 370 (Tex. Civ. App. 1914).



Left to right: FDR, Jimmie Allred, Elliot Roosevelt, and Senator Tom Connally make an appearance on the back of the train in Wichita Falls in 1938. Photo in the author's collection.



Thomas Terry Connally, U.S. Senator from Texas. Image courtesy of U.S. Senate Historical Office.<sup>93</sup>

Connally did not mention O'Daniel even once, despite serving alongside him for almost seven and one-half years.<sup>92</sup>

Senator Hatch opened the hearings on Tuesday, March 2, 1943. The first witness was Louisiana Senator John Overton. Almost immediately Hatch turned the proceedings over to Senator Connally. Senator Connally proceeded to ask the Subcommittee's chair the following.

**Senator Connally:** May I make an inquiry as to whether or not there have been any charges filed with the subcommittee attacking the character or the ability of Judge Allred?

**Senator Hatch:** There have been no charges filed in the sense of a charge of any nature at all, no written charges and nothing so far as I know. At least nothing has been said to the chairman of the subcommittee, attacking the character of Judge Allred.

**Senator Connally:** Or his ability?

**Senator Hatch:** I haven't had any charge of that kind.<sup>94</sup>

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<sup>92</sup> Connally, *My Name is Tom Connally*, 194-95.

<sup>93</sup> Biographical Directory of the U.S. Congress, "CONNALLY, Thomas Terry (Tom), (1877 - 1963)" <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000684>.

<sup>94</sup> Hearings, 1.



Connally was not going to allow any personal charges against Allred. The hearing proceeded with those in opposition to Allred's confirmation speaking first. The two Louisiana Senators and Congressman F. Edward Hebert, together with the President of the New Orleans Bar and the President of the Louisiana Bar Association, testified in opposition.

Louisiana had a strong argument that it should have a judge on the Fifth Circuit. There were now six spots—one for each state. Moreover, the Louisiana contingent focused on the perceived promise by the Attorney General to name a Louisiana judge, as well as the fairness of securing a Louisiana representative on the Fifth Circuit. Louisiana was the only state in the Union that used the Civil Code as opposed to the common law. Its people needed a Louisiana lawyer familiar with the Civil Code.<sup>95</sup>

Senator Connally took the lead in questioning the Louisiana representatives. For political reasons, the Huey Long undertones could not be mentioned. He noted that the capital of the Fifth Circuit was New Orleans itself.<sup>96</sup> Wasn't there a benefit to Louisiana in that? Despite the fact that Louisiana used the Civil Code, only 25 percent of the cases that reached the Fifth Circuit from Louisiana involved the Civil Code. Texas was responsible for 34 percent of the cases that went to the Fifth Circuit. In light of the docket, there could be no unfairness in having two judges from Texas.

Connally was a masterful cross-examiner. When Congressman Hebert made the accusation that Allred must have been promised another federal judgeship in return for making a Senate run, Connally gained a concession from the Louisiana Congressman that Hebert would have never supported the bill to create another Fifth Circuit judgeship had he not understood that Louisiana would get the additional judgeship.<sup>97</sup> Even if FDR had promised to take care of Allred, Louisiana had its own "trade" to atone for.<sup>98</sup> Throughout his questioning, he made each Louisiana representative publicly concede that they were not attacking Allred's character and that any allegation of impropriety regarding the federal judgeship was simply made upon rumor.<sup>99</sup>

Still, regardless of skillful cross-examination, the point had been made. If a non-Huey Long-connected nomination could be made, Louisiana had a valid point that it should have a representative on the Fifth Circuit, simply because there were six judgeships and six states. If Allred's nomination reached the Senate floor, there would be no way that the Louisiana Senators would vote to confirm.

The next witness to oppose confirmation was Senator W. Lee O'Daniel himself. He now publicly revealed that he opposed confirmation. He began his testimony by citing Article III, Section 1 of the Constitution to three Senators who sat on the Judiciary Committee, all three of whom were lawyers, and one of whom was a former judge. He read this portion of the Constitution to remind them that federal judges were supposed to hold lifetime appointments on good behavior

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<sup>95</sup> *Ibid.*, 4.

<sup>96</sup> *Ibid.*, 10.

<sup>97</sup> *Ibid.*, 36–38.

<sup>98</sup> *Ibid.*, 37.

<sup>99</sup> *Ibid.*, 35–36.

and were not supposed to become tangled in political affairs.<sup>100</sup> He explained that,

Because I refused to perform properly as a “yes man,” they [the Roosevelt Administration] decided I should be sentenced for life to private citizenship. To pronounce the sentence a federal judge crawled down off the Federal bench and became my “yes man” opponent. His efforts to pronounce the sentence failed because he was defeated at the polls by the voters of Texas. Now the glittering reward of another federal judgeship for his flying trapeze performance awaits confirmation or rejection by my worthy colleagues in the Senate.<sup>101</sup>

O’Daniel continued by stating that others had urged him to rise above petty politics and not oppose the confirmation. He related that,

It has been suggested that this case offers a grand opportunity to prove myself to be magnanimous and demonstrate real sportsmanship by lending a helping hand to a defeated brother. My official record shows that I, in the past, have appointed to public office those whom I previously defeated at the polls. Therefore my magnanimity and good sportsmanship have already been demonstrated. But this case is entirely different and to follow that course in this case would make it necessary that I blind myself to the Constitution of the United States, which I do not intend to do.

While I oppose confirmation, I want to make it perfectly clear that I have no intention of opposing this nomination on personal grounds. I do not mean by this that I do not have plenty of personal grounds upon which to base opposition but I feel sure the constitutional objection I am registering here will make personal objections unnecessary.<sup>102</sup>

Pappy’s rhetoric was limitless. He described Allred as “one who discarded the royal robes of the sacred judiciary and donned the dirty duds of politics to throw mud balls and stink bombs all over the great state of Texas.”<sup>103</sup> One Texas newspaper chided O’Daniel for his “littleness.”<sup>104</sup> Yet the newspaper also noted that O’Daniel did not attack Allred’s qualifications.<sup>105</sup>

Another newspaper observed that, “O’Daniel seemed embarrassed as he testified. Allred offered to shake O’Daniel’s hand when the Senator came into the Hearing room but O’Daniel ignored him.”<sup>106</sup> O’Daniel was briefly questioned by the Senators regarding any personal knowledge of Roosevelt’s intervention into the campaign or any actual promise by Roosevelt to reappoint Allred. He had heard rumors, but knew nothing concrete.<sup>107</sup> Wisely, Connally did

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<sup>100</sup> *Ibid.*, 47.

<sup>101</sup> *Ibid.*, 51.

<sup>102</sup> *Ibid.*, 47.

<sup>103</sup> *Ibid.*

<sup>104</sup> “O’Daniel Runs True to Form,” *Lubbock Morning Avalanche* (March 4, 1943), 5.

<sup>105</sup> *Ibid.*

<sup>106</sup> Marshall McNeil, “O’Daniel Voices Bitterness at Allred Hearing,” *El Paso Herald Post* (March 3, 1943), 1.

<sup>107</sup> Hearings, 50–52.

not engage with O’Daniel. O’Daniel’s testimony concluded the testimony of those who opposed Allred.

Then came those who warmly supported Allred. These were not politicians, but several attorneys who knew Allred’s service as a United States District Court Judge. There was one attorney from Vinson & Elkins, one from Baker Botts, and one from a firm that would shortly merge with Fulbright Crooker. There was also a so-called “independent attorney” who mainly did plaintiffs’ work. Even in 1943 the so called “Big Three” of the Houston Bar and plaintiffs’ attorneys had a say.



Newton Gresham, President of the Houston Bar Association, and later (1956–57), of the Texas Bar Association. Image courtesy of State Bar of Texas Past Presidents page.<sup>110</sup>

The first to testify in Allred’s favor was Newton Gresham, then President of the Houston Bar Association. Gresham would later become President of the State Bar of Texas and was a renowned trial attorney.<sup>108</sup> He was the attorney whose firm would merge with Fulbright Crooker. Gresham had a special way with juries. He was trying a case in Harris County when late on a Friday afternoon, the judge asked the jury if it wanted to go home for the week at 5:00 p.m. A spokesman for the jury said, “why yes, if that is all right with Mr. Gresham.”<sup>109</sup>

Gresham began his testimony by stating he had never held or sought political office and had never actively participated in any political campaigns, except for one in which he had made speeches for a friend. He had never been engaged in politics in any other sense. He was a trial lawyer.<sup>111</sup> But he was there to attest vigorously to Judge Allred’s qualifications, integrity, and judicial ability, which he had had ample opportunity to observe.<sup>112</sup> He stated that Allred

was a judge who the lawyers not only respected because he carried his court on in a dignified manner but a judge whom the lawyers loved because they knew that in addition to being a good and great judge, that he was a good and great man.<sup>113</sup>

Gresham also noted that in regard to the Louisiana Civil Code, he knew attorneys who had taken some thirty to forty days to study it and had become proficient in it. He felt Allred could do the same, much as attorneys and judges could learn patent law.<sup>114</sup> Senator Connally asked a few questions and then Gresham was done. Texas was much smaller at that time. Only a few years later, Newton Gresham would become a mentor for Senator Connally’s grandson,

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<sup>108</sup> State Bar of Texas Past Presidents, *State Bar of Texas* website, <https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/PastPresidents/PresidentBios/NewtonGresham.htm>

<sup>109</sup> Tom Connally, Senator Connally’s grandson, told the author this story.

<sup>110</sup> <https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/PastPresidents/default.htm>.

<sup>111</sup> Hearings, 53.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, 55-56.

Tom Connally, when he joined the law firm of Fulbright & Jaworski.<sup>115</sup>

Claude Carter of Harlingen, the State Bar President mentioned earlier, testified in favor of Judge Allred as well. Since Carter lived in the border area of Texas, he had a special observation:

I live in a portion of the state of Texas and the southern district of Texas in which a large percentage of the population are underprivileged persons of Mexican ancestry. As a result of this fact and our proximity to the Mexican border, a great deal of the business of the Federal court there is criminal in nature involving the immigration and revenue laws. I have observed Judge Allred's meticulous care in deciding the cases involving the rights and liberties of the poor and uneducated. I have seen him hold court time after time until late in the night in order to try fully and dispose fairly of these cases which were of grave importance only to the individual concerned. This man is a humanitarian, a great judge devoted to human rights as well as property rights and the bar of Texas is proud of his judicial record.<sup>116</sup>



Claude E. Carter, State Bar President 1942-43.<sup>117</sup>

That was praise indeed, especially in 1943.

One other witness from Houston appeared who had no reason to support New Dealer Jimmie Allred. T. E. Kennerly appeared to support the nomination. Kennerly was a Houston lawyer and was also, for 1943, that rare thing, a Texas Republican. His father, T. M. Kennerly, was a United States District Judge in Houston appointed by Herbert Hoover.

Senator Homer Ferguson, Michigan Republican, expressed mock surprise that Kennerly could admit to being a Republican in Texas.<sup>118</sup> In turn, Kennerly facetiously stated that he had held precinct conventions in a telephone booth in his house for years. The Houston Republican then said, "I don't think it could be said that I am a political friend, as it were, of Judge Allred."<sup>119</sup> He stated that, "I never voted for him but that doesn't keep me from coming up here as an attorney, a practicing attorney in Houston and saying a few words out of my heart for this man."<sup>120</sup> Kennerly read into the record a letter from his father to the subcommittee strongly supporting his former colleague for nomination to the Fifth Circuit.<sup>121</sup>

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<sup>115</sup> In turn, Tom Connally would become this author's mentor. The author also knew Newton Gresham, who was, to use the old phrase, a "Gentleman at the Bar."

<sup>116</sup> Hearings, 56.

<sup>117</sup> State Bar of Texas Past Presidents, *State Bar of Texas* website, <https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/PastPresidents/PresidentBios/ClaudeCarter.htm>.

<sup>118</sup> *Ibid.*, 59.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, 60-61.

The hearing was adjourned to the following Friday when Allred himself and Francis Biddle, the Attorney General of the United States, would testify. On March 5, testimony resumed. The first witness that day was Biddle, who was there to strongly support Allred's nomination. Inadvertently, however, he perhaps doomed it. Biddle was determined to let the committee know that Allred's nomination had not been the result of a political deal between Allred and Roosevelt. He stated that there had been other suggested candidates for the Fifth Circuit position. In doing so, he revealed a bombshell.

Governor Allred had been the *second* choice for the position. In December 1942, Biddle had asked Monty Lehman of New Orleans if he would allow his name to be considered for the vacancy.<sup>122</sup> Lehman was a well-regarded attorney and, according to Biddle, a "lawyer of national reputation."<sup>123</sup> Lehman refused to have his name considered.<sup>124</sup>

Only then did Biddle move forward with Allred. In stating that he had contacted a Louisiana lawyer to offer him the Fifth Circuit position, Biddle was offering legitimacy to the Louisiana Senators' argument that it was Louisiana's turn to have a judge. Still, Biddle strongly refuted the allegation that there had been an understanding between Allred and Roosevelt. He stated that he had carefully studied Judge Allred's record and determined that he was the outstanding *available* candidate based on his ability, judicial record, and reputation.<sup>125</sup> He then stated:

I make this categorical statement because the committee is entitled to an assurance that there is no foundation whatever for the rumor that Judge Allred's nomination proceeded from a promise made to him when he sought the senatorial nomination or any other time. I give you that assurance as simply and solemnly as I can.<sup>126</sup>

At this point a U.S. Senator directly called out a U.S. Attorney General. Senator Overton asked Biddle if it was not true that he had told both himself and Senator Ellender that, because of the political implications involved, he would not submit Judge Allred's name for the nomination.<sup>127</sup> Biddle frankly denied that such a conversation had occurred.<sup>128</sup>

After Biddle, James Allred himself testified. Allred insisted that in light of the insinuations and accusations made against him he be placed under oath. This was not something that the subcommittee had requested, and no other witness had been sworn. Yet Allred insisted upon it. Under oath, he denied that he had been promised another federal judgeship should he enter the Senate race and lose.<sup>129</sup> He stated that the thought had never even crossed his mind because he believed he was going to win the election.<sup>130</sup>

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<sup>122</sup> *Ibid.*, 82.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, 81–82.

<sup>126</sup> *Ibid.*, 82.

<sup>127</sup> *Ibid.*, 88.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, 103.

<sup>130</sup> *Ibid.*, 105.

Allred admitted that he had seen Elliot Roosevelt and mentioned that he would like the nomination. He said that he never heard from the younger Roosevelt about the matter.<sup>131</sup>

Senator Ferguson asked Allred, "Do you want to be a judge or use this job as a stepping stone to another political campaign?"<sup>132</sup> Allred replied, "I should very much like to be a judge."<sup>133</sup>

It appeared that Allred made a favorable impression upon the committee. The transcript reveals that Allred comes off as genial and straightforward. Had he "bowed up" and been confrontational about the accusation, his cause would have been lost. Instead, he was disarming. The accusation could not be true because he never expected to lose.

The following Monday, the subcommittee voted 2-1 to recommend Allred's candidacy to the full Senate Judiciary Committee. The one dissenting vote was Homer Ferguson. It seems that the pro-Allred attorneys, Allred's own performance as a nominee, and Senator Connally's careful stewarding might have saved the Allred nomination. Still, the fact that the Republican Ferguson had voted against confirmation in the subcommittee was an indication that Republicans would oppose the confirmation.<sup>134</sup> This would spell trouble if Democratic Senators other than Ellender and Overton opposed confirmation.

Senator O'Daniel would not go away easily. On March 15, he filed his "blue slip" stating that Allred's nomination was "personally obnoxious" to him.<sup>135</sup> This is the traditional form used under the rules of senatorial courtesy when a Senator objects to a particular nomination from his state.<sup>136</sup> In most cases, filing such a form blocks a nomination.<sup>137</sup> In this case, it did not. A blue slip could kill a nomination only if the nomination pertained to one state. But since the Fifth Circuit nomination applied to six states, one state's junior Senator's objection was not sufficient.<sup>138</sup>

Still, there was trouble. After the full Senate Judiciary Committee received the subcommittee's report on March 8, 1943, it postponed final action until the following week.<sup>139</sup> The dissenting vote by Ferguson and the continuing rumors caused the delay.<sup>140</sup> That week probably doomed the Allred nomination.<sup>141</sup> Connally now counted the votes on the committee and in the full Senate. He was aware that as many as 19 Democratic Senators would line up with the Republicans to oppose confirmation.<sup>142</sup> Nevertheless, he hoped that Ferguson, an ex-judge who had served on the subcommittee and been present at the hearings, would side with those

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, 106.

<sup>133</sup> *Ibid.*

<sup>134</sup> "Subcommittee Votes Okay of Allred as Judge," *El Paso Herald Post* (March 8, 1943), 1.

<sup>135</sup> "O'Daniel Considers Allred Obnoxious," *Washington Post* (March 16, 1943), 8.

<sup>136</sup> *American Congressional Dictionary* (Washington: Congressional Quarterly Press, 2001).

<sup>137</sup> Goldman, *Picking Federal Judges*, 12.

<sup>138</sup> "Committee Delays Vote on Allred Nomination," *Shreveport Louisiana Times* (March 16, 1943), 2.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

voting to confirm. This would secure Allred a 10-8 vote in the Judiciary Committee, advance the nomination to the Senate floor,<sup>143</sup> and give Allred a fighting chance in the full Senate.

The issue of a political promise by Roosevelt to return Allred to a federal judgeship had been debated in the hearings. The issue of whether Louisiana had been promised the Fifth Circuit seat had also been debated. By this time, it was known that O'Daniel opposed confirmation. Yet there was another factor. Regardless of whether there had been overt support for Allred in the primary and whether there was an actual promise (the evidence shows there was not), Allred was a FDR protégé and a New Dealer.

March 1943 marked the tenth year of Franklin Roosevelt's presidency. Since Pearl Harbor, "Doctor New Deal" had become "Doctor Win the War."<sup>144</sup> Many in the nation and in Congress had become tired of the President. One newspaper spoke of the Senate being "jittery, on pins and needles—inclined to slap the Administration" in regards to the nomination.<sup>145</sup> The combination of adverse factors gave some Senators an excuse to give the Roosevelt administration a black eye by blocking Allred's confirmation.

In a closed-door session of the Senate Judiciary Committee, Connally tried to persuade Ferguson to vote for Allred's confirmation. But as Drew Pearson reported in his column, the Michigan Republican did not forget politics. Pearson stated Ferguson "has made a fetish of opposing the President on all major appointments and proved it on this occasion."<sup>146</sup>

"Ferguson allegedly stated 'I am against all these New Deal lame ducks getting jobs from the President after they have been licked in an election,' he stormed. 'I am especially against playing politics in the federal judiciary.'"<sup>147</sup>

Pearson observed that Senator Connally "lost patience and declared that Allred had chalked up a brilliant record on the federal district bench in Texas, an indisputable fact. He decided to fight fire with fire."

"If I recall correctly, the Senator from Michigan didn't resign from the bench when he decided to run against former Senator Prentice Brown of Michigan in the last election, Connally lashed out. 'The senator is opposed to lame ducks now but he took care to protect himself at that time.' This agile dig brought hot flashes to the face of Ferguson."

"I resent the senator's insinuation' blurted Ferguson...'He can't tell me how to vote.'"

"I am not trying to tell anyone here to vote,' countered Connally...'If I have ruffled the senator's feelings by recalling something relevant in his own record let me hasten to apologize.'"<sup>148</sup>

<sup>143</sup> "Senators Block Action on Allred," *New York Times* (March 23, 1943), 21.

<sup>144</sup> This phrase is taken from Franklin Roosevelt's December 28, 1943 Press Conference.

<sup>145</sup> George Simpson, "Capitol Comments: Allred Nomination to Bring Fight on the Senate Floor," *Big Spring Daily Herald* (March 24, 1943), 6.

<sup>146</sup> Drew Pearson, "Washington Merry-Go-Round," *Abilene Reporter News* (April 1, 1943), 4.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

By the time Connally confronted Ferguson, he must have realized that Ferguson's vote was lost. Finally, on March 22, the Judiciary Committee voted in full session and tied 9-9. This effectively blocked Allred's nomination, as a tie vote meant that the Judiciary Committee would not refer the nomination to the full Senate floor.<sup>149</sup> As expected, two anti-New Deal Democrats joined the Republicans in opposing confirmation. Senator O'Mahoney, who had supported the nomination, suggested after the tie vote that the committee report the nomination without recommendation, but got nowhere with the proposal.<sup>150</sup> Senator Van Nuys, Chairman of the Judiciary Committee, stated that,

As far as the committee action is concerned the nomination is dead unless new affirmative action is taken in committee or on the floor to revive it. It cannot go to the senate calendar under its present status.<sup>151</sup>

The *New York Times* reported "the deadlock was viewed as an administration rebuff and a victory for Senator O'Daniel who is anti-New Deal, and the Louisiana delegation in the Senate."<sup>152</sup>

The *St. Louis Post-Dispatch* editorialized that, "Mr. Allred has been a United States District Judge and a good one. His elevation would have much to commend it . . . [Still] [n]otwithstanding the fact that Senator Hatch, sponsor of the clean politics law voted for a favorable report, there is inevitably the feeling on the part of many people that the Allred appointment does violate the spirit of the Hatch Act."<sup>153</sup>

Politics make strange bedfellows. In his March 19, 1943, Washington Merry-Go-Round column, Drew Pearson mentioned "the line-up of Republican Senators behind the old Huey Long gang to secure appointment of a Huey Long Judge to the Fifth Circuit Court of Appeals in Louisiana, merely for the satisfaction of embarrassing Roosevelt."<sup>154</sup> Pearson pointed out that these same Republicans would previously have had nothing to do with the Long crowd.

For his part, Allred was not yet ready to give up. On April 2, he wrote a letter to his father saying that:

I think it is a distinct compliment to be named the second time to the United States bench. This time to a court next to the Supreme Court and I am proud of it regardless of the fact that seven Republicans and two Roosevelt-hating Democrats have temporarily blocked me. I would rather for my boys to feel in the future that I did my duty as I saw it even at the cost of giving up a lifetime job than that I went to seed on a safe and sure thing when the world was on fire.<sup>155</sup>

Yet even if on April 2 Allred had not given up on his nomination, others had. On that date,

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<sup>149</sup> "Senators Block Action on Allred," *New York Times* (March 23, 1943), 21.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> "Rejection of the Allred Appointment," *St. Louis Post-Dispatch* (March 23, 1943), 14.

<sup>154</sup> Drew Pearson, "Washington Merry-Go-Round," *Odessa American* (March 19, 1943), 2.

<sup>155</sup> Letter, James Allred to his father (April 2, 1943).



Attorney General Biddle wrote President Roosevelt:

I had a long talk with Senator Connally Monday morning about the situation. He suggested and I agreed that we should make no more in the next few weeks. At that time, if agreeable to you, I will suggest to Jimm[ie] Allred that he write to you pointing out that the vote of the Committee shows his nomination as being considered on purely political partisan lines without regard to the merits and that, therefore, he is asking you to withdraw his name. I feel Allred will do this in a few weeks but I am sure he will not do it now.

By April 2, Biddle was ready to name another nominee—a Louisiana judge.<sup>156</sup> It appeared that nothing could be done. On April 10, Chairman Van Nuys again related that it was his opinion that the committee was finished with the nomination. "There is nothing new in the Judiciary Committee and it would seem logical that the nomination should be withdrawn. However, I would not want to make that prediction. So far as the Senate Judiciary Committee is concerned, however, it is my opinion that it is finished there."<sup>157</sup>

By the last week in April, things had not changed. One columnist reported that Allred had been expected in Washington to consult with Connally but had not arrived yet and had not communicated with Senator Connally, "his chief advocate in the Senate. This surprised Connally, his friends say."<sup>158</sup>

During the first week of May 1943, Tom Connally and Allred met. Connally told Allred that there simply were not enough votes on the Senate floor to confirm him, even if the Judiciary Committee deadlock was broken and his name reported to the floor.<sup>159</sup> At this juncture one newspaper reported that friends of Allred had suggested that he write the President asking for withdrawal of his nomination, pointing out that his nomination had become a partisan political issue and expressing a desire to avoid subjecting the President to an inter-party row in the Senate.<sup>160</sup> The newspaper reported that "some believe Allred may have followed this advice."<sup>161</sup> In fact, Allred asked the President to withdraw his name on May 3.<sup>162</sup>

By May 4, 1943, Senator Ellender made sure the request was public.<sup>163</sup> Strangely, there was no immediate acceptance of the withdrawal and no nomination of another name for the post. Instead, the *New York Times* reported on July 23, 1943 that Allred's nomination was "out" because it had been returned to the White House under a Senate Rule requiring such action on unconfirmed appointments when Congress recessed for more than thirty days.<sup>164</sup>

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<sup>156</sup> Goldman, *Picking Federal Judges*, 4–42.

<sup>157</sup> "Allred Case Finished by Committee," *Big Spring Daily Herald* (April 11, 1943), 10.

<sup>158</sup> Marshall McNeil, "Side-Bar Remarks," *El Paso Herald-Post* (April 29, 1943), 4.

<sup>159</sup> Marshall McNeil, "Allred Nomination Withdrawal Due," *El Paso Herald Post* (May 13, 1943), 8.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> Letter, Franklin Roosevelt to James Allred (November 1, 1943), Box 9 (1967-001), Allred Papers, University of Houston.

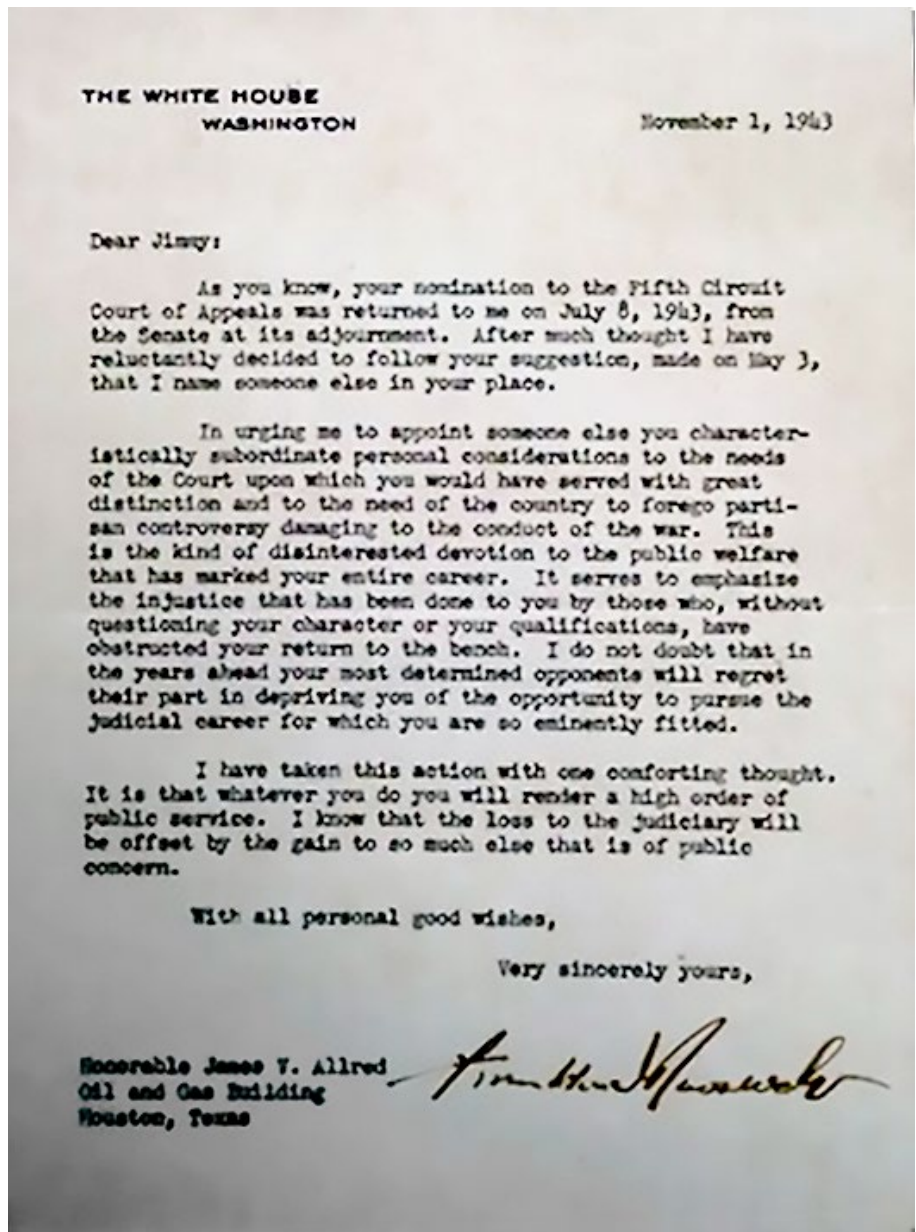
<sup>163</sup> "Ellender says FDR to Withdraw Allred's Name," *Daily Alexandria Louisiana Town Talk* (May 4, 1943), 1.

<sup>164</sup> "Allred Nomination Out," *New York Times* (July 23, 1943), 10.

It was not until November 1, 1943 that Franklin Roosevelt sent Allred a letter acknowledging the withdrawal of his nomination. That letter began "Dear Jimmy" and read:

As you know your nomination to the Fifth Circuit Court of Appeals was returned to me on July 8, 1943 from the Senate at its adjournment. After much thought, I have reluctantly decided to follow your suggestion made on May 3 that I name someone else in your place... I have taken this action with one comforting thought, it is whatever you do, you will render a high order of public service. I know that the loss to the Judiciary will be offset by the gain to so much else that is of public concern.<sup>165</sup>

Thus, one chapter of James Allred's life ended.



It was not Archie Higgins, Huey Long's sidekick, who would get the Fifth Circuit nomination. Francis Biddle first sought to nominate Judge Benjamin Dawkins, who had presided over the corruption trial of several of Huey Long's associates.<sup>166</sup> When Ellender and Overton raised too many complaints about this nomination, a compromise was achieved. Five days after sending his letter to Allred, Roosevelt nominated Elmo Pearce Lee to the Fifth Circuit. Lee was from Shreveport, Louisiana and thus safely removed from the downstate Huey Long machine. He was confirmed without incident by the Senate on November 30, 1943.<sup>167</sup>

Allred returned to the private practice of law in Houston. By June 1943, he was involved

<sup>165</sup> Letter, Franklin Roosevelt to James Allred (November 1, 1943), Box 9 (1967-001), Allred Papers, University of Houston.

<sup>166</sup> Goldman, *Picking Federal Judges*, 41; Drew Pearson, "Washington Merry-Go-Round," *Idaho Falls Post Register* (September 19, 1943), 4.

<sup>167</sup> "Elmo P. Lee is Approved," *Shreveport Louisiana Times* (November 30, 1943), 1.

in a major trial.<sup>168</sup> His career as an attorney would flourish. He took active roles in many cases involving politics. In 1944, he opposed the conservative Texas Regulars who opposed a fourth term for President Roosevelt. He took a case to the Texas Supreme Court to argue that a political party could insure that electors elected by the party would support the nominee of the particular party.<sup>169</sup> The Texas Regulars had supported electors who had pledged not to vote for Roosevelt despite the Texas parties' support for Roosevelt.<sup>170</sup> Of course, he was opposed by Pappy O'Daniel.<sup>171</sup> In 1948, Allred was on the team of lawyers who represented LBJ in his lawsuit over the disputed Senate election.<sup>172</sup>

What happened to Pappy O'Daniel? In the Senate he continued a career the *New York Times* called "unpredictable and conservative."<sup>173</sup> He once characterized World War II as "the President's war."<sup>174</sup>

Allred had written in April 1943 that despite his loss to O'Daniel, he had rendered a distinct service even in losing. "The groundwork is laid and in time the people of Texas are finding him out."<sup>175</sup> He was right. By May 1948, when O'Daniel had to make the decision whether to run again in the Democratic primary for another term, he called it quits. He was strongly influenced by the findings of the Texas Poll. Early in March this poll found that only 7 percent of eligible voters had stated they would vote to send O'Daniel back to the Senate.<sup>176</sup>

Faced with this reality, O'Daniel announced he would not seek reelection and would return to Texas as a private citizen.<sup>177</sup> A newspaper reported that he claimed that "New Deal destruction of our private enterprise system may make it difficult for him to be a good provider for his family 'but I am willing to try.'"<sup>178</sup> In fact, he ran a successful real estate business in later life, one allegedly begun at his Senate desk.<sup>179</sup> He would run for Governor again in 1956 and 1958, finishing third in the primary both times.<sup>180</sup> Part of his platform concerned his belief that the *Brown v. Board of Education* decision was part of a Communist conspiracy.<sup>181</sup> He would die in 1969, virtually forgotten.<sup>182</sup>

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<sup>168</sup> "Oil Man Says He Gave Wife \$40,000," *El Paso Herald Post* (June 30, 1943), 2.

<sup>169</sup> See *Seay v. Latham*, 182 S.W.2d 251 (Tex. 1944).

<sup>170</sup> See George N. Green, "Texas Regulars," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/wet02>.

<sup>171</sup> *Ibid.*

<sup>172</sup> See Robert Dallek, *Lone Star Rising: Lyndon Johnson and His Times 1908-1960* (Oxford: Oxford University Press, 1991), 338.

<sup>173</sup> "W. Lee O'Daniel, Former Senator and Governor of Texas is Dead," *New York Times* (May 12, 1969), 57.

<sup>174</sup> *Ibid.*

<sup>175</sup> Letter, James Allred to his father (April 2, 1943), Allred Papers, University of Houston.

<sup>176</sup> "O'Daniel Vote Appeal Drops to New Low Point," *Corpus Christi Caller-Times*, March 28, 1948, 46.

<sup>177</sup> "O'Daniel Will Quit Politics for Now," *Abilene Reporter News* (May 31, 1948), 1.

<sup>178</sup> *Ibid.*

<sup>179</sup> "W. Lee O'Daniel, Former Senator and Governor of Texas is Dead," *New York Times* (May 12, 1969), 57.

<sup>180</sup> George N. Green, "O'Daniel, Wilbert Lee [Pappy]," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fod11>.

<sup>181</sup> *Ibid.*

<sup>182</sup> "W. Lee O'Daniel, Former Governor and Senator Dies," *Amarillo Globe-Times* (May 12, 1969), 19.

O'Daniel's Senate retirement left the path open for two other contenders, Coke Stevenson and Lyndon Baines Johnson, to vie for the vacant Senate seat. The result is well known.

Johnson's eventual election to the Senate in 1948 leads to another twist in this story. On May 27, 1949, the *Houston Chronicle* reported that new U.S. Senator Lyndon Johnson was seeking to have Allred named to a newly created federal judgeship for the Southern District.<sup>183</sup> The *Chronicle* noted that a bill before Congress created the new post and reported Washington sources as saying the bill would be approved by July 31. The bill passed. On September 23, 1949, President Truman nominated James V Allred for one of the new district judgeships.<sup>184</sup> The other nomination went to Ben Connally, son of Senator Tom Connally.<sup>185</sup> Connally jointly proposed Allred's name with Johnson to Truman.<sup>186</sup> Without Pappy O'Daniel in the way, Allred was confirmed by the Senate on October 12, 1949 and commenced an almost ten-year second stint as a U.S. District Court Judge.<sup>187</sup>

This time Judge Allred sat on the bench in the Corpus Christi Division and provided judicial services in the border area.<sup>188</sup> He handled a heavy criminal docket, and many immigration cases.<sup>189</sup> While he was not seen as an intellectual judge,<sup>190</sup> he continued to try cases and move a docket along.<sup>191</sup> He had the good trial judge's ability to let the lawyers try their case and to be fair.<sup>192</sup> Trial lawyers want a judge who listens to both sides, has good judgment, and is one of them. By all accounts, Judge Allred fit that bill.

Sadly, Allred died at the relatively early age of fifty-nine. While hearing criminal cases in Laredo, Texas, he realized that he was sick. He knew that he had a heart problem and visited a doctor at lunch. The doctor told him that he should immediately go into a hospital because his heart was in bad condition. Allred told him that "if I do that those poor people are going to be in jail for months before they will be able to get a judge from Houston to come down here and clear the jails. I will just clear my docket this afternoon and go to the hospital right after."<sup>193</sup> Allred cleared the docket that afternoon. His wife and bailiff drove him to the hospital when court was over but as soon as he arrived at the hospital and was putting on a gown, he died.<sup>194</sup>

James V Allred may be one of only two men in history who left the federal bench to run for office and then was later reappointed to a federal judgeship. The other was Charles Evans Hughes, who resigned as a Justice on the U.S. Supreme Court to run against Woodrow Wilson, lost, and years later was appointed as Chief Justice of the Supreme Court.<sup>195</sup> Allred may be the

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<sup>183</sup> "Senator Johnson Reported Seeking Federal Judgeship for Allred," *Lubbock Morning Avalanche* (May 28, 1949), 15.

<sup>184</sup> "Allred Seen for Judgeship," *Abilene Reporter-News* (June 2, 1949), 4.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> James V. Allred, *Biographical Directory of Federal Judges*.

<sup>188</sup> Tidwell, "James V. Allred," 125.

<sup>189</sup> *Ibid.*, 96, 98-99.

<sup>190</sup> *Ibid.*, 91.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, 125.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> "Hughes, Charles Evans," *Biographical Dictionary of Federal Judges*, <https://www.fjc.gov/history/judges/hughes-charles-evans>.

only person who left the federal bench to run for a political office, was nominated and rejected for a federal judgeship, and later was nominated and confirmed for another federal judgeship.

By the testimony of the members of the Texas Bar who knew him, James Allred was an outstanding United States District Judge. He would have been an outstanding Fifth Circuit Judge. Yet his nomination faced the perfect political storm. Did Pappy O'Daniel's opposition cause Allred's rejection? One thesis says the answer is not definitive because the other alternative explanation is that the actions of the Louisiana Senators seeking a Louisiana judge played a hand.<sup>196</sup> Tradition says it was O'Daniel. The *Texas Bar Journal* obituary reporting Judge Allred's death includes this laconic statement: "[I]n 1943 Senator O'Daniel blocked his appointment as judge of the Fifth Circuit Court of Appeals."<sup>197</sup>

Yet from the vantage point of over seventy years, it appears that several factors stopped the nomination. Pappy O'Daniel's opposition was the least important one. O'Daniel was simply not respected enough to have a major effect on other Senators. An obituary of O'Daniel noted that he "won almost instant disapproval in wartime Washington" when he arrived in August 1941 to take his Senate seat. O'Daniel claimed that Roosevelt deliberately went out of town so as not to meet him. In fact, the President had gone to meet with Winston Churchill to establish the Atlantic Charter.<sup>198</sup> While Texas newspapers are full of items concerning O'Daniel's opposition to Allred's nomination, national newspapers focused on the Louisiana Senators' desire for a Louisiana man's nomination as well as anti-New Dealers' readiness to rebuke FDR. The *New York Times* obituary for Allred states that his nomination was blocked "as a rebuff to Roosevelt."<sup>199</sup>

Indeed, when O'Daniel tried to scuttle another judicial nomination he was sternly rebuked. In 1947, Tom Connally recommended Joe B. Dooley to President Truman for a federal judgeship in the Northern District of Texas. Truman submitted the nomination.<sup>200</sup> Dooley was a former President of the Texas Bar Association and, by all accounts, he was well respected and nonpolitical.<sup>201</sup> But O'Daniel was angry that he was not getting patronage and tried to block Dooley.<sup>202</sup>

It is interesting to review O'Daniel's comments on the Senate floor when he attempted to stop the nomination. Without proof, he charged that Dooley was a tool of railroad interests.<sup>203</sup> Moreover, O'Daniel was quoted as saying "this appointment of Dooley is just a diabolical plot of the New Deal Gang to try to purge me."<sup>204</sup> It might be noted that Lubbock was not known then or ever known as a hotbed of New Deal liberalism. The newspaper reporting on his speech observed that "before O'Daniel began his second day of speaking, it required more than twenty-two minutes to get a quorum of fifty-two senators. Few of them remained to hear him."<sup>205</sup> Without

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<sup>196</sup> Tidwell, "James V. Allred," 86.

<sup>197</sup> "James V. Allred Obituary," *Texas Bar Journal* 22 (1959): 664.

<sup>198</sup> "Senator Johnson Reported Seeking Federal Judgeship for Allred," *Lubbock Morning Avalanche* (May 28, 1949), 15.

<sup>199</sup> "James V. Allred of U.S. Bench 60, Federal Judge for South Texas, Dies," *New York Times* (September 25, 1959), 29.

<sup>200</sup> Goldman, *Picking Federal Judges*, 80.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> "Dooley Battle Rages," *Corsicana Daily Sun* (July 2, 1947), 2.

<sup>204</sup> *Ibid.*

<sup>205</sup> Goldman, *Picking Federal Judges*, 42.



Governor Allred is buried at the Riverside Cemetery in Wichita Falls. Image courtesy of Find-A-Grave website, <https://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=8649003>.

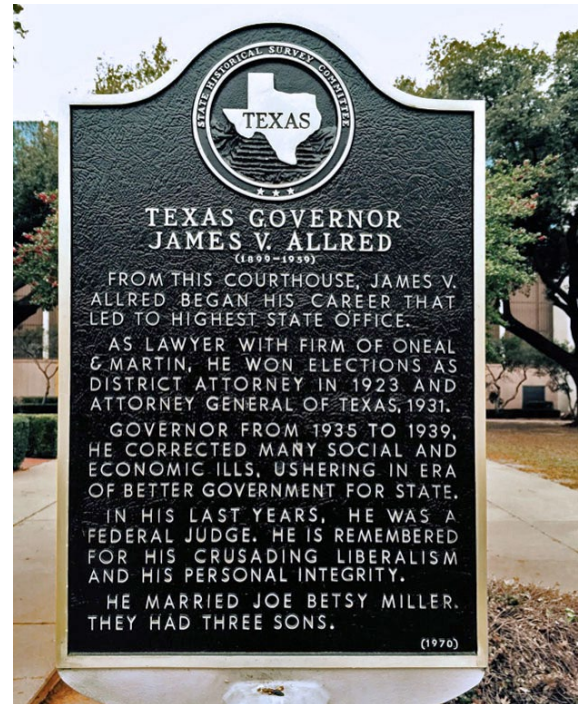


Photo by E. B. Hawley, in *Speaking of Historical Markers, Specifically About those in Wichita County* blog.<sup>207</sup>

the other complicating factors, the Senate Judiciary Committee voted 8–4 to refer Dooley to the full Senate. The Senate then voted to confirm Dooley 48–36.<sup>206</sup>

At the end of the day an able jurist was denied a judgeship on the Fifth Circuit. Perhaps it was for the best. James Allred had been an active Attorney General, Governor, and trial judge. Perhaps he would not have liked an appellate judge’s task of “grading papers.” He was probably better suited to be a trial judge. Today, a dwindling number of attorneys remember Judge Allred from his second stint on the federal bench, but there are enough to recall he was revered. One United States District Judge kept a photograph of Judge Allred in his chambers until the day he died to remind him what kind of judge he should be. He was a trial lawyer’s judge. To paraphrase South Texas trial lawyer Claude Carter, as a U.S. District Judge, Jimmie Allred “made tops.”

<sup>206</sup> *Ibid.*

<sup>207</sup> [http://speakingofhistoricalmarkers.blogspot.com/2015\\_02\\_01\\_archive.html](http://speakingofhistoricalmarkers.blogspot.com/2015_02_01_archive.html).

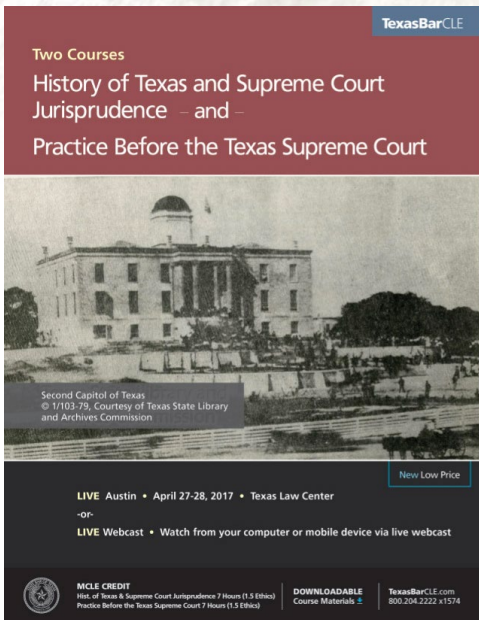


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# Society History Course Brings Law to Life

By Lynne Liberato



Cover of the brochure advertising the course.



Attendees in the Hatton Sumners meeting room at the Texas Law Center.

**A** reenactment of a historical appeal, lawyers reliving a landmark case, and grandsons bringing their Supreme Court justice ancestors alive were some of the presentations enjoyed by a room full of lawyers at the biannual History of Texas and Supreme Court Jurisprudence Course.

Held in April, the course marked the third time in six years that the Society sponsored such an event. The State Bar cosponsored the course, which was held in conjunction with the Practice Before the Texas Supreme Court seminar. Richard Orsinger and I were course directors for both programs.

One of the highlights of the day was the reenactment of oral argument in *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925). The nation's first All-Woman Court was appointed to hear the case when all of the Texas Supreme Court's male judges were disqualified because of their membership in Woodmen of the World, an early insurance company that was the Respondent on appeal. This was the second time the Society presented an All-Woman Court reenactment, which premiered at the 2016 State Bar Annual Meeting in Fort Worth.

Fifth Circuit Judge Jennifer Elrod was cast in the role of Special Chief Justice Hortense Sparks Ward and Justice Debra Lehrmann and former Justice Harriet O'Neill completed the panel



Top, left to right: former Justice Harriet O'Neill, Judge Jennifer Elrod, and Justice Debra Lehrmann listen to oral argument in *Johnson v. Darr*. Photo by David A. Furlow.  
Bottom: Doug Alexander dazzles the Court. Photo by Lynne Liberato.

as Justices Hattie Henenberg and Ruth Brazzil. David Keltner and Doug Alexander reprised their earlier roles as the advocates before the court, while David Furlow presented a PowerPoint to set the historical stage for the presentation. Linda Hunsaker of Houston, a descendant of Chief Justice Ward, loaned the panel the gavel, shown at the center of the top photo above, which her ancestor Hortense used during oral argument in 1925.

A panel of Fifth Circuit Judge Priscilla Owen, Larry Cotton, Wayne Fisher, and Mike Hatchell shared memories and sparred over the implications of *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995), the Texas Supreme Court opinion that marked a turning point in Texas law governing the admissibility of expert witness testimony. Judge Owen was a member of the five-justice majority serving on the Court when it decided the case; Wayne Fisher represented the plaintiff, while defense counsel Larry Cotton and Mike Hatchell represented DuPont.





Left to right: defense counsel Larry Cotton, plaintiff's counsel Wayne Fisher, Fifth Circuit Judge Priscilla Owen, and defense counsel Mike Hatchell analyze *Du Pont v. Robinson*. Photo by Lynne Liberato.

Other presentations centered on respected justices and colorful characters. Marilyn Duncan talked about Chief Justice Jack Pope's personal and professional history. Her theme was that Justice Pope was a common law judge and an uncommon man. As a dear friend of his, she brought her unique observations about the life and character of Chief Justice Pope, who died earlier this year at the age of 103. Ben Mesches complemented her presentation with an analysis of some of the important opinions authored by Chief Justice Pope.



Left: Marilyn Duncan describes the life of Chief Justice Jack Pope as course organizers Richard Orsinger and Lynne Liberato listen.  
Right: Ben Mesches analyzes Chief Justice Pope's opinions.



As for colorful characters, Justice Ken Wise told tales of the first judges in Texas, including "Three-Legged Willie" Robert McAlpin Williamson of San Felipe de Austin and Benjamin Cromwell Franklin, the Republic of Texas's first district court judge. Justice Wise told how the Republic's interim president, David G. Burnett, appointed Franklin to hear the admiralty case that arose in 1836 when the captain of the Texas schooner *Invincible* boarded and seized the American brig *Pocket*.



Left: Fourteenth Court of Appeals Justice Ken Wise tells colorful stories about the earliest judges in Texas. Right: The Texas Navy's vessel *Invincible*.

Dylan Drummond talked about the seven men who later became Texas Supreme Court justices after fighting in the Texas Revolution. In his words, they were the “seven who bled in the boggy marches of San Jacinto to ensure that the Supreme Court could be founded.”

Dylan Drummond guided the audience through the Battle of San Jacinto and introduced the Republic judges who fought in the battle. Henry McArdle's *Battle of San Jacinto* commemorates Sam Houston's victory.



David Furlow's presentation "Theodora Hemphill's Guide to the Texas Constitution," used the life of the first chief justice's daughter, whose mother was his slave, to present a personal history of slavery law in Texas. "Theodora's life," said Furlow, "sheds new light on the influences and dilemmas that shaped Chief Justice John Hemphill's jurisprudence and, through him, that of the jurisprudence of the Texas Supreme Court."

**John Hemphill and Sabina**

**December 1, 1844:** Chief Justice Hemphill bought Sabina, a slave. Sabina becomes Hemphill's surrogate wife, similar to President Thomas Jefferson's relationship with Sally Hemings.

**1847:** Daughter Theodora's birth.

**1849:** Daughter Henrietta's birth.

**1858:** Sabina dies, leaving Hemphill with two girls and, according to some sources, a son.



David Furlow told the story of Chief Justice John Hemphill's unconventional family. Photo by Lynne Liberato.

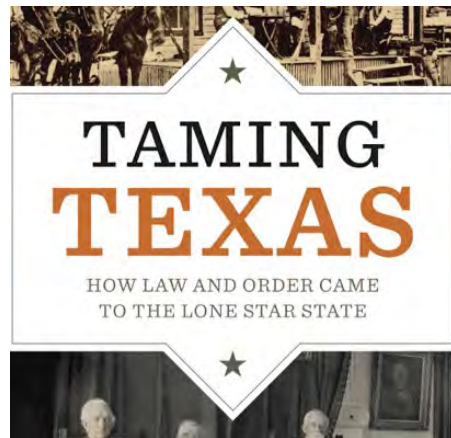
Other speakers offered substantive historical analyses of key laws. Family lawyer Jo Jenkins reviewed the history of child custody legislation in Texas “from the perspective of a woman born in 1950 who has toiled exclusively at family law for thirty-five years.” Chad Baruch presented the history of the Texas Petition Clause.

Warren Harris told the audience about the “Taming Texas” project. Sponsored by the Fellows of the Supreme Court Historical Society, the book and judicial civics program are designed to help seventh graders understand how the Texas court system works and how the history of the courts is intertwined with the rest of Texas history. Harris outlined the background of the project and plans for additional books.

The last panel focused on the history of the Texas Supreme Court during Reconstruction. Bill Ogden and Colbert Caldwell shared personal observations about their great grandfathers, both of whom were on Reconstruction Texas Supreme Courts. Both lawyers gave touching tributes and told harrowing stories about their ancestors, who served on the Court in the difficult years after the Civil War. Judge Mark Davidson defended the integrity and courage of the so-called “Semicolon Court,” which has been disparaged because its members were appointed by an



Left: Jo Jenkins. Photo by David A. Furlow. Right: Chad Baruch. Johnson, Tobey, Baruch website.



Warren Harris discusses the success of the Society's Taming Texas program. Photo by David A. Furlow.



Left to right: Judge Mark Davidson, Bill Ogden, and Colbert Coldwell defend the actions and integrity of the Reconstruction Supreme Courts. Photo by Lynne Liberato.



anti-Confederate governor and ruled that a semicolon determined the outcome of the election of Texas's governor in 1873.

The Society began organizing jurisprudence symposiums in 2013 as part of its educational mission. While no date has yet been set, the Society is likely to schedule its next symposium in 2019.

Descendants of Judge Colbert Coldwell came from San Antonio and El Paso to hear a vindication of the Reconstruction Courts. Photo by David A. Furlow.



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• On the Road with Texas History •  
**Exploring German and B-Movie Texas**

By David A. Furlow

**L**et's have some fun. Let's go on the road again. Let's search for the Texas history we didn't learn about in school. Along the way we'll see some notable architecture, look at some fine art, examine a fine piece of furniture, and take a gander at some memorable movies.

**Exploring German Texas at Bayou Bend and the Museum of Fine Arts Houston.**

There's no better way to understand daily life among the nineteenth- and twentieth-century elites who shaped Texas culture than to visit the Bayou Bend Collection and Gardens in Houston. Bayou Bend houses a superb collection of American and Texas decorative paintings, sculpture, photography, arts, and material culture, including everything from seventeenth-century Dutch ceramics to frontier chairs fashioned from the long horns of longhorn cattle to stunning table settings from some of River Oaks' most sumptuous, early twentieth-century mansions.



Website photo of Bayou Bend by Rick Gardner in memory of Mary Gardner.

Starting out as a 1927 mansion owned by Texas Governor James Stephen Hogg's extraordinarily-named daughter, Ima Hogg, and her two brothers Will and Mike, Bayou Bend and the Museum of Fine Arts Houston present the David B. Warren Symposium to honor Bayou Bend's founding director emeritus to examine different aspects of "American Material Culture and the Texas Experience." There's no better place to teach out-of-state visitors the lesson that *nothing exceeds like excess* than by showing them an amazing chair that represents the confluence of German and Texas cultures in Bayou Bend's Texas Room.



*Rocking Chair*, in the Texas Room at Bayou Bend.  
Photo by David A. Furlow.

Let's begin with Wenzel Friedrich's *Rocking Chair*. Born in Bavaria, Germany, Friedrich crafted his unique easy chair in San Antonio between 1880 and 1890.<sup>1</sup> At a time when wealthy foreigners and aspiring Texans were fascinated by the Lone Star State, Wenzel crafted this Texas original from longhorns, horn veneers, a jaguar's hide, fine woods, iron, and chrome.

Friedrich was a cabinet- and furniture-maker who settled in San Antonio in 1880. He advertised this kind of chair as an "extra large easy chair" in newspapers.<sup>2</sup> It reflects the many contributions Texas's German immigrants made to the material culture of the Lone Star State. He and other Germans brought European traditions of craftsmanship, then gave them a unique Lone Star twist.

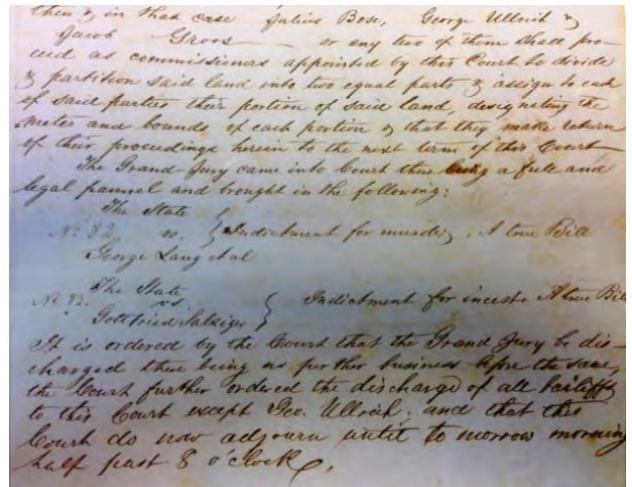
Houstonian William J. Hill gave *Rocking Chair* to the Houston Museum of Fine Arts a century later, in 1983. In addition to Bayou Bend's *Rocking Chair*, two other examples of Friedrich's 1880s-era chairs are found at the Buckhall Hall of Horns in

San Antonio, while another is displayed at Dodge City's Boot Hill Museum. I have no doubt that some prominent Texas lawyers wrote briefs, and judges and justices read them, while sitting in these unique expressions of late nineteenth-century Texana.

**Cruising through Sisterdale.** Seeing Friedrich's *Rocking Chair* at Bayou Bend made me want to learn about the lives of nineteenth-century Germans who landed in Indianola and traveled northwest to Sisterdale, New Braunfels, Weimar, Comfort, and Fredericksburg. Those Germans won renown for their beer brewing, winemaking, commitment to higher education, agricultural industriousness, fervent opposition to slavery, and efforts to bind their frontier communities with the rule of law.

<sup>1</sup> Houston Museum of Fine Arts, "Wenzel Friedrich Rocking Chair," <https://www.mfah.org/art/detail/7091?returnUrl=%2Fart%2Fsearch%3Fartist%3DWenzel%2BFriedrich%257CUnknown%2Bculture>.

<sup>2</sup> The National Texas Longhorn Museum, "The Buckhorn, Wenzel Friedrich & Billie Keilman's Horn Palace," <http://www.longhornmuseum.com/buckhornfriedrichkeilman.htm>.



Left: This nineteenth-century German *Neu Braunfelscher Zeitung*, or *New Braunfels Newspaper*, recorded a bloody shootout resulting in the death of Texas Ranger Captain James H. Callahan. Photo of newspaper in the Sophianeberg Museum in New Braunfels by David A. Furlow.  
 Right: Grand jury indictment of Comal County Justice of the Peace George Lang for murder. Photo of original Comal County records by David A. Furlow.

Last autumn my colleagues and I agreed to dedicate a future issue of this journal to German influences on Texas law and litigation.<sup>3</sup> To learn more about those influences, I attended Bayou Bend's 6<sup>th</sup> Biennial David B. Warren Symposium, "Traditions in Transition: Change and Material Culture in Nineteenth-Century Texas, the Lower South, and the Southwest." The scholars who spoke there discussed the lives of reform-oriented "Forty-Eighters" who settled in Sisterdale, the "Latin Colony" whose residents often spoke and debated that classic language. Its German immigrants included journalist Dr. Carl Adolph Douai, publisher August Siemering, who later organized the *San Antonio Express News*, and vintner Julius Dresel, who planted the first vineyards and later pioneered winemaking in Sonoma County.<sup>4</sup>

Frederick Law Olmsted, the writer, journalist, naturalist, abolitionist and landscape architect who created Central Park, visited Sisterdale in 1854. He observed how leading citizen Ottmar von Behr administered justice in that frontier settlement:

A few minutes brought us to the judge's house, a double log cabin, upon a romantic rocky bluff of the Guadalupe. He came out to receive us, and after converting his dining-room into a temporary courtroom, for the reception of the legal arrival, resumed his long pipe, and gave us a special reception in his own apartment.... Court over, our host rejoined us. The case had been one of great simplicity, to fix the value of the dog that had been shot and to reconcile all parties.<sup>5</sup>

That was justice in a German village on the nineteenth-century Texas frontier. Olmsted observed that "[Behr's] house was the very picture of good-nature, science and the backwoods,"

<sup>3</sup> Terry G. Jordan, "Germans," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/png02>.  
<sup>4</sup> Glen E. Lich, "Sisterdale, TX," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/hns51>; Marjorie Hagy, "The History of Sisterdale, Texas," *Explore Magazine* (2001), <http://www.hillcountryexplore.com/?p=4267>.  
<sup>5</sup> Frederick Law Olmsted, *A Journey Through Texas: Or, A Saddle-trip on the South-western Frontier, with a Statistical Index* (New York: Dix, Edwards & Co., 1857), 192–93.

where romance novels, books of philosophy, and a harpsichord competed with a dozen firearms, dried snakeskins, powder-horns, and a bag of Saxon wool.<sup>6</sup>

Karl Friedrich Hermann Lungkwitz memorialized this immigrant world in his atmospheric paintings. He wasn't born in Texas, but came after a revolution made him a wanted man in Germany. Born on March 14, 1813 in the town of Halle, in the principality of Saxony-Anhalt, he grew up in the home of a craftsman, hosiery manufacturer Johann Gottfried Lungkwitz and his wife Friederike Wilhelmine (Hecht) Lungkwitz.<sup>7</sup> Yes, you read that name right: artist Karl Friedrich Hermann Lungkwitz's mother may be related to Supreme Court of Texas Chief Justice Nathan Hecht.

Karl Lungkwitz enrolled at the Dresden Academy of Fine Arts, in eastern Germany, studied there from 1840 to 1843, earned his academic certificate of achievement in 1843 for a sketch of the Elbe River, then devoted the next three years of his life to honing his painting in the Salzkammergut among the Northern Limestone Alps of Bavaria. Dreaming of reforming the government by compelling King Frederick Augustus II to transform his kingdom into a constitutional government, Lungkwitz joined his brother-in-law Friedrich Richard Petti and other students to launch a May 1849 revolution in Dresden. When the going got rough in that failing revolution, Lungkwitz and Petti got going. They immigrated to the United States in 1850, landed in New York City, and went to Texas in 1851.



Top: Sisterdale's century-old dance hall shows where immigrants preserved the culture of their native Germany. Bottom: A large audience filled the Brown Conference Hall at the Museum of Fine Arts Houston's Carolyn Wiess Hall Building on February 28, 2017. Photos by David A. Furlow.

<sup>6</sup> *Ibid.*

<sup>7</sup> James Patrick McGuire, "Lungkwitz, Karl Friedrich Hermann," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/flu11>.





Hermann Lungkwitz's painting, *Hill Country Landscape* (detail), 1862.<sup>8</sup>

Once in Texas, Lungkwitz and Petti bought a 320-acre farm for \$400 in Pedernales, Texas, near Fredericksburg, and settled down to farming and cattle ranching. Lungkwitz began painting Enchanted Rock, Round Mountain, Marble Falls, Sisterdale, New Braunfels, and Hamilton Pool, among other places near San Antonio and Austin. He painted his *Hill Country Landscape*, above, in 1862. Now displayed at Bayou Bend, *Hill Country Landscape* depicts a cave along a cypress-fringed Central Texas river, probably the Comal or the Blanco.

Lungkwitz supplemented his income by running a San Antonio photographic studio from 1866 to 1870. He moved to Austin in 1870 to become the chief photographer of the Texas General Land Office until the end of Republican Reconstruction Governor Edmund J. Davis's administration in 1874. He died in Austin on February 10, 1891, and is buried next to his wife Elizabeth in Austin's Oakwood Cemetery. Lungkwitz and his neighbors in Central Texas shaped Texas law and life. Unlike Sisterdale's country-loving Justice of the Peace Ottmar von Behr, Lungkwitz preferred city living in the Lone Star State's capital.

<sup>8</sup> Oil on canvas, Museum of Fine Arts Houston, the Bayou Bend Collection, gift of Miss Ima Hogg, B.67.39, <https://www.mfah.org/art/detail/11638>.

Now fast-forward a century and take another look at Wenzel Friedrich's *Rocking Chair*. As beautifully crafted as it is, it still looks a little kitsch, as if it once might have supported Slim Pickens's slow-drawling, cowboy-hat-wearing B-52 pilot character, Texas-born Major "King" Kong. It's easy to imagine Pickens falling back into that Texas easy chair before riding *Dr. Strangelove's* H-Bomb onto a Russian missile base and starting World War III.

**Watching Lone Star movie history in Austin.** *Dr. Strangelove* is part of Texas history, too, as you'll see at the Bob Bullock Texas History Museum in Austin. A short film, *Texas in the Movies*, offers one of the fastest drive-throughs in the Lone Star State. Beginning in Galveston with Thomas Alva Edison's documentary about the devastating 1900 hurricane, *Texas in the Movies* celebrates the lives of cowboys and cowgirls, remembers Crockett, Travis, and Bowie's defense of the Alamo in a score of films, celebrates *Giant's* take on 1950s ranching, oil, and civil rights, and ends with Slim Pickens hootin' and hollerin' his way down while riding an H-bomb to *Dr. Strangelove's* nuclear apocalypse.

But why should Texas history end with the end of the world? The Bob Bullock Museum is offering a free, history-themed tour of the Good, the Bad, and the Bigly of Texas film from 7:00 to 8:30 p.m. on September 14, 2017: "B Movies and Bad History Texas through the World's Eyes."<sup>10</sup>

The tour will be led by University of Texas Liberal Arts Professor and *Texas Monthly* contributing author Don Graham, author of *No Name on the Bullet: A Biography of Audie Murphy* (New York: Viking Pub. Co., 1989), *Cowboys and Cadillacs: How Hollywood Looks at Texas* (Austin: Texas Monthly Press, 1983); and *Kings of Texas: The 150-Year Saga of an American Ranching Empire* (2003).

B movies and some exceptional films have long contributed to Texas's economy and legal culture. Dr. Graham could begin his program by discussing *Piranha*, a 1978 B-movie classic set in the heart of the German Hill Country. *Piranha* was an influential but inexpensively produced New World Pictures film produced by Roger Corman, directed by Joe Dante, and written by John Sayles. A sly parody of Steven Spielberg's 1975 blockbuster *Jaws*, it tells the lurid tale of "Operation Razortooth," the U.S. Army's secret plan to defeat the Viet Cong by filling Southeast Asia's rivers with the flashing fins, needle-sharp teeth, and genetically-enhanced viciousness of the Amazon's most fearsome predator.

*Piranha* explores landowner liability, governmental immunity, and trespassing. It begins when



Slim Pickens playing B-52 pilot Major "King" Kong in Stanley Kubrick's 1964 film *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*, Wikipedia.<sup>9</sup>

<sup>9</sup> "Slim Pickens," *Wikipedia*, [https://en.wikipedia.org/wiki/File:Slim-pickens\\_riding-the-bomb\\_enh-lores.jpg](https://en.wikipedia.org/wiki/File:Slim-pickens_riding-the-bomb_enh-lores.jpg) (contrast enhanced and lower resolution); original source, *Photobucket*, [http://i229.photobucket.com/albums/ee277/jefferyhodes/Slim-pickens\\_riding-the-bomb\\_enh-lo.jp](http://i229.photobucket.com/albums/ee277/jefferyhodes/Slim-pickens_riding-the-bomb_enh-lo.jp)

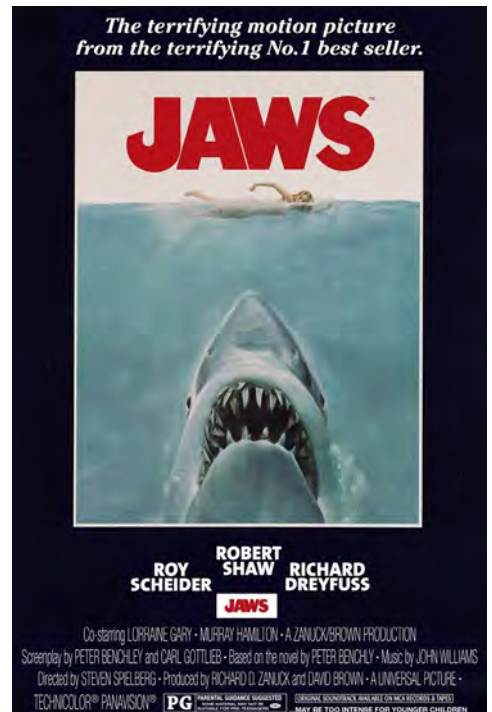
<sup>10</sup> Bullock Museum, "B Movies and Bad History Texas through the World's Eyes," <https://www.thestoryoftexas.com/visit/calendar/b-movies-and-bad-history-texas-through-the-worlds-eyes-20170914>.

two teenagers decide to go skinny-dipping in the swimming pool of an abandoned military installation at a fish hatchery. Dark waters churn and the teenagers disappear under the surface. A startled but disheveled scientist, seen in silhouette, arrives too late to save the trespassers. Soon after, an addled insurance company agent investigating the disappearance of the two teenagers discovers the mysteriously abandoned pool.

The insurance investigator stumbles across large but bizarre fish specimens preserved in a variety of glass jars. Intent upon determining whether the teenagers drowned in the dark waters of the pool, she throws a drainage switch. The scientist attacks the insurance investigator to end the pool-draining just as it reveals two skeletons at the bottom. A thrashing swarm of hungry, mutant, super-predators cascade into a river that looks like the Blanco attacking residents along the banks of a little town that resembles Wimberley. They slice and dice everyone until they reach a river resort that looks exactly like San Marcos. Will the razor-toothed fish chomp their way through students floating on flimsy tubes near Texas State? Will killer-fish fight their way down to the Gulf and infest the seas, rivers, and lakes of the world?

*Piranha's* release almost led to litigation. Universal Studios, the production company that made *Jaws*, considered seeking an injunction against distribution of a film its executives viewed as a blatant rip-off of its shark movie. But Stephen Spielberg, who considered *Piranha* "the best of the *Jaws* rip-offs," convinced the studio not to sue.<sup>11</sup> The movie-review aggregator *Rotten Tomatoes* gave the film a 72 percent positive rating based on reviews by twenty-five critics.

*Piranha's* profitability led to a 1995 remake and the release of *Piranha 3D* in 2009. It helped make Central Texas a mecca for independent film producers. The commercial success of *Piranha* and other films led Bellaire native Richard Linklater, later a resident of Austin, to make such films as *Slacker* (1991) and *Dazed and Confused* (1993), set in Texas, as well as the romantic trilogy of *Before Sunrise* (1995), *Before Sunset* (2004), and *Before Midnight* (2013).



The piranha in *Piranha's* movie poster<sup>12</sup> bore no resemblance whatsoever to the Great White Shark in *Jaws's* movie posters.<sup>13</sup>

<sup>11</sup> Joseph McBride, *Steven Spielberg: A Biography* (Cambridge, Mass.: DeCapo Press, 1999), 257.

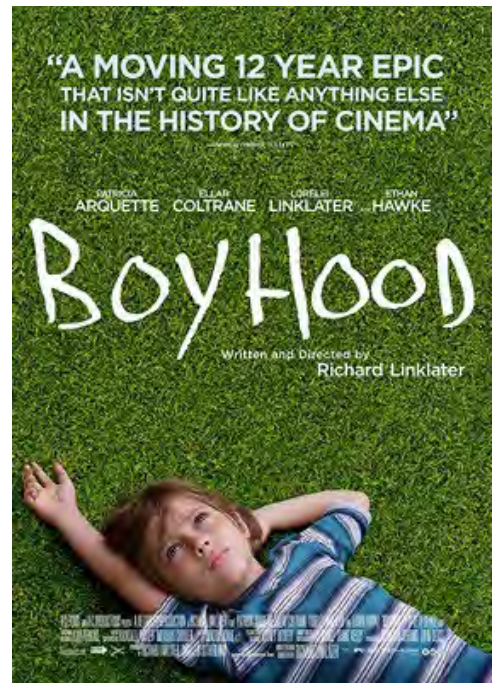
<sup>12</sup> Wikipedia, "Piranha," <https://en.wikipedia.org/wiki/File:PiranhaPosterA.jpg> (low-resolution image display under fair-use doctrine), accessing Posterwire.com image at <http://posterwire.com/category/exploitation/>.

<sup>13</sup> Wikipedia, "Jaws," [https://en.wikipedia.org/wiki/Jaws\\_\(film\)#/media/File:JAWS\\_Movie\\_poster.jpg](https://en.wikipedia.org/wiki/Jaws_(film)#/media/File:JAWS_Movie_poster.jpg) (low-resolution image display under fair-use doctrine), accessing Posterwire.com image at <http://www.posterrevolution.com/products/jaws-poster-24-x-36in.html>.

Linklater's Central Texas cinematic experiments culminated in *Boyhood*, his semi-biographical, coming-of-age film about growing up in Texas. Filmed in Austin, San Marcos, New Braunfels, and Houston from 2002 until 2013, it starred Patricia Arquette, Ellar Coltrane, Lorelei Linklater, and Ethan Hawke. *Boyhood* received six Academy Award nominations in 2014, won Golden Globes for Best Motion Picture-Drama and Best Director, and earned Patricia Arquette both a Golden Globe and an Academy Award for Best Supporting Actress as a young mother struggling to raise her son in a chaotic family situation.

That's about it. Time to turn off the tube, leave the Hill Country behind, take Highway 71 back through Central Texas, drive down I-10 and return to Bayou Bend. We've come full circle after a voyage of discovery through the history of German and cinematic Texas history.

I'll see you again in the next issue of the *Journal*.



*Boyhood* movie poster.<sup>14</sup>

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<sup>14</sup> Wikipedia, "Boyhood," [https://en.wikipedia.org/wiki/File:Boyhood\\_film.jpg](https://en.wikipedia.org/wiki/File:Boyhood_film.jpg), original source, <https://en.wikipedia.org/wiki/User:Hihono>.

**DAVID FURLOW** is a *First Amendment lawyer, a historian, an archaeologist, and a journalist.*

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Hill Country wildflowers photo by David A. Furlow.



# Wes Ferguson's *Blanco River* is a Treasure

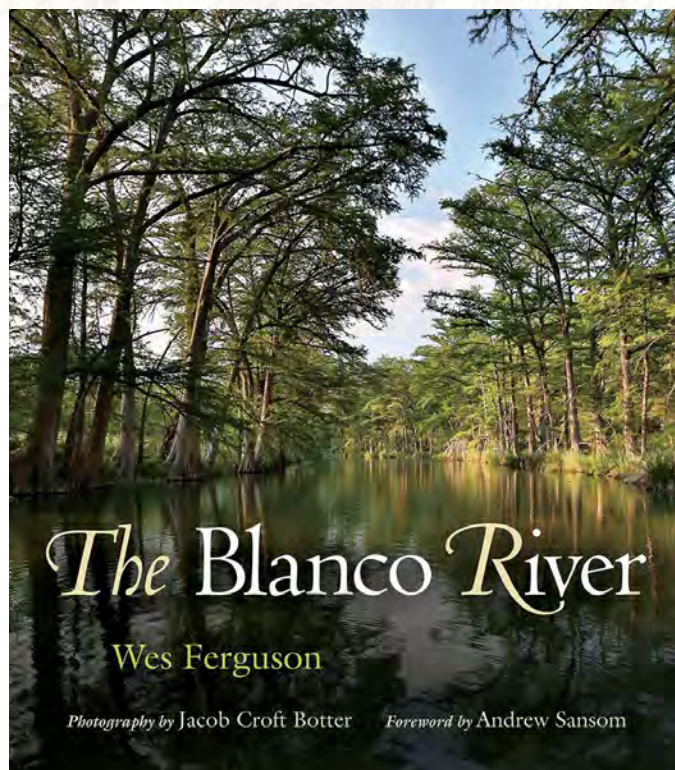
Book Review by David A. Furlow

"A river is more than an amenity," Justice Oliver Wendell Holmes declared in *New Jersey v. New York*, 283 U.S. 336, 342 (1931). "It offers a necessity of life that must be rationed among those who have power over it." In cold, legal terms, Justice Holmes was right—a river is more than an amenity or a resource. Yet those of us who live along a river bank, as I do, recognize an even deeper truth. The Blanco River is a living, breathing being, waxing and waning like the moon, peaceful and placid most of the time, yet increasingly a restless spirit furious in one rising flood tide after another.

Beautifully illustrated by nature photographer Jacob Croft Botter, Wes Ferguson's book, *The Blanco River*, explores the river's geography, history, and inhabitants in depth as travelogue and searching inquiry. Ferguson begins by examining the *nature* of the river he and Botter walked, paddled, and floated while producing this work:

In Texas, where there is not enough water to go around, even small streams are worth fighting for. Especially the Blanco, which has been described as the "defining element of some of the Texas Hill Country's most beautiful scenery."

It's true. The Blanco can be breathtakingly pretty, as long as you know where to look. The stream courses through sheer canyons, rolling hills, and flat, green valleys. On lazy afternoons, visitors enjoy cool flows and clear green swimming holes where bald cypress trees and craggy limestone bluffs offer much-needed shade. Before achieving national infamy for a flood that struck on the Memorial Day weekend of 2015, the Blanco was mostly known as an idyllic summer retreat and low-key tourist destination.



## ***The Blanco River***

By Wes Ferguson,

photographs by Jacob Croft Botter  
College Station: Texas A&M University Press,  
February 2017

184 pages

<http://www.tamupress.com/product/Blanco-River.8821.aspx>

That's spot-on.

Ferguson moves on to discuss the eighty-seven-mile waterway that first entered history on April 16, 1709, when Franciscan friar Isidro Félix de Espinosa described it as “an arroyo with little water” encountered after tramping through a forest of mesquite clumps and elms.

I like to picture Espinosa standing on the south bank of the Blanco, on a limestone bluff overlooking the whitewashed gravel and pale stone of the riverbed. He probably wore a long, loose tunic of dark twilled wool. His shaven head must have peeled with sunburn.

One can see the earnest Spaniard comparing this dry-landscape stream to the Guadalquivir and Ebro of his arid homeland. Later conquistadors named it Rio Blanco, or White River, because of the milky color of its staircase limestone ledges and glistening banks.

The Blanco evolved into a stream of commerce during the 1850s, when San Marcos cattleman General John D. Pitts and Captain James Hughes Callahan, the Texas Rangers' éminence grise, organized the 120-acre town of Pittsburg along the south bank of the river. After a bloody shootout that brought Captain Callahan's tempestuous life to a double-barreled conclusion, General Pitts's Pittsburg settlers crossed the river and re-founded their settlement on the north side as the modern town of Blanco.

The middle chapters chronicle the ways Texas law shaped the river's development. Without bogging the lay reader down in the intricacies of case styles and South Western Second citations, Ferguson accurately describes the Texas Supreme Court's 1904 “rule of capture” as a rule that “means that whoever has the biggest straw can take the biggest drink.” He notes that an early twentieth century rule that the origins and course of groundwater were too “secret, occult, and concealed” for human beings to understand seems especially dated considering that frackers earn multi-million-dollar fortunes mapping geological structures thousands of feet beneath the surface.

This is the second book journalist Wes Ferguson has written for Texas State University's Meadows Center for Water and the Environment. In *Running the River: Secrets of the Sabine* (College Station: Texas A&M University Press, 2014), Ferguson told the story of the waterway that separated his native East Texas from the United States along the Louisiana border, with all its swamps, alligators, and mosquitos. Before running the Sabine River, Ferguson explored stories about people, wildlife, and the environment for *Texas Monthly*, *Texas Observer*, and the *Longview News-Journal*.

The last chapters of *Blanco River* describe the 44.9-foot Memorial Day Flood of 2015 that inundated much of Wimberley, Kyle, and San Marcos, toppled hundreds of stately cypresses, and tragically took the lives of twelve people. The voices of Fischer Store Road, Wimberley, and Kyle residents lend poignancy to life along the river. A fast-paced description of the quiet little river that raged recalls the reasons ancient Europeans feared and revered the feminine riverine deities they named the Marne (for *Matrona*, “mother”), Boyne (for the goddess *Boann*), Severn

(goddess *Sabrina*), Danube, Don, and Dnieper (after mother *Danuna*).

In Ferguson's narrative, Federal Emergency Management Agency floodplain-surveyors and U.S. Army Corps of Engineers hydrologists were the Kassandras who accurately foretold the risk of disastrous flooding in the 1980s, only to be ignored or silenced by Hays County Commissioners, wealthy Wimberley residents, and U.S. Senator Lloyd Bentsen. "It was a Pyrrhic victory for the people of Wimberley and Hays County. The floodplain maps developed by the US Army Corps of Engineers, and scrapped at Hays County's insistence in 1993, eerily foreshadow the catastrophic flood that was to come on a holiday weekend two decades in the future."

If you're interested in learning how law, legislation, and lore reveal the realities of riverine life in Texas, you won't want Wes Ferguson's book to be the one that got away. It's a great read.

**DAVID A. FURLOW** is a First Amendment lawyer, a historian, an archaeologist, and a journalist. He began reading *The River Blanco* while sitting in the swing pictured here as the Blanco flowed past his Wimberley backyard.



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# U.S. Seventh Circuit Chief Judge Diane P. Wood Will Keynote Hemphill Dinner

**T**he Honorable Diane P. Wood, Chief Judge of the United States Court of Appeals for the Seventh Circuit, will be the principal speaker at the Texas Supreme Court Historical Society's Twenty-Second Annual John Hemphill Dinner. The dinner, which is the Society's main fundraising event, is scheduled for Friday, September 8, 2017, at the Four Seasons Hotel in Austin.

Judge Wood has a strong connection with Texas. In 1968, she graduated as valedictorian from Westchester High School in Houston. She graduated from the University of Texas's Plan II Honors Program in 1971 with highest honors and special honors in English. She earned her J.D. with highest honors from UT Austin in 1975 after serving as Notes and Comments Editor of the *Texas Law Review* and after winning the Outstanding Senior Law Student Award. After graduation, she clerked for Judge Irving L. Goldberg of the Fifth Circuit and for Justice Harry A. Blackmun of the U.S. Supreme Court. She was among the first women to clerk at the Supreme Court.

From 1993 until 1995, Judge Wood served as deputy assistant general in the Antitrust Division of the U.S. Department of Justice with responsibility for the Division's International, Appellate, and Legal Policy matters. Before her appointment by President Bill Clinton as Judge of the U.S. Court of Appeals for the Seventh Circuit in 1995, she was the Harold J. and Marion F. Green Professor of International Legal Studies at the University of Chicago Law School. She remains a Senior Lecturer at the UC Law School.

Judge Wood, a noted legal scholar, has written extensively in many areas of the law. The titles of her articles offer a glimpse at her interests: *Deconstructing the Foreign Trade Antitrust Improvement Act (FTAIA)* (2016), *The Changing Face of Diversity Jurisdiction* (2009), *The Bedrock of Individual Rights in Times of Natural Disaster* (2008), *"Original Intent" Versus "Evolution"* (2005), and *Our 18<sup>th</sup> Century Constitution in the 21<sup>st</sup> Century World* (2005). Outside the legal realm, she has played the oboe and English horn as a member of the Chicago Bar Association Symphony for more than two decades.

Macey Reasoner Stokes, 2016–17 Society president, will preside over the evening program at the Hemphill Dinner, which will include a presentation by the Texas Center for Legal Ethics of





the Ninth Annual Chief Justice Jack Pope Professionalism Award. The award recognizes a Texas appellate lawyer or judge who demonstrates the highest level of professionalism and integrity.

For ticket information, visit the Society's website at <http://www.texascourthistory.org/hemphill> or email [tschs@sbcglobal.net](mailto:tschs@sbcglobal.net).

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Hill Country wildflowers photo by David A. Furlow.



# Nominations Welcomed for the Texas Appellate Hall of Fame

**T**he Appellate Section of the State Bar of Texas, in cooperation with the Texas Supreme Court Historical Society, is now accepting nominations for the Texas Appellate Hall of Fame. The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas.

Hall of Fame inductees will be honored at a ceremony and reception held in conjunction with the Appellate Section's annual meeting on Thursday, September 7, 2017, immediately following the conclusion of the State Bar's Advanced Civil Appellate Practice course for that day.

**Nominations should be submitted in writing to [halloffametx@outlook.com](mailto:halloffametx@outlook.com) no later than Friday, July 14, 2017.**

An individual's nomination in a prior year will not necessarily carry over to this year. As a result, if you nominated someone previously and would like to ensure his/her consideration for induction this year, you should resubmit the nomination and nomination materials.

Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nomination (including the nominee's unique contributions to the practice of appellate law in the state). The more comprehensive the nomination materials, the better. All material included with any nomination will be forwarded to the voting trustees for their consideration in deciding whom to induct as part of this year's Hall of Fame class.

Nominations will be considered based upon some or all of the following criteria, among others: written and oral advocacy, professionalism, faithful service to the citizens of Texas, mentorship of newer appellate attorneys, pro bono service, participation in appellate continuing legal education, and other indicators of excellence in the practice of appellate law in Texas.

For more information, contact Jackie Stroh at [jackie@strohappellate.com](mailto:jackie@strohappellate.com).

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# Auld Lang Syne, Pat

By the *Journal* staff

**A**true-born son of Scotland once wrote a poem remembered throughout the world every New Year's Eve. Translated from Scottish into English, those words commemorate the importance of friendships that transcend the years:

*Should old acquaintance be forgot,  
and never brought to mind?  
Should old acquaintance be forgot,  
and old lang syne?*

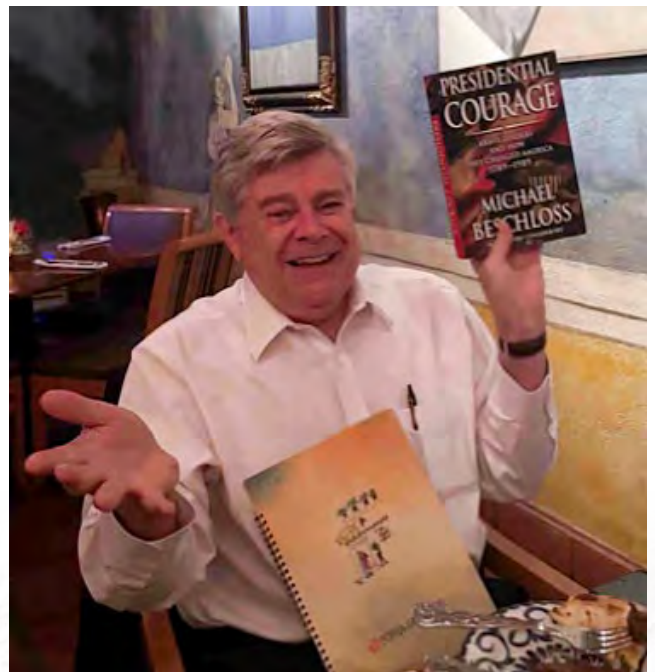
Bobbie Burns's poem came to mind in late May when the *Journal* staff thanked Pat Nester for four years' service as Executive Director of the Texas Supreme Court Historical Society. The group gathered at an Austin institution, Fonda San Miguel. After sharing great Mexican food and stories of TSHA annual meetings, book projects, *Journal* production, and much more, everyone signed and presented Pat with Michael Beschloss's best-seller *Presidential Courage*.

Pat, your friends wish you the best in all of your future adventures, wherever they may take you:

*We two have paddled in the stream,  
from morning sun till dune;  
But seas between us broad have roared  
since auld lang syne.*

*And there's a hand my trusty friend!  
And give me a hand o' thine!  
And we'll take a right good-will draught,  
for auld lang syne.*

We'll miss you, Buddy. But we're looking forward to seeing you again, for auld lang syne.



Top: the lounge of Fonda San Miguel.  
Bottom: Pat accepts his gift.

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**Warren W. Harris**

The Texas Bar Foundation's 2017 Gregory S. Coleman Outstanding Appellate Lawyer Award has been awarded to Society Fellow and past President Warren Harris. The award was established by the Bar Foundation in 2011 to honor the memory of outstanding appellate advocate and former Solicitor General of Texas Greg Coleman. It celebrates appellate attorneys who maintain an outstanding appellate practice, a strong commitment to providing legal services for the underserved, and record of mentoring young attorneys.

Past Society trustees who have been awarded this recognition include the Hon. David Keltner in 2012, Doug Alexander in 2013, and Mike Hatchell in 2015.



### **Justice Elizabeth Lang-Miers**

Society Trustee and Dallas Court of Appeals Justice Elizabeth Lang-Miers has been awarded the Texas Bar Foundation's 2017 Samuel Pessarra Outstanding Jurist Award. The award, established in 1987, is named after former Brazoria County Bar President Samuel Pessarra, and honors currently-serving state or federal judges who have sat on the bench for at least ten years. It recognizes outstanding judges who have earned a reputation for competency, efficiency, and integrity.

Past Society honorees have included former Texas Supreme Court Justice and current U.S. Fifth Circuit Court of Appeals Senior Judge Tom Reavley in 1991, current El Paso Court of Appeals Chief Justice Ann C. McClure in 2005, and former Austin Court of Appeals Chief Justice and current U.S. Western District of Texas Judge Lee Yeakel in 2012.

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# Calendar of Events

*Society-related events (highlighted in yellow) and other events of historical interest*

Through the  
end of 2017

**The “La Belle: The Ship That Changed History” exhibition continues in the Bob Bullock Museum of Texas History’s first floor Texas History Gallery.** The hull of the sunken *La Belle* is open for viewing. <http://www.thestoryoftexas.com/la-belle/the-exhibit>

Through  
July 9, 2017

**“Purchased Lives: The American Slave Trade from 1808 to 1865” exhibition continues in the Bob Bullock Museum of Texas History.** The exhibition examines the lives of individuals intertwined in the domestic slave trade by exploring slavery’s reach beyond New Orleans and Galveston, beyond Texas, beyond the South, and into the very fabric of America. <http://www.thestoryoftexas.com/visit/exhibits/purchased-lives>

**The “Mapping Texas” exhibition continues in the Bob Bullock Museum of Texas History.** Significant historic maps available through the Texas General Land Office will interest Society members. <https://www.thestoryoftexas.com/visit/exhibits/mapping-texas>

Through  
October 8, 2017

**The Houston Museum of Natural Science hosts an exhibition of Texas General Land Office maps in “Mapping Texas: From Frontier to the Lone Star State” exhibition.** Featuring maps dating from 1513 to 1920, the special exhibition traces more than 400 years of Texas history. The museum is at 5555 Hermann Park Dr., Houston, Texas 77030, (713) 639-4629. The exhibition is in the Hamill Gallery and features maps dating between 1513 and 1920. The works come from the archival collection of the Texas General Land Office, Houston map collectors Frank and Carol Holcomb, the Witte Museum in San Antonio, and the Bryan Museum in Galveston.

For more information, <http://www.hmns.org/exhibits/special-exhibitions/mapping-texas-from-frontier-to-the-lone-star-state/>.

Through  
Summer 2017

**The Alamo presents a new kind of exhibit: Bowie: Man • Knife • Legend.** The Alamo presents a brand new exhibition exploring the life of legendary Alamo defender James Bowie and his famous knife. James Bowie’s transformation from mere mortal to enduring legend

began ten years before his death at the Alamo. The knife that bears his family's name cuts deeply through American history and culture, even today. <http://www.thealamo.org/visit/exhibits/current/index.html>

Through  
December 17, 2017

**The Panhandle Plains Museum presents "The Great War and the Panhandle-Plains Region."** Using artifacts (militaria, uniforms, souvenirs, weapons, photographs, archives, and etc.) from PPHM's collections, the exhibition will examine the before, during, and after lives of various soldiers, Marines, sailors, and nurses (there was no Air Force) from the Panhandle-Plains region who served in "The Great War." <http://www.panhandleplains.org/p/collections-and-exhibitions/special-exhibitions/361>

Through Fall 2017

**The Museum of the Coastal Bend displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle's Fort St. Louis.** It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. <http://www.museumofthecoastalbend.org/exhibits>

Through Fall 2017

**The Bryan Museum's galleries offer artifacts and records from all periods of Texas and Southwestern history.** J. P. Bryan, Jr., a descendant of Moses Austin and a former Texas State Historical Association President, founded this museum at 1315 21<sup>st</sup> Street, Galveston, Texas 77050, phone (409) 632-7685. Its 70,000 items span 12,000 years. <https://www.thebryanmuseum.org/>. <https://www.thebryanmuseum.org/exhibitions-upcoming>

Through  
February 16, 2018

**The Star of the Republic Museum at Washington-on-the-Brazos presents its exhibition, "Heirloom Genealogy: Tracing your Family Treasures," beginning March 4, 2017, and continuing through February 16, 2018.** Stories come to light as artifacts are examined in depth through lineage research. Documents reveal where the artifacts originated, who owned them, and how they got to Texas. Items in the exhibit include three year-old Edward Boylan's buckskin suit, Pleasant B. Watson's diary, Heinrich Tiemann's clog-making tools, and Clara Lang's grand piano, among others. The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. <http://www.starmuseum.org/exhibits/#featured>

July 21, 2017

**The Texas State Historical Association will conduct its "Texas History Workshop Focusing on 1682-Present."** The workshop will take place at the Region 16 Education Service Center, 5800 Bell, Amarillo, Texas 79109 and is cost-free for teachers. <https://tshasecurepay.com/texas-history-workshop>

August 5, 2017

**The Alamo presents an educator's workshop in the Alamo's Legends of Texas series: "From Mission to Shrine 1519-1836: An Overview of the Spanish Missions and the Texas Revolution."**

This free program will last from 9 a.m. to 1 p.m. at [Alamo Plaza, San Antonio, Texas 78205](#), (210) 225-1391 ext. 169 or [mmcclenny@thealamo.org](mailto:mmcclenny@thealamo.org) to register.

August 7-8, 2017

**The Texas State Historical Association will conduct its "Energizing Texas History Conference" focusing on the period from prehistory to 1835 in Richardson, Texas.** The workshop will take place at the Region 10 Educational Service Center, 400 E. Spring Valley, Richardson, Texas 75081 and costs \$35.00 for teachers.

<https://tshasecurepay.com/energizingtexashistory>

August 12, 2017

**The Alamo presents an educator's workshop in the Alamo's Legends of Texas series: "Prominent Texas Women: Unsung Heroes of Texas."**

This free program will last from 9 a.m. to 1 p.m. at [Alamo Plaza, San Antonio, Texas 78205](#), (210) 225-1391 ext. 169 or [mmcclenny@thealamo.org](mailto:mmcclenny@thealamo.org) to register.

September 6-8, 2017

**The Texas Supreme Court Historical Society participates in the American Association of State and Local Historians Annual Meeting (AASLH) in Austin, Texas.**

Thursday,  
September 7, 2017

**Marilyn Duncan and David Furlow participate in a panel on judicial education at the AASLH Annual Meeting in Austin.** Their presentation will focus on the planning and production of the Taming Texas books and the classroom experience of teaching judicial history and civics through the Houston Bar Association Teach Texas pilot project. Historian James L. Haley leads an AASLH group on a tour of the Texas Capitol.

Friday,  
September 8, 2017

**The Texas Supreme Court Historical Society holds its Annual John Hemphill Dinner at the Grand Ballroom of the Four Seasons Hotel, 98 San Jacinto Blvd, Austin, Texas 78701, with a special 6:00 p.m. Invitation-Only Reception with the dinner speaker, Chief Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, followed by a 6:30 p.m. general reception and dinner at 7:00 p.m.**

Friday,  
September 8, 2017

David Furlow helps present the Isaac Allerton Society's program and attends the General Society of Mayflower Descendants triannual meeting in Plymouth, Massachusetts in preparation for the November 20, 2020 quadricentennial anniversary celebration, in Boston, of the *Mayflower's* arrival at Cape Cod in November 1620.



Saturday,  
September 16, 2017

**The Texas General Land Office will conduct its *Save Texas History Symposium* at the Commons Learning Center on UT Austin's J.J. Pickle Research Campus in far north Austin.** The Society is a sponsor of the event.

Fall 2017

**The Museum of the Coastal Bend opens the exhibit "Sunken History: Shipwrecks of the Gulf Coast."** The museum displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle's Fort St. Louis. It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. For additional information, see <http://www.museumofthecoastalbend.org/exhibits>.

Thursday,  
October 12, 2017

**David Furlow presents: "Evidence, Trial, and Appeal in the Salem Witch Trials" for the Houston Bar Association Appellate Section from 11:30 a.m. to 1:00 p.m.** The one-hour CLE program, which will include images of original court records, depositions, and evidence from the 1692 Salem trials and appeals (and other witchcraft trials), will occur at the Coronado Club, 919 Milam Street, Suite 500, Houston, Texas 77002. Reservations and ticket-purchase required c/o of Ron Riojas, [luncheon@hbaappellationsection.org](mailto:luncheon@hbaappellationsection.org).

Wednesday,  
October 18, 2017

**The Texas Supreme Court Historical Society will conduct its Fall 2017 Board of Trustees Meeting in Austin.** The meeting will be held in the Hatton Sumners Room in the Texas Law Center.

November 7-8, 2017

**The Texas State Historical Association will conduct its "Discovering Texas History Conference" focusing on the period from 1836 to 1900, for teachers and school district administrators.** The program will take place at the Thompson Conference Center from 8 a.m. until 4 p.m. on November 7, and at the Bob Bullock Museum in Austin on November 8, for a cost of \$35.00. For additional information, see <https://tshasecurepay.com/discovering-texas-history>.

February 5-6, 2018

**The Texas State Historical Association will conduct its "Encountering Texas History Conference" for the Houston area at the Aldine ISD Nutrition Center.** The program will take place at the M. B. Sonny Donaldson Child Nutrition Center, Aldine ISD, Houston, Texas, for a cost of \$35.00 for teachers. For additional information, see <https://tshasecurepay.com/encounteringtexashistory>.

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## DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal's* readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal's* endorsement of the views expressed therein.

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# 2017-18 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2017, the beginning of the membership year.

## **TRUSTEE**

Lawrence M. Doss

Hon. Jennifer Walker Elrod

D. Todd Smith

Mark Trachtenberg

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# 2017-18 New Member List

The Society has added 5 new members since June 1, 2017.

## **CONTRIBUTING**

Neal Davis III

JT Morris

## **REGULAR**

Adam H. Charnes

Larry E. Cotten

Rachel Stinson

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# Membership Benefits & Application

## **Hemphill Fellow \$5,000**

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- All Benefits of Greenhill Fellow

## **Greenhill Fellow \$2,500**

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of Society Publications
- Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- Recognition in All Issues of *Quarterly Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

## **Trustee Membership \$1,000**

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

## **Patron Membership \$500**

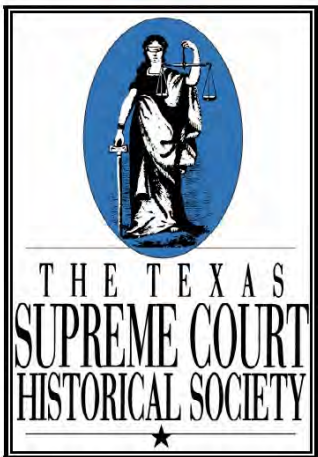
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

## **Contributing Membership \$100**

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

## **Regular Membership \$50**

- Receive *Quarterly Journal of the Texas Supreme Court Historical Society*
- Receive Quarterly Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs



## Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

Join online at <http://www.texascourthistory.org/Membership>

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| <input type="checkbox"/> Contributing \$100 |   |
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