Winner of the American Association for State and Local History's Excellence in History Award

Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Summer 2025 Vol. 14, No. 4 Editor Emerita Lynne Liberato Editor-in-Chief Hon. John G. Browning

Columns

Message from the President

By Jasmine S. Wynton

Jasmine S. Wynton

I am proud to serve alongside a deeply committed and talented Board of Trustees, whose experience and dedication to the Society's mission continue to inspire me. Read more...

Executive Director's Column

By Sharon Sandle

Sharon Sandle

The articles in this issue concern the idea of boundaries—physical boundaries, and the ideological boundaries that both chafe and protect us. Read more...

Fellows Column

By Warren W. Harris

Warren W. Harris

The Houston Bar Association will again use our Taming Texas materials to teach students during the 2025-26 school year. Read more...

Editor-in-Chief's Column

By Hon. John G. Browning

Hon. John G. Browning

The fragility and importance of First Amendment rights like freedom of speech, freedom of the press, and freedom of assembly are echoed in the articles in this issue. Read more...

Leads

The History of Tex. R. Civ. P. 76a on Sealing Court Records • Part 1 of 2 •

By Richard R. Orsinger

Before Rule 76a, there was no recognized procedure for sealing or unsealing court records in Texas courts, and the standards that governed the question were undetermined. Read more...

The Great Charter: A Look at the History and Texas Legacy of the Magna Carta, Which Celebrates Its 800th Anniversary This Year

By Vincent R. Johnson

Close-up of a Magna Carta copy

The provisions of the Magna Carta were to shape American jurisprudence, particularly the law of Texas. Read more...

Banned in Texas: A Brief Legal History of Movie Censorship in the Lone Star State

By Hon. John G. Browning

Early filmmakers wanted fight films, depicting heavyweight championships —a tall order in a state like Texas where boxing was outlawed. Read more...

Features

The First Red River "Shootout": A Century of Texas Border Dispute

By Robert J. Reagan

Map with the Red River boundary

A rivalry between Oklahoma and Texas, concerning the Red River, originated over 200 years ago. And the rivalry may still exist. Read more...

Forty-Five Years of First Amendment Law in Texas: Reflections of an Accidental First Amendment Lawyer

By Thomas S. Leatherbury

Constitutional law fascinated me from an early age, but I never thought I would practice it, much less make a career out of it. Read more...

Book Reviews

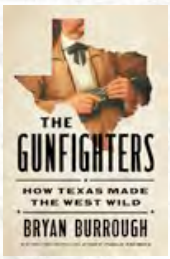
Mapping Texas

By Frank Mace

Historic maps visually put us in the milieu of the map's era, its knowns and unknowns, and the geopolitics of the time. Two recent books chart the development of maps of Texas, each contributing to Texas cartographic history in its own way.
Read more...

Book Review—*The Gunfighters: How Texas Made the West Wild*

By Hon. John G. Browning



According to the author, Texas was the "Ground Zero" of gun violence in the 19th century, boasting the highest murder rate per capita in U.S. history.
Read more...

News & Announcements

Spring 2025 Meeting: Nacogdoches, History, and Judge Tom Reavley

Text and photos by David A. Furlow

Judge Reavley's boyhood home in Nacogdoches

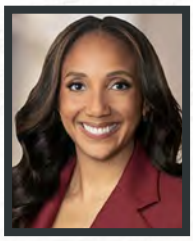
In May the Society conducted its Spring 2025 Members and Board Meeting in Nacogdoches. Officers toured historic sites that revealed new insights about Judge Reavley.
Read more...

Membership & More

Officers, Trustees & Court Liaison
2025-26 Member Upgrades
2025-26 New Member List
Join the Society

@SCOTXHistSocy

FB: Texas Supreme Court Historical Society



Jasmine S. Wynton

Message from the *President*

It is a distinct honor to begin my term as President of the Texas Supreme Court Historical Society. I want to begin by expressing my deep appreciation for the outstanding leadership of my predecessor, Lisa Bowlin Hobbs, whose energy, vision, and commitment guided the Society through a remarkable year. From her thoughtful stewardship of our programs to her choice of Nacogdoches—a place rich in history and personal meaning—as the site of our Spring Meeting, Lisa exemplified the values at the heart of our mission. I am grateful for her service and excited to build on the momentum she has helped create.

This year, I am proud to serve alongside a deeply committed and talented Board of Trustees, whose breadth of experience and dedication to the Society's mission continue to inspire me. I am joined by an exceptional group of officers: President-Elect Alia Adkins-Derrick, Vice-President Mark Trachtenberg, Treasurer Rachel Stinson, and Secretary Matthew Kolodoski. Their leadership and insight will be vital to advancing the work of the Society in the coming year.

We're also thrilled to welcome eight new trustees to our board: Alison Battiste-Clement, Judge Jerry Bullard, Justice Lawrence Doss, Hon. John H. Cayce Jr., Dave Campbell, David A. Furlow, Chris Kratovil, and Audrey Vicknair. I'm grateful for their commitment and eager to collaborate with them in the year ahead. I also want to extend sincere thanks to the trustees who recently concluded their service: Judge Andrew Edison, Justice Brett Busby, Justice Emily Miskel, Hon. John G. Browning, Kristen LaFreniere, and our former presidents Thomas S. Leatherbury, and Richard B. Phillips Jr. We are deeply grateful for their time, leadership, and contributions to the Society during their terms.

This issue focuses primarily on First Amendment history in Texas. It features an article by Richard Orsinger on the history of Rule 76(a) of the Texas Rules of Civil Procedure, which governs the sealing of court records. We also have an article from Professor Vincent Johnson discussing the Magna Carta's influence on early Texas legal history, and John Browning's examination of the legal history of movie censorship in Texas, as well as a short reflection on First Amendment Law by Tom Leatherbury. We also turn our attention to one of the oldest and most contested boundary

disputes in American history in "The First Red River 'Shootout'" by Robert J. Reagan. This piece unpacks more than a century of legal wrangling, federal-state tensions, and judicial rulings that have shaped the Texas-Oklahoma border. Lastly, David A. Furlow offers an engaging account of the Society's Spring 2025 Meeting in Nacogdoches, where members explored the life and legacy of Judge Thomas M. Reavley. With insights from local historian Jeff Abt and archivist Kyle Ainsworth of Stephen F. Austin State University, attendees viewed rare archival materials and toured historic sites, including Reavley's boyhood home and the city's last surviving Caddo Indian mound. It was a meeting rich in substance, storytelling, and purpose—one that beautifully reflected the Society's mission to preserve and promote the history of the Texas Supreme Court and other Texas courts. This rich blend of topics—ranging from ancient charters to modern speech, border disputes to sealed court records—reminds us that the law does not operate in a vacuum. It lives in the archives and in the headlines, in statutes and in stories, in our traditions and in our trials.

Looking ahead, we will undertake a strategic planning initiative this summer—our first since 2016—to chart the Society's future priorities. This effort will help ensure that our programs, publications, and outreach continue to serve our mission with clarity and impact.

Before I close, I want to extend a heartfelt invitation to all our members and friends to join us for a milestone event in the Society's calendar—the 30th Annual Hemphill Dinner. This year's dinner will take place on Friday, September 5, 2025, at 7:00 p.m. at the Four Seasons Hotel in Austin, Texas.

The Hemphill Dinner has long been one of our most cherished traditions—a time when we gather to honor outstanding individuals, celebrate our shared achievements, and look to the future of our Society. We will honor this year's recipients of the Chief Justice Jack Pope Professionalism Award and the President's Award, recognizing their outstanding contributions to the profession and to the Society.

This year's keynote program promises to be especially memorable, highlighting the intersection of the law and the arts through the talents of members of the judiciary. We are privileged to welcome former Justice Craig Enoch as our emcee, who will lead an engaging conversation with Texas Supreme Court Justice Brett Busby, former Chief Justice Nathan Hecht, and other special guests about their artistic passions and creative pursuits.

The dinner is more than a celebration—it is a vivid showcase of the Society's mission in action. Through your generous support, we publish books on Texas judicial history, teach judicial civics to over 20,000 seventh graders, and facilitate the conservation and protection of historical portraits maintained by the Supreme Court and several appellate courts. Having attended past dinners myself, I can attest to the sense of fellowship, inspiration, and commitment to service that defines these gatherings. Please consider lending your support early this year, as we anticipate the event will sell out quickly.

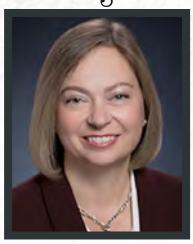
At a time when the pace of change in law and society can feel dizzying, preserving our legal history is more important than ever. Understanding where we've been helps us make sense of where we are—and chart a more thoughtful course forward. I encourage you to join us in this work: become a member, renew your dues, contribute your time, your scholarship, or your stories.

Whether you're a judge, lawyer, student, or history enthusiast, you are a steward of Texas's legal legacy. Let's ensure that Texas's legal history remains a living, accessible, and inspiring part of our civic life. The record of our past must remain intact—not just for study, but for reflection, context, and a deeper understanding of the law's role in our shared society.

Thank you for your trust and your support. I look forward to working with all of you as we continue to chart the course of Texas legal history—one story at a time.

Return to Journal Index

Executive Director's Page



Sharon Sandle

Drawing Lines:

Boundaries, Borders, and Freedom in Texas History

As an elementary school student in Texas a few decades ago, I owned a set of colored pencils, and I remember using them in class to color in the features on maps. At that time, learning to read a map was an important part of elementary school. I learned the boundaries of Texas by coloring in the shape of our state on a mimeographed map of the United States. Right there on the page were the boundaries of Texas: the Rio Grande River, the Gulf of Mexico, Louisiana and Arkansas to the east, Oklahoma to the north, and New Mexico to the west. I understood the shape of Texas and its boundaries long before I'd crossed the state line. It's a stark contrast in the history and culture of Texas that we are fiercely proud of the very shape of our state and its boundaries, both physical and cultural, from the rest of the country, while also valuing the free spiritedness and individualism that has been a magnetic draw to our state and is a bedrock of Texans' identity. In Texas history, these lines—both literal and metaphorical—often become the battlegrounds where liberties are fought for, protected, or, at times, challenged. The articles in this issue of the Texas Supreme Court Historical Society Journal concern the idea of boundaries—physical boundaries, and the ideological boundaries that both chafe and protect us.

In Robert J. Reagan's exploration of the Texas-Oklahoma border dispute in "The First Red River 'Shootout': A Century of Texas Border Dispute," the author considers the physical borders of Texas and how those border disputes come to represent other legal and cultural implications. The Red River dispute wasn't merely about land; it was about governance, jurisdiction, and identity. Such disputes underscore how deeply territorial boundaries intertwine with legal and diplomatic realities, shaping regional identities and impacting residents' daily lives over generations.

Hon. John G. Browning's insightful narrative "Banned in Texas: A Brief Legal History of Movie Censorship in the Lone Star State" reveals another facet of boundary-setting—this time cultural and moral rather than geographic. The tug-of-war over what constitutes acceptable cultural expression has historical echoes in today's ongoing discussions surrounding First Amendment protections explored by Thomas S. Leatherbury in his article. And the delicate balance between transparency and privacy in our legal system is addressed through Richard R. Orsinger's deep dive into "The History of Tex. R. Civ. P. 76a on Sealing Court Records."

Finally, Vincent R. Johnson's article "The Great Charter: A look at the history and Texas legacy of the Magna Carta" explores how the effort to delineate clear boundaries between governmental authority and individual liberties in the Magna Carta remains important to Texas jurisprudence today.

These reflections on historical boundary disputes remind us that each generation must revisit and redefine the lines that preserve society. Texas's legal history teaches us that the boundaries we set—whether along riverbanks, in courtrooms, or within societal norms—shape our collective identity.

Return to Journal Index

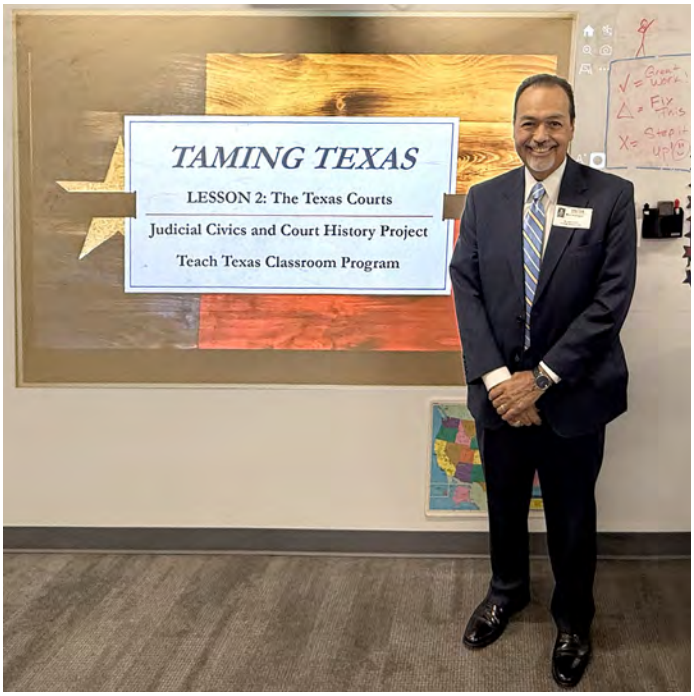
Fellows Column

By Warren W. Harris, Chair of the Fellows

The Houston Bar Association (HBA) will again use our Taming Texas materials to teach students during the 2025-26 school year. We appreciate the HBA and its President, Daniella Landers, partnering with us on Taming Texas again this year. It takes dozens of volunteers to reach the many students we teach each year, and we could not implement this vast program without the HBA's support. In the past ten years, Taming Texas has reached over 25,000 Houston-area students.

HBA President Landers has appointed Richard Whiteley and Judge Tanya Garrison as the HBA program co-chairs to recruit volunteer attorneys and judges to teach the seventh-grade students in the upcoming school year. "The Taming Texas program educates seventh-grade students in the Houston area about the rule of law and the Texas judicial system, which are subjects that are not in their normal Texas history curriculum," said Whiteley. "The program allows for lawyers and judges to interact with students in the community, serve as role models, and teach the curriculum created by the Texas Supreme Court Historical Society. My favorite part of the program is interaction with the students and their questions about the practice of law; I always leave the classroom hoping that I inspired a few students to be lawyers one day." If you would like to participate in this important program, please contact the HBA or one of the HBA program co-chairs.

Houston attorneys Alan Ratliff and Tiffany Lewis teaching Taming Texas to 7th graders at Chinquapin Preparatory School.



Patricia Limon de Rodriguez and Judge Paul Rodriguez taught at Landrum Middle School.

This Spring was a busy time for the 2024-25 Taming Texas program in Houston. HBA volunteers taught in middle schools in three districts. In addition to the attorney volunteers, judges who taught the program include Hon. Audrie Lawton-Evans, Hon. Brian Warren, Hon. Dianne Curvey, Hon. LaShawn Williams, Hon. Lee Kathryn Shuchart, Hon. Michael Landrum, Hon. TaKasha Francis, Hon. Andrea Beall, and Hon. Raul Rodriguez.

We are also working to expand Taming Texas to other parts of the state. Justice Brett Busby is coordinating efforts with the Austin bar, which recently did a pilot of Taming Texas. We are hoping to expand the project in more Austin-area schools this school year. Additionally, Mindy Davidson will be working with us to coordinate the implementation of Taming Texas in other areas of the state, including San Antonio.

Our exclusive event, the annual Fellows Dinner, is one of the benefits of being a Fellow. At the dinner each year, the Fellows gather with the Justices of the Texas Supreme Court for a wonderful evening of history, dinner, and conversation. We are currently working on plans for our next event at a unique Austin venue. Further details will be sent to all Fellows.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government and the history of our Supreme Court, such as our Taming Texas judicial civics program. 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*
David E. Chamberlain
Lauren and Warren Harris*
Joseph D. Jamail, Jr.* (deceased)
Thomas S. Leatherbury
Richard Warren Mithoff*

Greenhill Fellows
($2,500 or more annually)

Stacy and Douglas W. Alexander
Marianne M. Auld
Hon. Jane Bland and Doug Bland
Hon. Christina Bryan and J. Hoke Peacock III
E. Leon Carter
Hon. John H. Cayce
Mindy and Joshua Davidson
David A. Furlow and Lisa Pennington
Harry L. Gillam, Jr.
Marcy and Sam Greer
Joe Greenhill
William Fred Hagans
Mary T. Henderson
Thomas F. A. Hetherington
Jennifer and Richard Hogan, Jr.
Dee J. Kelly, Jr.*
Hon. David E. Keltner*
Lynne Liberato*
Ben L. Mesches
Jeffrey L. Oldham
Hon. Harriet O'Neill and Kerry N. Cammack
Connie H. Pfeiffer
Hon. Thomas R. Phillips
Hon. Jack Pope* (deceased)
Russell S. Post
Shannon H. Ratliff*
Harry M. Reasoner
Robert M. Roach, Jr.*
Professor L. Wayne Scott* (deceased)
Macey Reasoner Stokes
Cynthia K. Timms
Hon. Dale Wainwright
Charles R. Watson, Jr.
R. Paul Yetter*

*Charter Fellow

Return to Journal Index

Editor-in-Chief's Column

Hon. John G. Browning

Our Fragile Constitutional *Protections*

Eight hundred and ten years ago this summer (June 15, 1215), England's most powerful feudal barons gathered at Runnymede on the banks of the river Thames to force King John to formally recognize their traditional legal rights by signing a charter known as Magna Carta. Divided into sixty-three chapters, Magna Carta established the crucial principle that the "law of the land" existed independently of the monarchy, and that the king himself was subject to it. The charter also recognized the rights of the barons to trial by jury, due process, and habeas corpus. Widely considered the foundation of both the English and American constitutional systems, Magna Carta serves as the source for such modern constitutional concepts as the rule of law, representative government, and impartial justice.

I thought about the enduring significance of Magna Carta a lot this summer. I pondered it on June 14, during the nationwide series of protests on what came to be known as "No Kings Day," as people expressed their opposition to what they perceived as overreach by the Trump administration. Whether one agrees with those protesting or not, the very fact that they could freely assemble and express their views without fear of governmental retaliation demonstrated the enduring influence of Magna Carta.

I even had more recent occasion to think about Magna Carta and the constitutional protections it spawned when I read a curious headline on August 8 about how the official website of Congress (Congress.gov) had deleted Sections 9 and 10 of Article 1 of the Constitution. Section 9, of course, includes eight different clauses, perhaps the best known of which is the right of habeas corpus. As the clause goes, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." Habeas rights are particularly relevant lately as the courts weigh the legality of certain Trump administration deportations.

Now, before any conspiracy theorists out there start churning out diatribes about our constitutional protections being subject to a "Delete" button or draft Nicholas Cage to steal the *actual* Constitution and check for signs of White-Out, rest assured that the Library of Congress has

restored the missing sections. Blaming a "coding error" that affected the Constitution Annotated website, the Library quickly corrected the high-profile mistake.

Episodes like the "No Kings Day" protests and this remind us of how important, yet fragile, our constitutional protections are. Every time an elected official blocks one of her critics on social media and every time a law enforcement officer tries to arrest a citizen for recording a traffic stop, these rights are threatened. Less than two years ago, the small-town Kansas newspaper the *Marion County Record* was raided by police and had its computers and other items seized after publishing an investigative story about identity theft. The incident sparked national outrage and concern about freedom of the press. Legal action is pending against the city and its officials, and the police chief was brought up on charges of obstruction of justice. And yes, the magistrate-issued search warrant was quickly withdrawn, but one wonders why it was judicially approved in the first place.

The fragility and importance of First Amendment rights like freedom of speech, freedom of the press, and freedom of assembly are echoed in the articles we offer in this special issue. We are proud to bring you St. Mary's Professor Vincent Johnson's look at how Magna Carta's influence was felt in early Texas jurisprudence, as well as the reflections of one of Texas' First Amendment legal giants (and Society past president) Tom Leatherbury. In keeping with our theme, we are thrilled to showcase Part 1 of Richard Orsinger's meticulously researched two part article on the history of Texas Rule of Civil Procedure 76(a), which governs the sealing of court records. You will find Part 2 in our Fall issue. We also feature an article on the history of film censorship in Texas; as the film and television business booms in Texas and state government fuels this boom (with some strings attached), it's good to appreciate Texas' celluloid history and efforts at censoring it. Finally, as the Texas-OU "Red River Rivalry" looms on the college gridiron, we are honored to present Bob Reagan's look at the history of the *real* border dispute between Texas and Oklahoma. As we welcome incoming Society president Jasmine Wynton and bid farewell to President Lisa Hobbs, we hope you enjoy this issue.

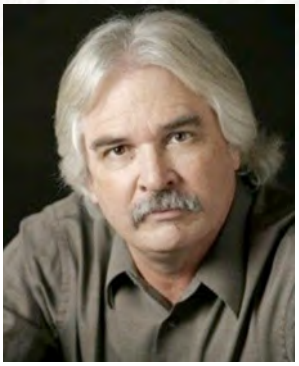
Return to Journal Index

The History of Tex. R. Civ. P. 76a on Sealing Court Records

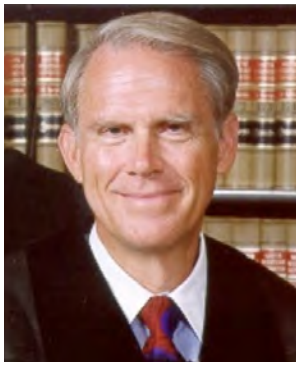
• Part 1 of 2 •

By Richard R. Orsinger[1] ©2025

In the late 1980s, Stephen Lee McGonigle, a 1975-graduate of the University of Texas School of Journalism who later acquired a master's degree from Northwestern University, was working as an investigative reporter for the Dallas Morning News newspaper when he was assigned the job of uncovering the extent to which court records, and particularly settlement agreements, in Dallas County were being sealed from public view. In 1987, Stephen McGonigle wrote a series of articles that were published in the Dallas Morning News. McGonigle and his compatriots determined that nearly 300 case files were being held in the basement of the Dallas County courthouse, as sealed files that were not available to the public. This investigation led to the Presiding Judge of Dallas County John Marshall adopting a local rule restricting the sealing of court files. McGonigle recounted his story to the Association of Trial Lawyers of America on March 26, 1992, in a speech that can still be viewed on C-Span.[2] When legislation was passed directing the Texas Supreme Court to adopt a rule of procedure setting standards and a process for the sealing of court records, the law firm representing the Dallas Morning News stepped forward to assist and influence the rule-making process.



Stephen Lee McGonigle



Judge John Marshall

Judge Susan Reed

Meanwhile, in September of 1988 momentum for change was building at the Bexar County courthouse. A criminal case had been brought against a former Catholic priest for sexually molesting two young brothers. The prosecutor and defendant agreed to a plea bargain where the defendant would receive a 10-year probated sentence. The deal was rejected by Criminal District Judge Susan Reed, (later the elected district attorney of Bexar County). In response, the prosecution dismissed the criminal charges against the defendant, saying that having to testify in trial would traumatize the boys. Judge Reed said that a sealed settlement of a multi-million dollar lawsuit the children's family filed against the Church may have influenced the victims not to support the criminal prosecution. A public controversy erupted, and by the end of the week the Bexar County district and county judges met to discuss adopting a policy on sealing settlements. District Judge


Sen. John Cornyn

John Cornyn (now a U.S. Senator) made a motion to adopt a rule that all records of settlements in civil cases would be open to the public unless attorneys can show that they should be sealed under the State or Federal constitutions. A majority of the judges voted in favor of the rule. Judge Cornyn said: "The need for the rule occurred when it became common practice in this courthouse for judges to automatically, without question, sign orders sealing settlements just because the two lawyers ask him to." The Local Administrative Presiding Judge James Barlow was quoted as saying "I don't think we ought to seal anything under any circumstances ... What happens in the courtroom is public property."[3] A member of the Supreme Court Advisory Committee later recounted that the legislation, requiring the Texas Supreme Court to adopt a rule governing the sealing of court records, grew out of this case in San Antonio.[4]

Before Tex. R. Civ. P. 76a, there was no recognized procedure for sealing or unsealing court records in Texas courts, and the standards that governed the question were undetermined. In *Times Herald Printing Company v. Jones,* 717 S.W.2d 933 (Tex. App.–Dallas 1986) (en banc), *judgment vacated and cause dismissed,* 730 S.W.2d 648 (Tex. 1987) (per curiam),[5] before trial on the merits of a damage suit brought against a physician, the defendant's motion for summary judgment was denied, and the parties settled on the condition that the case would be sealed, which the trial court ordered. Five months later, the Dallas Times Herald newspaper filed a motion asking the court to unseal the file and allow the newspaper access to "pleadings, discovery and other court records" in the case, on the ground that this information was of importance to the public. The trial court denied the request. The newspaper appealed, arguing the abridgment of its rights under both Article 1, Section 8 of the Texas Constitution and the First Amendment to the United States Constitution, and denial of the common law right of access to judicial records. The Dallas Court of Appeals. sitting en banc on rehearing, issued a Majority Opinion signed by six justices, a Concurring Opinion signed by one Justice, a Dissenting Opinion signed by four Justices, and another Dissenting Opinion signed by one of the four dissenting Justices. The Majority Opinion first determined that the trial court had jurisdiction to rule on the newspaper's motion to unseal the file, despite the fact that the motion was filed more than five months after the judgment was signed by the court, by which time the trial court's plenary power had expired. The Majority also ruled that the appellate court had jurisdiction over the appeal from the denial of the motion to unseal (*Ibid.*, 936-37). The Court Majority then agreed with the newspaper, as a matter of first impression, that a common-law right of access to court records exists in Texas (*Ibid.*, 936). Then the Court Majority distinguished between the media's right to *publish* and the media's right to *access*, and rejected the argument that the Texas Constitution gave a broader right of access to court records than did the First Amendment to the U.S. Constitution (*Ibid.*, 937). The Court Majority then assumed without deciding that the public had a right of access to judicial records in civil cases that was equivalent to the right of access recognized by the U.S. Supreme Court in criminal prosecutions (*Ibid.*, 398). The Majority then recognized the power of a court to deny access to court records based on "the private rights of participants [including prospective jurors] or third parties, trade secrets, and national security" (*Ibid.*, 938). The Majority then said that "an agreement of the parties to deny public access is not binding on the court" (*Ibid.).* The Majority also recognized the State's interest in the settlement of litigation (*Ibid.*, 939). The Majority wrote that, once a confidentiality order has been entered and relied upon by the parties, it should be modified "only in extraordinary circumstances, or to meet a compelling

need" (*Ibid.).* The Majority said that the trial court's refusal to unseal would not be judged by a higher standard elevated by the First Amendment, but rather would be reviewed for an abuse of discretion (*Ibid.*, 940). The Majority then said that none of the court records in dispute were relevant to a decision on the merits, except to the extent that denial of a motion for summary judgment indicated that a fact question existed (*Ibid.).* The Majority noted that the trial court's order discussed both facts and law (*Ibid.).* The Majority concluded, after looking at the evidence, the record, the findings, and the order, that the trial court did not abuse its discretion in refusing to unseal the file (*Ibid.).* The Concurring Justice agreed that the state's interest in facilitating settlement justified the decision not to unseal, and he further rejected a constitutional right of access to court records (*Ibid*., 942). The four Dissenting Justices said that the newspaper had no standing to appeal from a final judgment in a case in which it was not a party, so that the appeal should be dismissed for lack of jurisdiction (*Ibid.*, 942). One of the dissenting Justices also wrote his own Dissenting Opinion, a lengthy one, agreeing that the newspaper had no standing to appeal, but if jurisdiction did exist, he would reverse the trial court and order the records unsealed (*Ibid*., 942). On appeal to the Supreme Court, in a Per Curiam Opinion the Court held that the lower courts erred in assuming jurisdiction, and the appeal was dismissed (*Ibid*, 649). This case demonstrates that Texas courts were in need of guidance as to the procedure to follow and the substantive law to apply when asked to seal or unseal court records.


John H. McElhaney


Thomas S. Leatherbury


Rep. Steven Wolens

In 1988, the Dallas Morning News Company filed a suit for declaratory judgment and injunctive relief against Dallas County District Clerk Bill Long, asking the district court to establish prospective substantive guidelines and adequate procedural safeguards for sealing court documents, which the newspaper said was required by the Texas and federal constitutions and the common law for non-child-related cases. The newspaper sought an injunction against the clerk sealing records pursuant to Local Rule 1.33.[6] Local Rule 1.33 permitted the "suppression of any pleading filed in any action by filing a petition with the Court in which the action is filed showing good cause for such suppression." The Rule provided for a suppression order denying public access to "all papers filed in such action." The trial judge issued an Order, part of which the newspaper agreed with and part of which the newspaper appealed. The newspaper's Brief was filed by John H. McElhaney and Thomas S. Leatherbury, of the Locke Purnell Rain Harrell law firm, and was signed by McElhaney. After briefing, the appeal was dismissed without explanation. The appellate court's records of the case were destroyed in 2015.

The Legislature Acts. In 1989, during the Regular Session of the 71st Legislature, Representative Steven Wolens, a lawyer from Dallas, introduced House Bill 698, which would have prohibited agreements or court orders that limited public access to information relating to a public hazard. Intentionally or knowingly violating this law would be a Class A misdemeanor (maximum $2,000 fine and one year in jail). Proponents argued the bill would stop parties in products liability suits from sealing information regarding the dangerousness of their product. Opponents

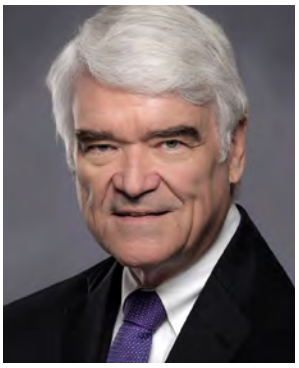
said that the definition of "public hazard" was so vague that it might subject innocent parties to prosecution. The bill passed the House by voice vote with one nay, but the bill died in the Senate Jurisprudence Committee.

In the same Regular Session, State Representative Orlando Garcia, an attorney from San Antonio (now a Federal District Judge for the Western District of Texas) introduced House Bill 1637, which was enacted and was signed by Governor William Clements on June 14, 1989, effective September 1, 1989. The statute adopted Section 22.010 of the Texas Government Code, which provided: "SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed."


Rep. Orlando Garcia


Gov. William Clements


Luther H. Soules III


Justice Nathan Hecht


Charles E. Morris


Charles M. Herring, Jr.


Judge Solomon Casseb Jr.


Judge David Peeples


Ken Fuller

The Rules Committee Process Begins. On July 10, 1989, John McElhaney wrote a letter to Luther H. ("Luke") Soules III, the chairman of the Texas Supreme Court Advisory Committee (SCAC), noting the enactment of HB 1637 and requesting the opportunity to submit a summary of the Dallas Morning News' position on sealing court records, and an opportunity to meet in person with any subcommittee considering language for a new rule. McElhaney enclosed a proposed set of guidelines that he had previously submitted to the Dallas County District Judges.[7]

At the meeting of the SCAC held on July 15, 1989, Chairman Soules confirmed with Supreme Court liaison Justice Nathan Hecht that the drafting of the rule had been assigned to the SCAC. Soules cajoled Charles E. "(Lefty") Morris and Charles ("Chuck") M. Herring, Jr., both of Austin, to co-chair an ad hoc subcommittee on sealing court records. Soules appointed himself, as well as Judge Solomon Casseb Jr. and Judge David Peeples, both of Bexar County, and Ken Fuller, a family lawyer

from Dallas, and guest John McElhaney, to serve on the ad hoc subcommittee.[8] At the August 12, 1989 SCAC meeting, the last meeting of the year, Soules commented briefly on the formation of the ad hoc subcommittee. He mentioned Representative Garcia's bill, saying that Garcia was "given a fairly specific proposal to carry, which he did not choose to carry." Soules said that Garcia "negotiated with the proponents to just get a resolution and let the Supreme Court" do the rule making.[9] Soules said "we have been writing letters to senators and representatives" and "doing everything we can to keep communications with the legislature in the best shape we can in this committee, the court on rule making."[10]

The ad hoc subcommittee conducted public meetings on November 18, 1989, and December 15, 1989. Twenty-seven people showed up to express their views.[11] Co-chair Chuck Herring, in his eventual memorandum to the Supreme Court, wrote that the ad hoc subcommittee went through several days of sometimes painful hearings and proceedings that culminated in a proposed draft of Rule 76a, as well as the amendment to Rule 166b(5) pertaining to protective orders relating to unfiled discovery.[12] Herring reported having received "received hundreds of pages of letters, drafts and written input, as well as many hours of testimony and spirited debate."[13]

The ad hoc subcommittee received correspondence from around Texas and from around the country.[14] Austin attorney Jett Hanna wrote a letter dated November 30, 1989 to the ad hoc subcommittee Co-Chair Chuck Herring,[15] in which he argued that setting standards for sealing in a way that impaired the substantive rights of parties took the Supreme Court into an area reserved to the Legislature. Hanna suggested that a Rule 76a order sealing records require findings of fact "demonstrating that sealing is permitted under applicable constitutional, statutory, and common law, that sealing the court record will adequately protect any interest served by sealing, and that no less restrictive alternative can adequately protect the interest served by sealing." Hanna concluded: "If the Supreme Court decides once and for all the standard right now without having hard cases in front of it, it may be locking into a system which would trample on the substantive rights of parties."

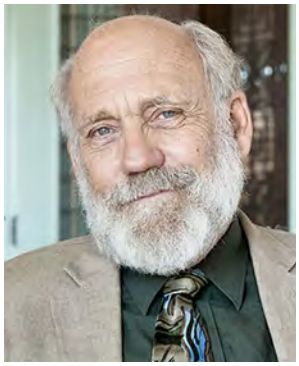

Jett Hanna

A Public Session in the Supreme Court. On November 30, 1989, the Supreme Court held an unprecedented public administrative session "to consider proposed changes to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence." All nine Justices participated in the session, and statements were taken on the record from twenty-seven speakers, ten of whom addressed the sealing of court records.[16] The first speaker on sealing, Chip Babcock, said that "indiscriminate and wholesale sealing of court records is unconstitutional" and "a threat to our democratic form of government."[17] The next speaker, John McElhaney, told the Court that he and Tom Leatherbury had submitted a proposed rule for sealing court records.[18] McElhaney said "[t]he problem is that that [current sealing practice] is overkill and overbreadth, because the entire case file is sealed and nobody knows what it's about." McElhaney also noted that he was not attempting to eliminate agreed protective orders during discovery, which have the salutary effect of reducing


Chip Babcock


David Donaldson

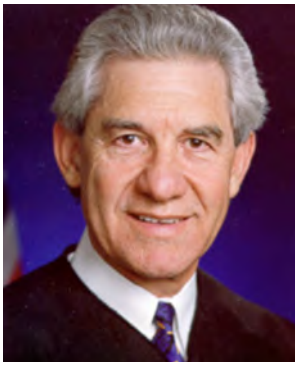

Tommy Jacks


Tom Smith

the number of disputes that have to be ruled upon by court. McElhaney also spoke of "an irresponsible opponent [who] decided he would plead many trade secrets that he had gotten hold of and just make them public records." McElhaney's partner Tom Leatherbury spoke next, saying that the draft of the proposed rule submitted to the Court in the materials was a first draft, that had since been revised after a meeting with the SCAC ad hoc subcommittee, and explaining the operation of the rule.[19] Next was David Donaldson, an Austin attorney, speaking on behalf of Texas Media, a non-profit coalition of professional journalism groups.[20] Donaldson received some probing questions and comments from members of the Court. Next was Tommy Jacks, a plaintiff's attorney from Austin, who said that discovery in products liability cases was routinely sealed upon settlement by agreement of the parties, thus covering up dangerous products.[21] Next up was Tom Smith, director of the Austin office of Public Citizens, a national consumer organization founded by Ralph Nader. Smith focused on product safety and open records in courts and regulatory agencies, and the sharing of discovery among plaintiffs. Secrecy, Smith argued, "keeps bad products on the market long after they should have been pulled off."[22] It also drives up the cost of litigation where the same pre-trial discovery against the same defendants (General Motors for example) must be pursued over and over again. Next was Mack Kidd, an Austin plaintiff's attorney, who said he had just concluded a products liability case against a major automobile manufacturer, and was required by the agreed protective order to return all documents provided in discovery at the conclusion of the case, which prohibited him from sharing those materials with other lawyers.[23] Kidd described a "conflict of interest" between the lawyer's duty to the client and a duty to protect the public. Kidd urged the Court to include information obtained through discovery as records open to the public. He called the McElhaney draft a "step in the right direction." Next was Howard Nations, a plaintiff's attorney from Houston.[24] Nations said that this issue of sealing court records was at the very top of the list of concerns of the board of governors of the Association of Trial Lawyers of America. He urged the Court to include discovery as part of court records. Nations described a series of cases involving a manufacturer of fork-lifts that tipped over, which managed to keep its design defect secret for thirty-four years, until a trial court refused to seal the file. The information became public and, according to Nations, the manufacturer made a $34 change in design that eliminated the problem. Chuck Herring, from Austin, was next, and he passed up the opportunity to speak, other than to say that his subcommittee was pretty much in agreement on most of the structural rule, and he thought they would have a good proposal for the Court to consider.[25] Next to speak was SCAC Chair Luke Soules, from San Antonio, who said he did mostly business


Mack Kidd


Howard Nations


Justice Raul Gonzalez


Bryan Webb

litigation.[26] Soules said that the legal system deals with "the most sensitive problems of human nature," and "there has to be consideration to those human concerns and the need, in many of those human problems, for privacy." Soules also said that existing Tex. R. Civ. P. 166b.5(c) addressed discovery, with a "good cause shown" requirement to limit dissemination of discovery. Soules said that, under *Garcia v. Peeples*,[27] outsiders could come into court and have a redetermination whether discovery should be open to the public. Soules also mentioned *Houston Chronicle v. Hardy*,[28] nuclear plant litigation, where the trial court sealed discovery, was affirmed by the court of appeals, n.r.e.'d by the Texas Supreme Court, and cert. denied by the U.S. Supreme Court. Soules said the area of need was information of "significant individual sensitivity" used in open court. Upon a question from Justice Raul Gonzalez, Soules indicated that he opposed including discovery in the definition of "court records." Soules indicated that the "good cause shown" standard for sealing discovery "were critical words negotiated in the rule making process of that rule." The last to speak was Bryan Webb, a family lawyer from Dallas.[29] Webb advocated a standard "that would apply to divorce and family law cases in such a way that it would allow people to preserve their privacy and their dignity." He spoke of a concern that depositions in family law cases, made public, would not only expose private matters to public scrutiny but also could lead to children of the parties reading, years later, the details of their parents' divorce. Webb also supported SCAC member Dallas family lawyer Ken Fuller's suggestion of an ex parte procedure to seal records until a hearing could be held.


David Perry


David Chamberlain


Frank Branson

The Advisory Committee Develops a Rule. The SCAC met on Friday, February 9, 1990, with 27 members present and 9 members absent. The minutes of the meeting indicate that "[a] report was given by Charles (Lefty) Morris, Chuck Herring, and Tom Leatherbury regarding proposed new rule TRCP 76a, regarding Sealing of Court Records.[30] Chuck Herring reported on the progress of the ad hoc subcommittee.[31] He explained the details of a working draft of a proposed rule that was a blend of the proposed rule submitted by Locke Purnell on December 26, 1989 and proposed rules submitted by David Perry and by David Chamberlain.[32] Tom Leatherbury explained the Locke Purnell draft, and compared it to the ad hoc subcommittee's draft.[33] After a discussion of differences between the rules, Dallas plaintiff's attorney Frank Branson moved that the Committee use the Locke Purnell draft and not the ad hoc committee's draft for further discussion. The motion carried by a vote of 10-9.[34] There followed 220 pages of debate over different aspects of Locke Purnell's proposed rule, with a few votes being taken. Approximately two hours were spent on the debate of whether to include unfiled discovery in court records, at the conclusion of which an 11-9 majority voted to table the question.[35] The Committee recessed at 5:40 p.m. until 8 a.m. the next

morning. The committee reconvened at 8:00 a.m. on Saturday, February 10, 1990, with twenty-eight SCAC members present, seven absent. Votes were taken on twenty-three rules, but Rule 76a was not one of them. At the end of the meeting it was moved, seconded, and unanimously approved to have a previously unscheduled meeting the following Friday, February 16, 1990. The meeting began at 8:00 a.m. on February 16 with 21 members present and 13 absent. Tom Leatherbury was also present.[36] An 11-4 majority of the members present voted to amend the provision relating to appeal of sealing orders.[37] A 12-3 majority voted to recommend Rule 76a as revised to the Supreme Court.[38] A 10-7 majority voted to amend Rule 166(b)(5) to subject discovery protective orders to Rule 76a.[39] Luke Soules criticized this last vote in his March 1, 1990 Report to the Supreme Court, because the proposal was never considered by the discovery subcommittee, was voted down by the Rule 76a ad hoc subcommittee, was never put on the agenda in advance of a SCAC meeting, and the proposal was expressly tabled in the SCAC's February 9, 1990 meeting and then reopened on February 16, 1990 by a majority of less than half of the committee, and finally because the proposal was not published for comment from the bench and bar.[40] Toward the end of the February 16 meeting, a revealing perspective was related by SCAC member David Beck, who commented on the speed at which the Rule adoption was proceeding. David said:


David Beck

> I would like to say something for the record, and the first time I saw this proposal is this morning because I could not attend the meeting last week. I am not opposed to what we have done in concept, but I am very troubled about the way we have done it. This represents a very material change in our Rules of Civil Procedure and our general practices.
>
> The bench and the bar have not seen this, to my knowledge. The first time this was ever presented to the general Committee was at the meeting last week with the exception of the subcommittee that was working on this, and I think they have done an excellent job in working on it, but what I am concerned about is the potential problems that we may not even anticipate, like John Collins was saying.
>
> We are trying to write a rule that applies in all cases, and I notice there is some references in the rule to public safety and health, but we use some terminology in that rule that we passed that is very, very broad, and I don't know what some of these provisions mean. And I suspect that some of the members of the bar are going to have some real questions about some of the terms.
>
> * * *
>
> And my concern is that not every case we have got is a personal injury case and not every case we have got is a product liability case. There are patent suits out there, there are domestic relations suits, there are breach of contract suits, that have very critical pieces of information that the parties want to keep private.
>
> * * *
>
> And I am just concerned that we are doing this so quickly, with such limited review opportunities, by such a comparatively few members of even this Committee, that I am concerned we are going to come up with a result that is going to cause us a lot of problems on down the line. I just wanted to say that for the record.[41]

Austin plaintiff's attorney Broaddus Spivey responded a few moments later:

> I agree with you and I think it is time to move on, except I want the record to reflect a response to David oratory there. And I can understand his concern, but one of the basic problems is people have elected to take their private disputes into a public forum. And I face that every time a defendant wants my client to produce income tax returns, and that settles cases sometimes. That is one of the hazards of entering into litigation or being drawn into litigation, and that is just something we have to deal with.[42]


Broaddus Spivey

This exchange reflects the plaintiff-versus-defendant dynamic that existed on the Committee regarding Rule 76a. As Beck later noted, "I want to make sure everybody understands what we are doing here, and I know I am in the minority. There are only two people here that I count that do essentially defense work."[43] However, the compelling need for speed (all committee discussionand voting was compressed into two meetings within a seven-day period), and the need for the Chairman to reign in discussion in order to reach final votes, is not evident from the transcript. Regardless of the reason, the Committee's action was extraordinarily quick. When David Beck asked "what are our time limits," Chairman Soules said "this is it. I would like to have a motion that we accept 76(a) as it has been concluded today just by that last vote, in its entirety."[44] Chairman Soules powered through to a vote to adopt Rule 76a as amended that day, and the amended version of Rule 76a was adopted by a vote of 12-3.[45] (Less than half of the Committee voted on the motion.) Tom Davis asked: "Am I allowed to point out some more things wrong with it before we vote it?" Chairman Soules responded: "We have voted." Davis continued: "Well, you have got some errors in it and I would like to get the errors out." Broaddus Spivey said: "That is administrative."[46] With that the discussion ended.

The Minutes from the meeting[47] reflect:

> A request for amendment to proposed TRCP 76a was reported on, motion was made, and the committee voted 11 to 4 to recommend that the Supreme Court promulgate the requested amendments to paragraphs C, D, and E and the committee voted 12 to 3 to recommend that the Supreme Court promulgate the requested amendments to TRCP 76a as a whole.
>
> A request for amendment to proposed TRCP 166(b) (5) was reported on, motion was made, and the committee voted 10 to 7 to recommend that the Supreme Court promulgate the requested amendment.

The Advisory Committee's Report to the Supreme Court. Chairman Soules forwarded the final report from the Committee to Justice Nathan Hecht on March 1, 1990. Soules made special mention of the proposed amendment to Tex. R. Civ. P. 166b (5), which would prohibit sealing of discovery unless the party seeking protection files the discovery with the clerk of the court and complies with Rule 76a. Soules wrote:

The reason that I believe that this recommendation needs special mention is because the process through which it proceeded was not the usual process, and it is an extremely important and far reaching matter.

1. That provision was never submitted to the discovery subcommittee for study or recommendation.

2. That concept was considered before the Special Subcommittee on Sealing of Court Records and was, by that Subcommittee, not recommended. Neither the Subcommittee's reported rule nor the "Locke-Purnell" proposal for Rule 76a encompassed discovery not filed with a court.

3. That concept was never a subject of any advance written proposal in any agenda prepared for any Committee meeting.

4. The inclusion of discovery in the rule on sealing court records was expressly tabled by a majority of all members present at the meeting on Friday [February] 9, 1990, on motion of Justice Peeples. That meeting was attended by 25 of 36 members of the Supreme Court Advisory Committee.

5. Notwithstanding the February 9 vote to table, a majority of the 20 members who attended the smaller meeting on Friday, February 16 voted to reopen the question. The matter then passed by narrow majority vote of 10 to 7 with less than half the full membership attending and voting. None of the four member judges of the committee was able to attend the February 16 meeting.

6. The proposal was not published for comment from the bench and bar.

In conclusion, Chairman Soules said: "I believe this to be the only occurrence in the history of the Committee where such a broad sweeping and burdensome change has been recommended by the Committee with so little study and consideration."[48]

Views of the Ad Hoc Subcommittee Chair. On March 5, 1990, Chuck Herring forwarded to the Supreme Court his memorandum regarding *Proposed Rule 76a and companion amendments to Rule 166b(5)*.[49] This memorandum is the best way for the interested reader to get a sense of the SCAC's deliberations short of reading the meeting transcripts. Herring acknowledges that he voted against Rule 76a and the amendment to Rule 166b(5). Herring concluded:

> The issues of whether and how to seal court records are complex and evoke strong and varied opinions from many different perspectives. Proposed rule 76a, together with the companion amendments to Rule 166b(5), creates a veritable thicket of constitutional, statutory, common law and procedural issues. The many public and private interests affected by the rule are exceedingly difficult to reconcile, and that difficulty is compounded by the diverse contexts in which sealing orders arise, including family law, trade secrets, products liability, commercial litigation.

My advice to the Court -- after distilling all of the knowledge and wisdom I have acquired during many, many hours of listening and reading and studying about these issues -- is simple: good luck. Good luck, and may you have the patience and insight to develop a reasonable, workable rule.

The Texas Bar Journal; Adoption by the Supreme Court. The April 1990 Texas Bar Journal contained the proposed Rule 76a and the amendment to Rule 166b(5), followed by three articles praising or criticizing the proposed Rule. John H. McElhaney & Thomas S. Leatherbury supported the rule in *An Overview: Proposed Rule 76a*;[50] Gale R. Peterson opposed the rule in *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*;[51] and David E. Chamberlain opposed the rule in *Proposed Rule 76a: An Elaborate Time-Consuming, Cumbersome Procedure*.[52] On April 14, 1990, the Texas Supreme Court promulgated Rule 76a, in an Order that also adopted a number of other changes to the rules of trial and appellate procedure. Justices Gonzalez and Hecht dissented from the adoption of Rule 76a and the amendment to Rule 166b.5(c)., saying:

> We concur in the changes to the Texas Rules of Civil Procedure adopted by this Order except the addition of Rule 76a and the concomitant amendment to Rule 166b.5.c. We agree that that it is appropriate to articulate standards for sealing court records which recognize and protect the public's legitimate interest in open court proceedings. Our concern is that the adopted rules are excessive.
>
> Strong arguments have been made that pleadings, motions and other papers voluntarily filed by a party to avail itself of the judicial process should not be sealed absent specific, compelling reasons. The arguments are much weaker for denying protection from public disclosure of information which a person is ordinarily entitled to hold private and would not divulge except for the requirements of the discovery process. It is one thing to require that pleas to a court ordinarily be public; it is quite another to force a person to give an opponent in a lawsuit private information and then require disclosure to the world. On balance, we believe that the adopted rules do not afford litigants adequate protection of their legitimate right to privacy.
>
> The procedural burdens created by the adopted rules are thrust principally upon already overburdened trial courts and courts of appeals. The trial courts must now conduct full, evidentiary hearings before ordering court records sealed. After records are ordered sealed, any party who did not have actual notice of earlier proceedings may request reconsideration of the order. Because it is impossible to give actual notice to the world, an order sealing records can never be effectively final. Trial courts must either hold as many hearings as there are requests by people without actual notice of prior hearings, or surrender and unseal the records. All parties, for and against sealing, are entitled to appeal. The demand of the adopted rules on the judiciary's limited resources is impossible to assess.
>
> Finally, Rule 76a and the change in Rule 166b.5.c are probably more controversial than any rules ever adopted by this Court. Although issues relating to sealing court records have been addressed across the country, adoption of rules like these two is unprecedented. Despite strongly conflicting views of the members of our Rules

Advisory Committee, the Court has not invited the same public comment on these two rules as it has on the others. People outside the rules drafting process, lawyers and non-lawyers alike, have only recently become aware that these two rules were being considered. Even without inviting comment, the Court has received a relatively large number of sharply divergent views of these rules. The stridency of the controversy, the dearth of precedent, and lack of opportunity for full public comment all counsel a more measured response by the Court than the rules it adopts. We have refused this year to change the rules pertaining to the preparation of jury charges because of conflicting comments on the proposed amendments. The reasons for deferring sweeping changes in the charge rules for further debate apply equally to Rule 76a and Rule 166b.5.c.

We agree with the Court generally that court records should be open to the public. We do not agree with the manner in which the Court has chosen to effectuate this policy.[53]

Praise From the Media. In 1990, Justice Lloyd Doggett received the Society of Professional Journalists' national First Amendment Award for his work both as a state senator and a supreme court justice on governmental issues. The board also commended Justice Doggett for his role in drafting new rules that restrict the sealing of court records and permit cameras in Texas court rooms.[54] The Freedom of Information Foundation of Texas gave its James Madison Award for outstanding achievements and distinction in open government and First Amendment rights to: Robert W. Decherd (CEO, Dallas Morning News) in 1989; Texas Supreme Court Justice Lloyd Doggett in 1990; Chip Babcock, David Donaldson, and Tom Leatherbury, among others in 1991.


Justice Lloyd Doggett


Robert W. Decherd

Publications. Beginning in 1987, the Dallas Morning News published a succession of articles by investigative reporter Stephen McGonigle, an investigative journalist for the newspaper, consisting of *Secret Lawsuits Shelter Wealthy, Influential* (11-22-1987, p. 1A); *Judge Says Privacy Can Help Settle Suits: To jurist, public's right to know is secondary to achieving justice*, (11-22-1987, p. 24A); *Jurist Believes Sealing Records Is Undemocratic* (11-22-1987);[55] *Sealed Lawsuits Deal with Poisonings, Sex, Surgery* (11-23-1987, p. 1A;[56] *Rules Set on Sealed Records: Clerks given directive on accepting documents* (12-31-1987).[57] In March of 1988, the Dallas Morning News published McGonigle's article *Judge Orders Lawsuit Unsealed: Jurist sees "no compelling reason" to keep legal firm's case closed* (4-19-1988, p. 16A).[58] In April of 1990, the Texas Bar Journal published the rule proposed by the SCAC along with short articles for, against, and about the proposed Rule. In 1991, Texas Supreme Court Justice Lloyd Doggett and former Texas Supreme Court briefing attorney Michael Mucchetti published a law review article, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643, 684-85 (1991). On March 26, 1992, Steve McGonigle gave a speech to the Association of Trial Lawyers of America explaining how he exposed the


Michael Mucchetti


Jennifer S. Sickler


Michael F. Heim


Judge Craig Smith


Grant Schmidt

practice of sealing court records in Dallas County, which led to a local rule in Dallas County and eventually led to the adoption of Rule 76a. In 1992 Mary Hull wrote *76a Intervention Allowed in Settled Case: GM Claims Protective Order Shrouds Pickup Crash Data*, Texas Lawyer, June 15, 1992, at 5. In 1993, Jennifer S. Sickler and Michael F. Heim wrote *The Impact of Rule 76a: Trade Secrets Crash and Burn in Texas*, 1 Tex. Intell. Prop. L.J. 95, 97 (1993). Also in 1993, Robert C. Nissen wrote *Open Court Records in Products Liability Litigation under Texas Rule 76a*, 72 Tex. L. Rev. 931 (1994). In 2016, District Judge Craig Smith, Grant Schmidt, and Austin Smith published *Finding a Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76a and its Application to Unfiled Discovery*, 69 SMU L. Rev. 309 (2016).[59] In 2017, Judge Craig Smith and Tom Melsheimer published *Open Courts: The role of Rule 76a in our civil justice system*, in 80 Tex. Bar J. 355 (June 2017). In 2022, Joseph F. Cleveland, Jr. & Dillon Minick wrote *A Proposal to Amend Rule 76a to Reduce the Burden and Expense of Filing Court Records under Seal in Trade Secret Cases*, published in the State Bar of Texas Litigation Section's The Advocate Magazine, Vol. 100 (Fall 2022) p. 44. In the same Magazine, Tom Leatherbury published *Practical Way to Deal with Sealing Requirements—A Lawyer's Perspective*."

Selling Depositions. On September 28, 1993, the Texas Attorney General's Office issued Letter Opinion No. 93-87, regarding whether a court reporting firm could enter into a contract to sell all of its depositions to a business in exchange for a percentage of the proceeds from selling the depositions. The Letter Opinion made the following comments about Rule 76a:

Rule 76a of the Texas Rules of Civil Procedure, which sets forth the standard for sealing court records, is also relevant to your inquiry. That rule presumes that "court records" are open to the general public and may be sealed only upon a heightened showing. [Footnote 5] Rule 76a defines "court records" for purposes of the rule as "documents of any nature filed in connection with any matter before any civil court" with certain exceptions. Tex. R. Civ. P. 76a(2)(a). It also defines court records for purposes of the rule as discovery, not filed of record, concerning


Austin Smith


Tom Melsheimer


Joseph F. Cleveland, Jr.


Dillon Minick

matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights. Tex. R. Civ. P. 76a(2)(c). In providing that discovery that has been filed with a court as well as discovery concerning certain matters which has not been filed with the court constitutes "court records" presumed open to the general public, rule 76a suggests that discovery that has not been filed with a court and does not concern such matters, is not open to the general public. As noted above, however, rule 206 requires the shorthand reporter who has taken a deposition to file a copy of a certificate with the court. We do not consider whether, given this filing, deposition transcripts are "court records" under rule 76a(2)(a) in every case, or whether they are subject to the special provision under rule 76a(2)(c) for "discovery, not filed of record."

* * *

There is no statute or rule prohibiting or authorizing a shorthand reporter to sell a copy of a deposition transcript to a company which operates a computerized data base, or any person or entity other than the deponent, a party to the proceeding, or a party's attorney, without leave of court. This question would be more appropriately addressed by supreme court rule or by the court with jurisdiction.[60]

Unfiled Discovery and Tex. R. Civ. P. 166b(5). Rule 166b was one of a slew of discovery rules repealed by the Supreme Court on November 9, 1998, effective January 1, 1999. Prior to repeal, Rule 166b(5) said:

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

The final sentence of Subdivision 166b(5)(c) was adopted by the SCAC at its meeting on February 16, 1990. Just as Chairman Soules called for a vote on the adoption of Rule 76a, committee member Tom Davis proposed to add to Rule 166b(5)(c) language that no "protective order or agreement relating to protecting disclosure of information concerning matters of public health or safety or information concerning administration of public office or the operation of government" shall be valid unless Rule 76a has been complied with.[61] The vote to approve Rule 76a was taken, and Sam Sparks of San Angelo moved to reopen discussion on unfiled discovery, which had been tabled at a prior meeting. During the brief discussion, Doak Bishop cautioned against moving too rapidly. He said that the time constraints to adopt Rule 76a did not apply to changing Rule 166b. He suggested that the proposed change be given to the Administration of Justice Committee to review.[62] Chairman Soules terminated discussion, called for a vote, and Tom Davis's proposal was accepted by a vote of 10 to 7.[63]


Sam Sparks


Doak Bishop

Chairman Soules' concerns about the way the amendment to Rule 166b(5) came about are discussed above. The ad hoc subcommittee Co-Chair Chuck Herring, in his March 5, 1990 final report to the Supreme Court, noted the unusual way that the amendment to Rule 166b(5) was adopted by vote of a small number of SCAC members, and summarized arguments against the amendment: (1) the "[i]nclusion of the specified discovery materials subjects a vast amount of litigation to a cumbersome, time-consuming process, unnecessarily and dramatically multiplying litigation costs and delays"; (2) the law distinguishes unfiled discovery from court records; (3) the clause "matters of public health or safety" is vague and "vastly overbroad"; (4) having to file protected discovery would overburden clerks who must store the materials; (5) the "back door" amendment to Rule 166b(5) should be addressed in Rule 76a's definition of court records; and (6) "The 'good cause' standard for protective orders pertaining to discovery, including sealing orders, provides a workable, proper standard, and should not be changed."[64] The Dissent by Justices Gonzalez and Hecht to the adoption of Rule 76a and the amendment to Rule 166b(5) are discussed above.

After the adoption of Rule 76a and the amending of Rule 166b(5)(c), disagreement arose over the extent to which a protective order under Rule 166b(5) was subject to the standards and procedures of Rule 76a. In *General Tire, Inc. v. Kepple*, 970 S.W.2d 520 (Tex. 1998), the Supreme Court held that unfiled discovery that constitutes "court records" is subject to the procedures and standards of Rule 76a. However, if the unfiled discovery did not constitute "court records," then under Tex. R. Civ. P. 165b(5) the court "for good cause shown" can order that results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be unfiled restricted without regard to the procedures and standards under Rule 76a. Under Rule 76a(2)(c), information produced in discovery constitutes court records if it "concern[s] matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."

Endnotes

[1] Richard R. Orsinger, a family law and civil appellate attorney in San Antonio, Texas, was appointed to the Texas Supreme Court Advisory Committee in 1994 and serves as chair of the subcommittee that proposed changes to Tex. R. Civ. P. 76a in 2021-2022.

[2] *Keeping Secrets: Justice on Trial* (C-Span 3-26-1992) beginning at 7 minutes and 56 seconds https://thedailytexan.com/2013/09/04/ut-journalism-alumnus-remembered-for-investigative-work-for-fair-sentencing/ [12-30-2024]. McGonigle's obituary is at https://www.dignitymemorial.com/obituaries/richardson-tx/steve-mcgonigle-5645751

[3] The story about the Bexar County judges adopting restrictions on sealing settlements in civil cases was published in the Sunday, September 15, 1988 *Herald-Zeltung* newspaper of New Braunfels, Texas, p. 4A.

[4] This comment was made by SCAC member Harry Tindall, from Houston: "I was in the legislature when all that was presented, and evidently it grew out of a case in San Antonio where a member of the clergy was charged with sex abuse or something and the records were all sealed. It was anti-sealing sentiment is what was expressed in the legislature." Transcript of Proceedings of the 7-15-1989 SCAC meeting, p. 29. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1989/supplementary/sc07151989.pdf

[5] One of the lawyers representing the *Times Herald Printing Company* was Charles L. ("Chip") Babcock, later a proponent of Rule 76a and currently Chair of the Texas Supreme Court Advisory Committee. Chip was appointed to the Texas Supreme Court Advisory Committee in 1993 and was appointed Chair of the Committee in 1999, which he remains to this day.

[6] The relief requested in *The Dallas Morning News Company v. Bill Long, District Clerk, Dallas County, Texas*, is quoted from Appellant's Brief in the appeal of the case, No. 05-88- 01131-CV (Tex. App.–Dallas, no writ), filed on 10-20-1988. The newspaper sought unsealing of both pleadings and unfiled discovery but dropped unfiled discovery on appeal.

[7] McElhaney, Leatherbury and Thomas's submission, "A Proposal for a Rule Establishing Guidelines for Determining Whether and How Texas Civil Court Records Should be Sealed" is contained in the Supplemental Materials for the SCAC's 8012-1989 meeting, beginning at pdf p. 55. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[8] 7-15-1989 SCAC meeting transcript, pp. 21-30. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1989/supplementary/sc07151989.pdf

[9] 8-12-1989 SCAC meeting transcript, pp. 344-45. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1989/transcripts/sc08121989.pdf

[10] *Ibid.*, 348.

[11] Chuck Herring's 2-9-1990 Memorandum to the SCAC, p. 00792. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02161990.pdf

[12] Chuck Herring, 3-5-1990 Memorandum dated 3-5-1990 to the Texas Supreme Court, pdf p. 1. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02161990.pdf

[13] Many of the written suggestions and comments sent to the ad hoc subcommittee are included in the supplemental materials for the 2-9-1990 SCAC meeting, under the "Supplement" link https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[14] Some communications and submissions received by the ad hoc subcommittee are contained in the Supplemental Materials for the SCAC's 8-12-1989 meeting https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[15] Jett Hanna's 11-30-1989 letter to Chuck Herring is contained in the supplemental materials for the 2-9-1990 SCAC meeting, at pdf p. 174 https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[16] 11-30-1989 Transcript of the Supreme Court's Administrative Session to consider rule changes, pp. 163-320. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1989/transcripts/sc11301989.pdf

[17] Chip Babcock's statement, *Ibid.*, 165-89.

[18] John McElhaney's statement *Ibid*., 189-219.

[19] Tom Leatherbury' statement, *Ibid.*, 201-219].

[20] David Donaldson's statement, *Ibid.*, 219-238.

[21] Tommy Jacks's statement, *Ibid.*, 238-267.

[22] Tom Smith's statement, *Ibid.*, 268-283.

[23] Mack Kidd's statement, *Ibid.*, 283-295.

[24] Howard Nation's statement, *Ibid*., 295-306.

[25] Chuck Herring's statement, *Ibid.*, 306.

[26] Luke Soules's statement, *Ibid.*, 307-315.

[27] *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987), was a mandamus review of a protective order issued pursuant to Tex. R. Civ. P. 166b(4) in a products liability suit brought against General Motors Corporation. GM claimed that the documents contained trade secrets. The trial court issued an order prohibiting the plaintiff from sharing this unfiled discovery with others without first obtaining the trial court's approval. The Majority Opinion, written by Justice Kilgarlin, noted that the Texas Rules of Civil Procedure had for thirty years "included provisions specifically tailored to prevent dissemination of trade secrets." *Ibid.*, 346. The Court also cited three prior Supreme Court decisions noting "the importance of protecting trade secrets through protective orders." *Ibid.* The Court weighed this protection against "public policies favoring the exchange of information" with other persons "involved in similar suits against automakers."

Ibid., 347. The Court said: "Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." *Ibid.* The Court continued: "In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues." *Ibid.* The Supreme Court held that the trial court's anti-sharing order was overbroad and therefore was an abuse of discretion. *Ibid.*, 348. Chief Justice Hill dissented, writing that "[t]he Texas Rules of Civil Procedure expressly authorize trial courts to issue 'any order in the interest of justice to protect ... property rights.' TEX.R.CIV.P. 166b(4). The Rules also specifically provide that trial courts may limit the distribution or disclosure of discovered documents. TEX. R. CIV. P. 166b(4)(c)." *Ibid.*, 349. Chief Justice Hill concluded that the trial court's order was expressly authorized by the Texas Rules of Procedure and therefore was not an abuse of discretion. The Chief Justice then commented: "If this Court believes that trial courts should not be allowed to issue such orders, then the Court should seek to change the rules through the formal procedures rather than handing down this mandamus order when a clear abuse of discretion has not been shown." *Ibid.*

[28] *Houston Chronicle Publishing Co. v. Hardy*, 678 S.W.2d 495 (Tex. Civ App.–Corpus Christi 1984, writ ref'd n.r.e.), *cert. den.* (1985), was a mandamus case involving litigation over the South Texas Nuclear Project, in which the trial court ordered that "[a]ll depositions, interrogatories and answers thereto, requests for admissions and answers thereto and all other documents shall be filed under seal and shall be opened only by order of the court." *Ibid.*, 498. In addressing the newspaper's claims, the appellate court wrote that "not a single case, state or federal, holds directly that raw pretrial depositions, taken in a civil case, which have never been offered in evidence upon a future trial is subject to access, as a matter of right, to the news media." *Ibid.*, 498-99. The appellate court held that the trial court did not abuse its discretion. The appellate court also rejected the contention, raised by the cities of Austin and San Antonio, that the portion of the trial court's order providing, that "[a]ll parties, attorneys, experts, etc. employed by the parties, court reporters, clerks and officers of the court shall likewise refrain from disclosing to third parties information obtained through the court's discovery processes," violated the right of city officials to freedom of speech under the First Amendment to the U.S. Constitution. The cities' request for mandamus was denied.

[29] Bryan Webb's statement, *Ibid*., 314-19.

[30] Minutes of the 2-9-1990 SCAC meeting, p. 2 https://txcourts.gov/All_Archived_Documents/SupremeCourtAdvisory-Committee/Meetings/1990/minutes/sc02091990.pdf

[31] Chuck Herring's comments to the SCAC on 2-9-1990, meeting transcript pp. 68-79

[32] *Ibid.*, 79, 113-117. David Perry's proposed Rule 76 dated 12/18/1989 is in the Supplemental Materials for the 8-12-1989 SCAC meeting, at pdf p. 128 https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/

Meetings/1990/supplementary/sc02091990.pdf On 11/20/1989 Luke Soules's submitted his "'cut' toward a balanced rule." *Ibid.* pdf p. 134.

[33] Tom Leatherbury's comments to the SCAC. *Ibid.*, 79-91.

[34] *Ibid.*, 115.

[35] 2-9-1990 SCAC meeting transcript, p. 309; Chuck Herring's 3-5-1990 Memorandum to the Supreme Court, p. 1. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[36] Minutes of the 2-16-1990 meeting of the SCAC, p. 1. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02161990.pdf

[37] *Ibid.*, 177. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/minutes/sc02101990.pdf

[38] *Ibid.*, 191.

[39] Luther H. ("Luke") Soules, III's Final Report from the SCAC to the Supreme Court, pdf pp. 527-530.

[40] 2-16-1990 SCAC meeting transcript, pp. 168-170. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[41] *Ibid.*, 272-272.

[42] *Ibid*., 185.

[43] *Ibid.*, 171.

[44] *Ibid.*, 177.

[45] *Ibid.*, 177.

[46] Minutes of the 2-1-1990 SCAC meeting pdf p. 3.

[47] Luther Soules' letter of 3-1-1990 is contained in the 2-9-1990 SCAC Supplemental Materials, pp. 527-29. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02161990.pdf

[48] Chuck Herring's 3-5-1990 Memorandum on *Proposed Rule 76a and companion amendments to Rule 166b(5)*, 2-9-1990 SCAC Supplemental Materials, pdf p. 1. https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf

[49] McElhaney & Leatherbury, *An Overview: Proposed Rule 76a*, 53 Tex. B. J. 340 (April 1990) ***** The Texas Bar Journal articles cited in this and the following endnotes can be accessed free of charge through https://www.texasbar.com/ Search by author, then look down the resulting list for the particular article. *****

[50] Gale R. Peterson, *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*, 53 Tex. B.J. 344 (April 1990) (access through the Texas Bar Journal Archives link).

[51] David E. Chamberlain, *Proposed Rule 76a: An Elaborate Time-Consuming, Cumbersome Procedure*, 53 Tex. B.J. 348 (April 1990) (access through the Texas Bar Journal Archives link).

[52] Concurring and dissenting statement by Justice Gonzalez and Justice Hecht to the adoption of Rule 76a pdf p. 3.

[53] *Laurels*, 53 Tex. B. J. p. 898 (Sep. 1990) (reach the page through the Texas Bar Journal archives link).

[54] In this article McGonigle wrote: "Robert John Huse was a reluctant newsmaker who made headlines only after a Dallas County judge denied his request to seal court records that indicated the Mesquite pediatrician carried the AIDS virus. The judge was John McClellan Marshall, a blunt-spoken former history teacher who admits waxing occasionally "cosmic' in describing his passion for the legal idealism espoused by America's founding fathers. Marshall believes that Thomas Jefferson, James Madison, Alexander Hamilton, John Jay and other framers of public rights would share his view that barring court records from the public is an evil that democracy cannot abide. "You can't seal things up and keep them away from the people to whom you are responsible and be valid,' said the 44-year-old Republican jurist. 'There is something inherently invalid in that.' Marshall's views collided with Huse's request Sept. 11 after Huse filed a lawsuit to stop a former roommate from telling people that Huse had tested positive for the acquired immune deficiency syndrome virus. The case was assigned to Marshall's 14th District Court. While Huse had tested positive

for the HIV virus in 1985, he had not exhibited symptoms of AIDS and was not a danger to his patients, his lawyer, Bill Nelson, told Marshall. Public disclosure of the infection would destroy Huse's practice, Nelson said. In rejecting Huse's request to seal the lawsuit, Marshall recited his belief that government operations should be open to the public, particularly in a matter of potential public health hazards. Nineteen days later, with his patient load dwindled to almost nothing, Huse closed his $100,000-a-year practice." McGonigle continued: "Three days before his ruling in Huse's case, Marshall issued a memorandum to Dallas County's 54 other district and county judges advising them of a problem that he perceived with sealed court records. Marshall, who also is the county's chief administrative judge, issued the memo after being told by The Dallas Morning News that almost 300 lawsuits were being held by the district clerk as sealed records in the courthouse basement, many of them without any court orders. He subsequently ordered District Clerk Bill Long to release any lawsuit being held without a sealing order and drafted guidelines and form orders for other judges to use in future suits where sealing is requested. Several civil district judges said they supported Marshall's effort to establish guidelines for sealing, although most said they did not perceive a problem and will continue to seal files when appropriate. 'We really should be engaged in a search for truth,' Marshall said, 'and we really should be concerned about rendering the highest form of justice of which we are capable. And in our system that means the fullest amount of information. No smoke filled rooms. No secrets.' Marshall said he was 'flabbergasted' by the number of sealed lawsuits and a computer study by The News showing that more records have been sealed since 1980 than in the preceding 60 years."

[55] In this article McGonigle interviewed Judge Gary Hall and wrote about his sealing the file in a case that "involved allegations that toxic emissions from the now-defunct RSR Corp. lead smelter in West Dallas caused irreversible brain damage to an entire generation of children, mainly poor and black, living in nearby public housing. Despite the fact that the entire case had been sealed by Hall, The Dallas Morning News reported last December that RSR had settled the lawsuit in mid-1985 by paying almost $20 million to 370 children. Hall said he signed the sealing order because attorneys for both the plaintiffs and defendant requested it and told him that confidentiality was essential for settlement of the case. 'I didn't even look at the terms of the settlement,' Hall said. "I just signed it and sealed it. I learned more about it from reading the newspaper than I did from the attorneys.'" McGonigle continued: "Hall sealed another lawsuit in which a woman claimed that Dr. Eugene Massad had sex with her in his Farmers Branch clinic on several occasions while treating her for back problems. The lawsuit was sealed and settled in September 1985 after WFAATV broadcast a series of reports on the doctor and his patient. Massad admitted in court records that on five occasions he had had sex with his patient, a violation of the Texas Medical Practice Act. He remains in practice with his medical license unaffected by the lawsuit, agency records show. Hall said he did not order the lawsuit sealed to help Massad conceal misconduct. The records, he said, remain open to any regulatory or law enforcement agency. Though Hall said he realized that the Massad and RSR cases had public interest value, he said he was confident that closing the records to the public ensured 'ultimate justice' in the cases. 'Sealing cases sometimes gives the appearance we're trying to hide something. That's not the issue,' Hall said. 'The issue is, 'What are the courts really here for?' We're here to help people get justice in their cases.'"

[56] McGonigle, *Rules Set on Sealed Records: Clerks given directive on accepting documents*, Dallas Morning News (12-31-1987) 25A. McGonigle wrote in this article that Dallas County's chief administrative judge John Marshall issued a local rule that "required the clerks to establish procedures within their respective offices for accepting sealed records and to refuse to accept those records that do not comply. Under the order, only records required to be sealed by statute or those displaying signed judicial orders spelling out which portions are sealed are to be withheld from public inspection. 'Now the judges who seal them are going to be accountable, and that's the important thing,' Marshall said Wednesday. 'It's introducing the accountability into the system.'" McGonigle continued: "The directive was the fourth in a series of orders concerning sealed court records that Marshall has issued since August, when The Dallas Morning News asked him to allow the newspaper access to lawsuits being held as sealed by District Clerk Bill Long. After Marshall granted limited access, The News reported in November that dozens of court records were being withheld from public view without a court order that specified whether they were to be sealed. The News also disclosed that court records often were sealed by district judges without public hearings to spare embarrassment or unwanted legal costs to wealthy or influential parties involved in lawsuits."

[57] *Judge Orders Lawsuit Unsealed: Jurist sees "no compelling reason" to keep legal firm's case closed*, Dallas Morning News, 4-19-1988, 16A. McGonigle wrote in this article that a visiting Judge, Clyde Whiteside of Montague County, unsealed a court file involving a law firm that was breaking up whose case was settled and the file sealed by a local judge. McGonigle also wrote that "[t]he Dallas Morning News reported last November that Dallas civil judges had sealed almost 300 lawsuits to public view without convening hearings on requests to close the records and without stating specific reasons for the closings, which became indefinite in longevity once they were ordered."

[58] The two McGonigle articles, and the Hull, as well as the Sickler and Heim, newspaper articles were cited in the 2016

law review article by Smith, Schmidt, and Smith that is mentioned in this same paragraph.

[59] Texas Attorney General Letter Opinion No. 93-87.

[60] Transcript from the 2-16-1990 SCAC meeting pp. 174-77.

[61] *Ibid.*, 187.

[62] *Ibid.*, 188.

[63] Chuck Herring's 3-5-1990 memorandum to the Supreme Court is contained in the SCAC 2- 9-1990 meeting's supplemental materials, pdf pp. 1-ff.

[64] Survey of practices in how the courts of appeals handle records sealed by the trial court, pdf p. 77-85.

End of Part 1

RICHARD ORSINGER *has practiced Family Law and Civil Appellate Law in Texas for 50 years. In October of 2021, as part of the Texas Supreme Court Advisory Committee, Richard's subcommittee was asked to review Tex. R. Civ. P. 76a and suggest changes. Richard reviewed the letters, memos, minutes, and meeting transcripts leading up to the adoption of the Rule in 1990, and interviewed persons still alive who were involved in those historical events. This article is a result of that work. Part 2 of this article will appear in the TSCHS Fall '25 Issue.*

Return to Journal Index

The Great Charter: A Look at the History and Texas Legacy of the Magna Carta, Which Celebrates Its 800th Anniversary This Year

By Vincent R. Johnson

This article was originally published in the April 2015 issue of the Texas Bar Journal *and has been reprinted with permission.*

The document that became known as the English Magna Carta—the Great Charter of Liberties—was issued in the name of King John on small, unadorned sheets of parchment dated June 15 in the 17th year of his reign (1215). Decidedly modest in appearance, each original was hand drafted by a scrivener and written in tightly packed Latin script. The papers contained many abbreviations, but the authenticity of each was apparent from the wax royal seal attached to the parchment by a ribbon.

Magna charta cum statutis angliae, England, 14th century. Among the Law Library's rarest books, this small version of the Magna Carta is still in its original pigskin wrapper and features intricate colored pen work. PHOTOGRAPH COURTESY OF THE LAW LIBRARY, LIBRARY OF CONGRESS

The originals, four of which still survive, were dispatched throughout England and read to crowds awaiting news related to the ongoing civil war that had temporarily been suspended. Those public proclamations dramatically announced the king's capitulation to a group of barons.

The nobles had been driven to rebellion by King John's abusive practices, including rapacious taxation, excessive fines, and manipulation of the court system. In the Magna Carta, the barons forced King John to pledge himself to a multitude of reforms. The charter even contained provisions whereby a committee of twenty-five barons could hold the king accountable for noncompliance.

Transplanted to the New World

The events of 1215 occurred long before England had colonies in America and more than half a millennium before those colonies declared their independence. However, the provisions of the Magna Carta were to shape American jurisprudence, particularly the law of Texas.

As the Texas Supreme Court has explained, "Colonists brought to America and then to Texas their belief in the historic rights guaranteed by Magna Carta."[1] The Magna Carta was one of the documents relied upon by the drafters of the 1836 Constitution of the Republic of Texas.[2] It was also one of the sources for the Texas Bill of Rights.[3] In the early 20th century, the Texas Supreme Court expansively opined, in text using the document's alternative spelling, that "[a]ll grants of power are to be interpreted in the light of the maxims of Magna Charta and the Common Law as transmuted into the Bill of Rights."[4]

Initial Failure and Second Chance

Things might well have turned out differently. As a peace treaty, the 1215 charter failed and its provisions were never meaningfully implemented. Within three months, the document was repudiated by King John and voided on grounds of duress by Pope Innocent III.

However, fate intervened. About sixteen months after the charter was issued at Runnymede, King John died. The advisers to his nine-year-old successor then quickly embraced the previously scorned charter as a way to sue for peace with the still-warring barons.

The charter was reissued on at least six other occasions during the next eighty-five years (1216, 1217, 1225, 1265, 1297, and 1300) in substantially different forms. Far from being an immutable icon, roughly one-third of the language in the original 1215 charter was jettisoned or changed.

As the years passed, the alterations to the Great Charter's text were forgotten, probably because they did not concern the provisions for which the Magna Carta has become famous.

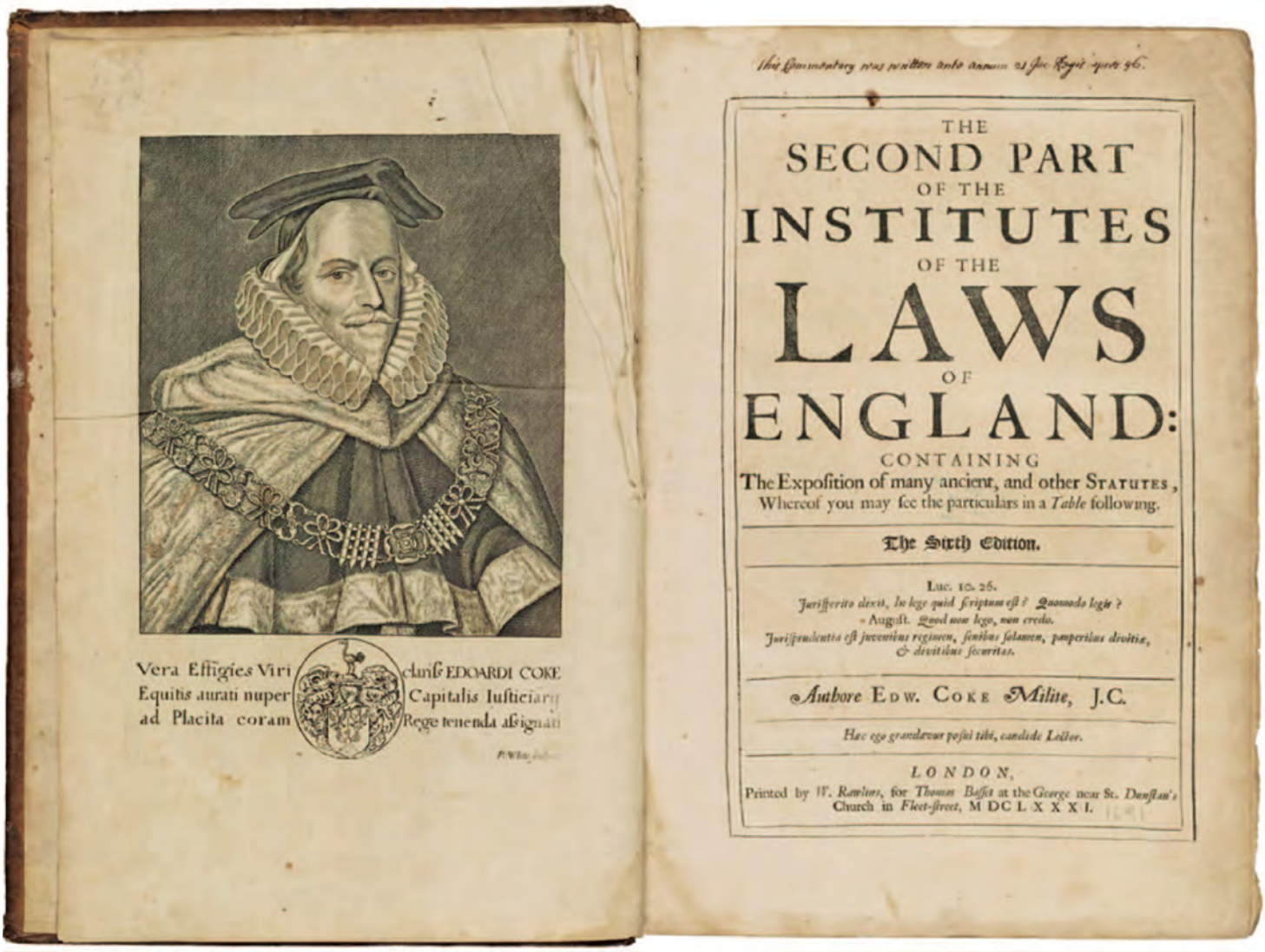
---

1 *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986).

2 Jadd F. Masso, *Mind the Gap: Expansion of Texas Governmental Immunity Between Takings and Tort*, 36 St. Mary's L.J. 265, 272 (2005).

3 Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 St. Mary's L.J. 93, 119 (1988).

4 *Spann v. City of Dallas*, 235 S.W.2d 513, 515 (Tex. 1921). *Spann v. City of Dallas*, 235 S.W.2d 513, 515 (Tex. 1921).



The Second Part of Sir Edward Coke's Institutes contains his famous interpretation of the Magna Carta, which placed the charter squarely in the center of English constitutional law. Lawyers in colonial America uniformly learned the law from Coke. Thomas Jefferson had his own set of the Institutes. London, 1681. PHOTOGRAPH COURTESY OF THE JEFFERSON COLLECTION, LIBRARY OF CONGRESS

Thus, in the guise of a seeming monolith, the 1215 document embarked on its jurisprudential odyssey across the centuries.

The Magna Carta is held in high regard because the unknown drafters understood the importance of legal principles, fair procedures, proportional punishment, official accountability, and respect for human dignity. Though intensely focused on the issues of feudal England, the Great Charter set the high expectations that have inspired lawyers and reformers for 800 years.

Due Process, Habeas Corpus, and Trial by Jury

The most famous provision in the Magna Carta, Clause 39, declares an unquestionable commitment to the primacy of legal principles. It states: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any

other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."[5]

Clause 39 is widely recognized as embodying the English concept of due process and its American progeny. The phrase "due course of law" in the Texas Constitution "can be traced to the Magna Carta."[6] As early as 1847, the Texas Supreme Court referred to the Magna Carta in interpreting the phrase "due course of the law of the land."[7] A century ago, on the charter's 700th anniversary, an opinion of the same court extensively considered how the American idea of due process evolved from the Magna Carta.[8]

The Magna Carta says nothing about the writ of habeas corpus and little about criminal procedure. However, it has long been maintained that the rights to legally challenge unlawful detention and unfair criminal procedures are implicit in the charter's guarantee that a person accused of crime is protected from adverse consequences except in accordance with the law of the land. The Texas Court of Criminal Appeals has noted that "[a]lthough the origin of the Great Writ has not yet been firmly established, most historians believe that it comes to us through the principles set out in" the Magna Carta.[9]

Clause 39 greatly advanced the idea that trials should be based on relevant evidence weighed by juries. Thus, the 5th Circuit has explained that "[t]he concept of trial by jury devolved to us from King John's grant of certain liberties to his nobles in the Great Charter of 1215."[10] Until the Magna Carta, disputes were often resolved by such dubious procedures as ordeal by hot iron or trial by battle.

It has been said that "the drafters of the Texas Declaration of Independence of March 2, 1836, which included experienced lawyers such as Sam Houston, demonstrated a keen awareness of the historical significance of both the Magna Carta and the right to a jury trial when they alleged that the Mexican government 'failed and refused to secure, on a firm basis, the right of trial by jury ... .' "[11] The 9th Court of Appeals in Beaumont has opined that courts of appeals should exercise restraint in overturning a jury's work, noting that the Magna Carta "forced King John to give rights to juries, not appellate courts."[12]

Judicial Ethics, Open Courts, and Proportional Punishment

Clause 40 is the shortest and most eloquent provision in the charter. In language that still glows with rectitude, it states simply: "To no one will we sell, to no one deny or delay right or justice."

---

5 The numbering and quotations are from the translation of the 1215 charter that is available on the British Library website.

6 Cristen Feldman, *A State Constitutional Remedy to the Sale of Justice in Texas Courts*, 41 S. Tex. L. Rev. 1415, 1418 (2000).

7 *Janes v. Reynolds' Adm'rs*, 2 Tex. 250, 251 (1847).

8 *Mabee v. McDonald*, 175 S.W. 676, 679 (Tex. 1915).

9 *Ex parte Banks*, 769 S.W.2d 539, 550 (Tex. Crim. App. 1989).

10 *Rabinowitz v. U.S.*, 366 F.2d 34, 44 (1966).

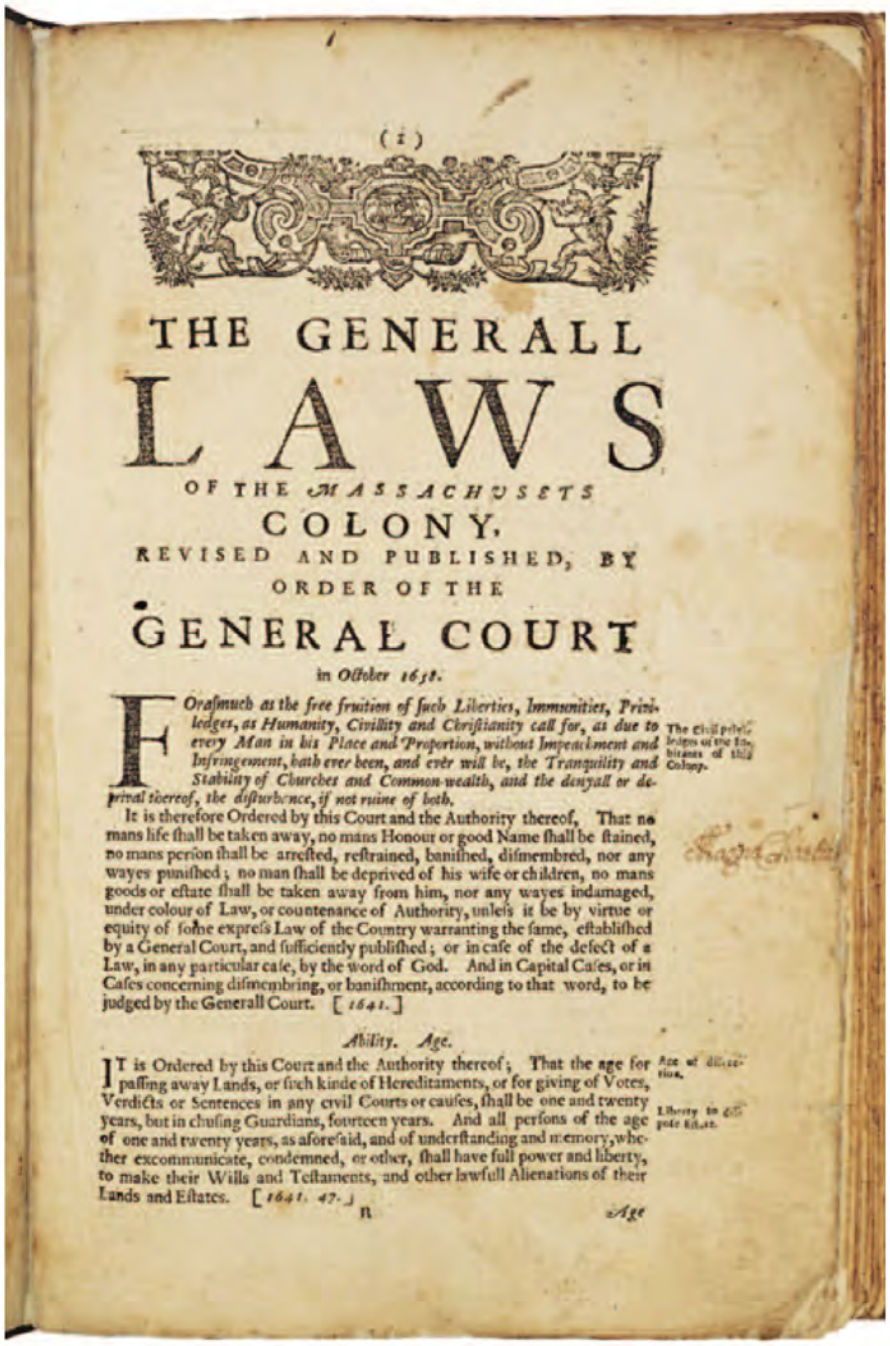
11 James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. Tex. L. Rev. 449, 542 n.276 (2004).

12 *Goolsbee v. State*, 927 S.W.2d 198, 201 (Tex. App—Beaumont 1996).

In the early 13th century, when judicial bribes were common, this principled statement was revolutionary. It anticipated the development of the rule of judicial ethics, recognized today in Texas and other states, holding that judges may not receive gifts or other things of value from persons likely to come before them.

Because Clause 40 allowed access to the courts for redress, it is regarded as the inspiration for the "open courts" guarantee found in the Texas Constitution.[13] "Many states have similar provisions in their constitutions … [and it] is generally acknowledged, in accordance with the Texas Supreme Court's conclusion, that open court clauses have their roots in Article 40 of the Magna Carta … ."[14] It has been said that "[a]mong those principles traceable to Magna Carta, only the due process guarantee itself has had a greater impact on American Constitutional law."[15]

The Great Charter spoke generously about the need for proportionality in punishment. Clause 20 states: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not



(1)

THE GENERALL
LAWS
OF THE MASSACHUSETS
COLONY,
REVISED AND PUBLISHED, BY
ORDER OF THE
GENERAL COURT
in October 1658.

For asmuch as the free fruition of such Liberties, Immunities, Privi-ledges, as Humanity, Civility and Christianity call for, as due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever been, and ever will be, the Tranquility and Stability of Churches and Common-wealth, and the denyall or deprival thereof, the disturbence, if not ruine of both.

The Civil privi-ledges of the Inhabitants of this Colony.

It is therefore Ordered by this Court and the Authority thereof, That no mans life shall be taken away, no mans Honour or good Name shall be stained, no mans person shall be arrested, restrained, banished, dismembred, nor any wayes punished; no man shall be deprived of his wife or children, no mans goods or estate shall be taken away from him, nor any wayes indamaged, under colour of Law, or countenance of Authority, unless it be by virtue or equity of some expres Law of the Country warranting the same, established by a General Court, and sufficiently published; or in case of the defect of a Law, in any particular case, by the word of God. And in Capital Cases, or in Cases concerning dismembring, or banishment, according to that word, to be judged by the Generall Court. [1641.]

Ability. Age.

IT is Ordered by this Court and the Authority thereof; That the age for passing away Lands, or such kinde of Hereditaments, or for giving of Votes, Verdicts or Sentences in any civil Courts or causes, shall be one and twenty years, but in chusing Guardians, fourteen years. And all persons of the age of one and twenty years, as aforesaid, and of understanding and memory, whether excommunicate, condemned, or other, shall have full power and liberty, to make their Wills and Testaments, and other lawfull Alienations of their Lands and Estates. [1641. 47.]

Age of discretion.

Liberty to make Wills.

The Generall Laws of the Massachusetts Colony, Revised and Published, by Order of the General Court, in October 1658. The earliest charters and codes of law created by colonists in British America incorporated the guarantees set down in the famous Chapter 39 of the Magna Carta: trial by jury, freedom from unlawful seizure of property, freedom from unlawful imprisonment, and a guarantee of the rule of law. PHOTOGRAPH COURTESY OF THE LAW LIBRARY, LIBRARY OF CONGRESS

[13] *Weiner v. Wasson*, 900 S.W.2d 316, 322 (Tex. 1995); *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988); *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986).

[14] Nora O'Callaghan, *When Atlas Shrugs: May the State Wash Its Hands of Those in Need of Life-Sustaining Medical Treatment?*, 18 Health Matrix 291, 301 (2008).

[15] *Lucas v. United States*, 757 S.W.2d 687, 715 (Tex. 1988) (Phillips, C.J., dissenting).

so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein [a feudal tenant] the implements of his husbandry. ...” This provision reflects a humane desire to allow persons to provide for their own subsistence. “[P]arallels have ... been drawn between the livelihood-protection provisions of the Magna Carta and state homestead laws,”[16] such as the one in Texas. In addition, according to the Texas Supreme Court, the language in the Texas Constitution prohibiting “excessive fines ... [and] cruel or unusual punishment” is said to have its “origin” in the Magna Carta.[17]

Ethics in Government and Protection of the Vulnerable

Three provisions in the Magna Carta prohibited royal officials from taking corn or other movable goods without immediate payment, or taking horses, carts, or wood without the consent of the owner. These clauses presaged the development of a broader, fundamental principle of modern governmental ethics jurisprudence. That principle, which is part of the ethics codes of Texas cities like San Antonio[18] and Dallas,[19] holds that a government official or employee may not use official power for personal economic benefit.

The Magna Carta contained a number of provisions that advanced interests of widows, surviving children, heirs, wards, hostages, and debtors. Some of the provisions are striking. For example, in feudal England, a widow could be forced to remarry or deprived of her inheritance. In opposition to those practices, Clause 8 states with certainty, “No widow shall be compelled to marry, so long as she wishes to remain without a husband,” and Clause 7 provides, “At her husband’s death, a widow may have her marriage portion and inheritance at once and without trouble.”

The Magna Carta was a product of its times and in no sense guaranteed everyone equal treatment. However, it protected a much wider array of persons and entities than just free men and aristocrats. It recognized the freedom of the church, the rights of merchants and others to travel, the liberties and customs of cities, and even the interests of mercenaries.

The Magna Carta made an important contribution to the law of Texas. That legacy is part of what makes the Great Charter’s 2015 octocentennial a grand occasion that deserves to be internationally celebrated.

---

[16] Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 901 n.227 (2013).

[17] *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

[18] City of San Antonio Ethics Code § 2-43(a) (2014).

[19] City of San Antonio Ethics Code § 2-43(a) (2014).

Vincent R. Johnson *is a professor of law at St. Mary’s University School of Law in San Antonio.*

Return to Journal Index

Banned in Texas:

A Brief Legal History of Movie Censorship in the Lone Star State

By Hon. John G. Browning

Texans love their movies. In the Dallas/Fort Worth area alone, North Texans spent $271 million on films in 2022. That same year, film, television, and commercial production companies contributed nearly $2 billion to the Lone Star State's economy. In fact, film production is so important to Texas that this year the Legislature passed a bill providing a staggering $500 million in incentives to support filmmaking in our state.

But for much of Texas' legal history, filmmakers didn't feel this kind of warm embrace. In the early days of the movies, early filmmakers wanted fight films, depicting heavyweight championships—a tall order in a state like Texas where boxing was outlawed. However, there were other "action-friendly" subjects that could be immortalized on the turn-of-the-century Kinetoscope, and so audiences were treated to 1896's *Mounted Police Charge* as well as movies depicting the aftermath of the *Storm of the Century*, in such 1900 movies as *Galveston Disaster*, *Bird's-Eye View of Dock Front, Galveston*, and *Searching Ruins on Broadway, Galveston, for Dead Bodies*.[1]

The popularity of titles promising scenes of action and violence, however, did not keep movies from coming under fire due to the perceived need to protect impressionable viewers and children. Calls for censorship soon came, with the *Houston Post* warning in 1909 that "Until the pictures cease to depict killings and law breaking, and the interior of bawdy houses and the torturing of animals, the shows of each town should be compelled by an ordinance to support a censor."[2] By the end of 1909, Fort Worth became the first city to create a censor's office to regulate such "immoral" films.

Censorship efforts soon accelerated. In 1913 Houston assembled a three-person censorship board. The *Houston Post* editorialized that "censors must be given full authority to suppress improper films, and the police must be given ample authority to close places that flagrantly violate the law."[3] Although the board flagged the controversial motion picture *The Seventh Commandment* in 1915, the theater manager was acquitted at trial.[4] Houston's censorship unanimously approved

1 Jeremy Geltzer, *Film Censorship in America: A State-by-State History,* (McFarland & Company, 2017), 175.

2 "Moving Picture Show Censor," *Houston Post*, Dec. 27, 1909.

3 "Stand by the Censors," *Houston Post*, Aug. 2, 1915.

4 "Motion Picture Manager Was Acquitted by Jury," *Houston Post*, July 30, 1915.

Clockwise from top left: Still images from *Mounted Police Charge* (1896), *Galveston Disaster* (1900), *Birth of a Nation* (1915), and *The Seventh Commandment* (1915)

the equally controversial *The Birth of a Nation* the same year, though. Dallas followed Houston, creating its censor board in 1915. It was considerably more active, banning nineteen films in its first year of operation.[5]

By the 1930s and 1940s, censor boards were active throughout Texas. Abilene's censors were worried about the 1932 MGM film *Strange Interlude* because of the picture's mature themes. Based on a play by award-winning playwright Eugene O'Neill, the film was ultimately allowed to open with the caveat that viewership be limited to adults.[6]

Censorship in Texas had its first major test on a national stage with the 1949 release of the 20th Century Fox film *Pinky.* The movie told the story of a light-skinned Black woman who had passed for white while at a Northern nursing school. Returning home to the South, the titular heroine confronts racist attitudes while caring for an elderly white neighbor. Although the film experienced no opposition opening in such Southern cities as Atlanta, Marshall, Texas was a different story.

---

5 "Work of Dallas Censors," *Motion Picture Weekly*, May 27, 1916.

6 "Censors Bar Children at O'Neill Play," *Abilene Reporter-News,* Jan. 1, 1933.

Clark Gable and Norma Shearer in S*trange Interlude* (1932)

In Marshall, the city's Board of Censors notified theater manager W.L. Gelling that it disapproved of the film and instructed him not to show it. Gelling defied the order and exhibited *Pinky* anyway, resulting in criminal charges for violating the city's ordinance. He was tried in the County Court of Harrison County on October 24, 1950, found guilty by a jury, and assessed a fine of $200. Gelling appealed, and the Texas Court of Criminal Appeals affirmed the conviction.[7] Relying on a 1915 U.S. Supreme Court that had upheld film censors in Ohio, the Court of Criminal Appeals banned the showing of *Pinky* without considering the First Amendment issues or free speech concerns at all.[8] Instead, it railed against "[t]he desire of a great industry to reap greater fruits from its operations," which "should not be indulged at the expense of Christian character, upon which America must rely for its future existence."[9] It would only weaken society if "the citizens of the community are divested of all power to surround [children] with a wholesome entertainment and character building education."[10]

The U.S. Supreme Court wasted no time—or words—in reversing the Texas court in a per curiam opinion that tersely stated "The judgment is reversed."[11] It was up to Justice Douglas in a brief concurring opinion to directly confront what he described as "the evil of prior restraint... present here in flagrant form."[12] Douglas succinctly stated what was at stake: "If a board of censors can tell the American people what is in their best interests to see or to read or to hear, then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated."[13]

Jeanne Crain and Ethel Waters in *Pinky* (1949)

If you thought that being on the end of an epic slapdown by the highest court in the land would have a sobering effect on Texas courts regarding films and freedom of expression, you'd be wrong. Texas censors remained active into the Sixties. In 1960, Fort Worth's Board of Censors was unimpressed by the Ingmar Bergman film

7 Gelling v. State, 247 S.W.2d 95 (1952).

8 Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S.230 (1915).

9 Gelling v. State, 247 S.W.2d 95 (1952).

10 *Ibid.*

11 Gelling v. State of Texas, 343 U.S.960 (1952).

12 *Ibid*.

13 *Ibid.*

Max Von Sydow in *The Virgin Spring* (1960)

The Virgin Spring and its Academy Award for Best Foreign Film. The movie, a meditation on faith and revenge, includes a nonexplicit scene depicting the brutal rape and murder of a young girl. Before the film could be screened at Fort Worth's Capri Theatre, censors demanded that the scene in question be cut. The film's distributor refused, setting up a court challenge. Once again, the Board of Censors won at the trial level, and the appellate court affirmed. The Court of Appeals—without even seeing the film—stated "We cannot say from this record that the 'Rape Scene,' which we have not viewed, is not indecent and is not obscene."[14]

Three years later, Dallas' censor board stopped Louis Malle's film *Viva Maria!* from playing in a Dallas theater. The censors complained that the movie's depiction of scenes of "sexual promiscuity," could be a bad influence on young persons. Much like the *Virgin Spring* case, the Board of Censors prevailed at both the trial level and at the Court of Appeals. This time, however, theater owners appealed to the U.S. Supreme Court.

The Supreme Court began with a look at Dallas' ordinance itself that the local Board of Censors followed. The Board was empowered by the ordinance to declare a film "not suitable" if, in the Board's judgment, "the film describes or portrays (1) brutality, criminal violence, or depravity in such a manner as likely to incite young persons to crime or delinquency" or (2) "sexual promiscuity or extramarital or abnormal sexual relations in such a manner as...likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest."[15] However, as the Court pointed out, the term "sexual promiscuity" was neither defined in the ordinance itself nor had it been interpreted in the state courts. Accordingly, the court held that the ordinance was violative of the First and Fourteenth Amendments as unconstitutionally vague, since it lacked "narrowly drawn, reasonable and definite standards for the officials to follow."[16]

Brigitte Bardot & Jeanne Moreau in *Viva Maria*! (1963)

[14] Janus Films, Inc. v. City of Fort Worth, 354 S.W.2d 597 (Tex. App.-Fort Worth, 1962).

[15] Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690, (1968).

[16] *Ibid*.

Freedom of expression won out. By 1971, most if not all of Texas' municipal censor bodies had been defunded. Shortly thereafter, the Lone Star State began to realize the economic benefits of encouraging movie production companies to come to Texas. The Texas Film Commission (TFC) was established in 1971 by Gov. Preston Smith. It was, he declared, "in the social, economic, and educational interest of Texas to encourage the development of the film-communication industry."[17] In 2007, the Texas Legislature established the Texas Moving Image Industry Incentive Program, which empowered the Texas Film Commission to administer grants to films produced in Texas.


Gov. Preston Smith

But with the power of purse strings came another, more indirect limitation on freedom of expression. The TFC could deny funds to any project that "portrays Texas or Texans in a negative fashion."[18] This "negative portrayal" provision was cited in the 2010 denial of a 15 percent TFC rebate for the $30 million production of a film about the Branch Davidian siege in Waco. The TFC's commissioner at the time disapproved of the script, which he considered factually inaccurate.

This "negative portrayal" language wasn't challenged in the courts until 2015. Director Robert Rodriguez had filmed the Danny Trejo movie *Machete* in Austin, spending an estimated $8 million in Texas production costs and creating hundreds of jobs. However, after TFC viewed a trailer for the film, it reneged on the already-approved tax incentive commitment. Rodriguez' production company sued over the denial of payment, which Rodriguez viewed as an unconstitutional attempt to influence the speech of movie producers. However, both the trial court and the Austin Court of Appeals disagreed, finding that the state commission's denial could be appropriate at any stage of the project, including pre-production and post-production.[19] Accordingly, the *Machete* case stands as a cautionary tale for producers not to "mess with Texas"—at least if they expect tax incentives.


Danny Trejo in *Machete* (2010)

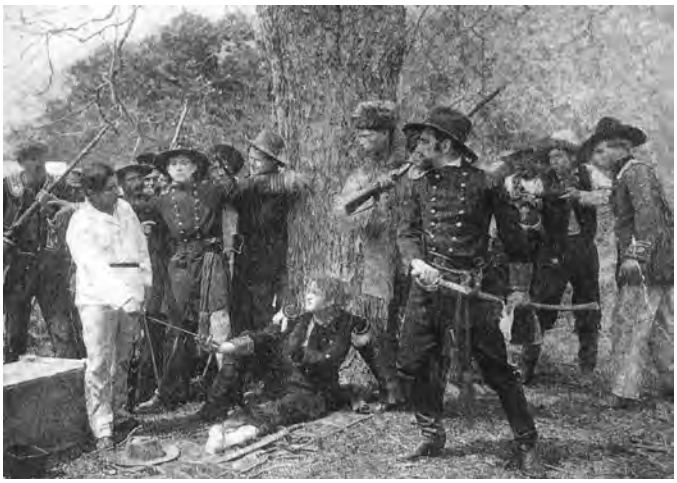
Certainly, Texas has had a rich film legacy. Consider the fact that the very first film about the Alamo—*The Immortal Alamo*—was made in 1911. Nearly a century later, the Alamo defenders' brave stand still fascinated filmmakers, as director John Lee Hancock's 2004 *The Alamo* demonstrates. However, Texas has a similarly lengthy legacy of film censorship, even if it never had a state board of censors. Local boards popped up not just in metropolises like Houston, Dallas, and Fort Worth, but also in Abilene, Corsicana, Denison, Marshall, and El Paso. Interestingly, Austin never

---

17 Marc Savlov, "Thirty Years on Location," *Austin Chronicle*, June 15, 2001.

18 Tex. Admin. Code §(21.4 (b), 2010, Texas Film Commission, Ineligible Projects.

19 Machete's Chop Shop, Inc. v. Texas Film Commission, et al. No. 03-14-00098-CV (Tex. App. – Austin 2016).




Still images from *The Immortal Alamo* (1911) and *The Alamo* (2004)

empaneled a board of motion picture regulators.[20]

Movies have a long tradition of both entertaining audiences and agitating so-called "moral authorities." It is hard to grasp today, but the medium of film wasn't recognized as worthy of First Amendment protection until 1952. Nevertheless, as the work of the Texas Film Commission demonstrates, the tension between freedom of expression and government control of content remains.

---

20 "Want Movie Censor," *Corsicana Daily Sun*, May 27, 1921.

Return to Journal Index

The First Red River "Shootout":
A Century of Texas Border Dispute

By Robert J. Reagan

Every year in October since 1900, with several interruptions in the 1920s, the Universities of Texas and Oklahoma football teams face off at a neutral location in Dallas. This game has been characterized as the "Red River Shootout" referencing the boundary between the two states. Fortunately, the only violence occurring was the usual sanctioned one associated with the blocking and tackling in the game, and occasional physical altercations between fans, which are rare.

This paper is about another rivalry — a diplomatic, legal, and judicial one — between the United States and Texas, and another between Oklahoma and Texas, concerning the Red River. that originated over 200 years ago. And the rivalry may still exist. It involves treaties, their interpretation and application, and the determination of boundaries on land.

What was and is the actual border between Texas and the territory that would become the state of Oklahoma?

During the Presidency of Thomas Jefferson in 1803, the United States doubled its geographical size with the Louisiana Purchase negotiated with Napoleon's France. The extent of Louisiana territory in the Treaty between the United States of America and the French Republic signed April 30, 1803, was only vaguely defined, with reference to the territory that Spain re-conveyed to France in 1801.

President Jefferson pressed the United States claims farther afield. He asserted that Louisiana embraced all of the lands drained by the western tributaries of the Mississippi River, including the far-flung and uncharted headwaters of the Missouri River and the area drained by their tributaries. Jefferson also planned the first exploration of this land that became known as the Lewis & Clark Expedition.

Map of the Louisiana Purchase

The government of Spain, which had relinquished Louisiana to Napoleon's France, subsequently disputed the boundaries of Louisiana with Spanish colonial territory. Accordingly, Secretary of State John Quincy Adams undertook negotiations with the Spanish government

Land claimed by the U.S.

during the James Monroe Administration. In 1819 the United States and Spain negotiated the 1819 Adams-Onis Treaty, also known as the Transcontinental Treaty. The Treaty described the boundary between the Louisiana Purchase as follows:

> The Boundary Line between the two Countries, West of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the River Sabine in the Sea, continuing North, along the Western Bank of that River, to the 32d degree of Latitude; thence by a Line due North to the degree of Latitude, where it strikes the Rio Roxo of Nachitoches, or Red-River, then following the course of the Rio-Roxo Westward to the degree of Longitude, 100 West from London and 23 from Washington, then crossing the said Red-River, and running thence by a Line due North to the River Arkansas, thence, following the Course of the Southern bank of the Arkansas to its source in Latitude, 42. North and thence by that parallel of Latitude to the South-Sea. The whole being as laid down in Melishe's Map of the United States, published at Philadelphia, improved to the first of January 1818.

The Treaty further provided:

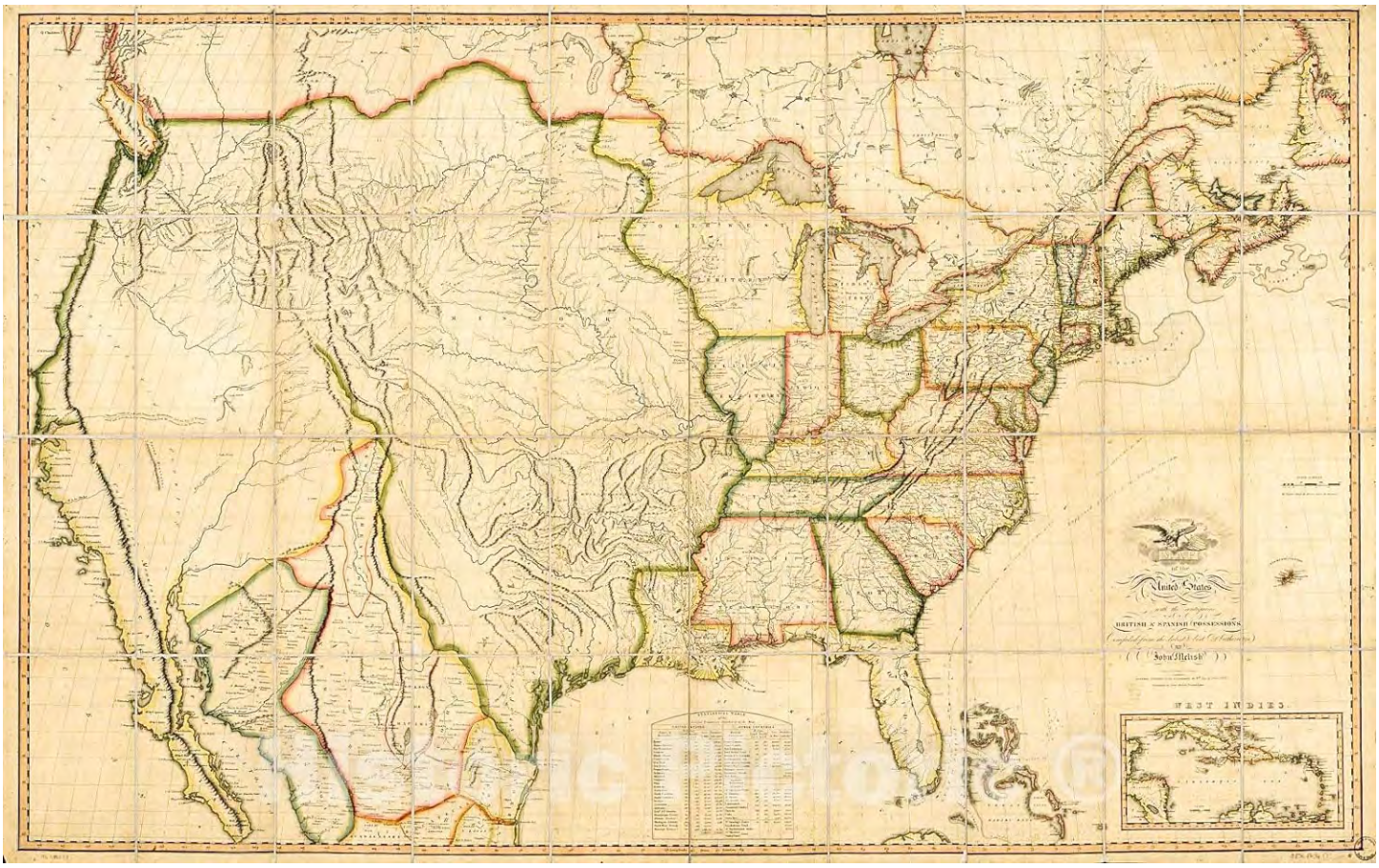
> To fix this Line with more precision, and to place the Landmarks which shall designate exactly the limits of both Nations, each of the Contracting Parties shall appoint a Commissioner, and a Surveyor, who shall . . . mark the said Line from the mouth of the Sabine to the Red River, and from the Red River to the River Arkansas, and to ascertain the Latitude of the Source of the said River Arkansas . . . they shall make out plans and keep Journals of their proceedings, and the result agreed upon by them shall be considered as part of this Treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree respecting the necessary Articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary.

The Adams-Onis Treaty was in effect with Spain for less than two years. After Mexico gained its independence from Spain in 1821, the treaty's effectiveness was in question. Mexico and the United States, however, agreed to the Treaty boundaries in 1828.

Most of us in the Lone Star State know that Texas won its de facto independence from Mexico in 1836. The Republic became a U. S. State in December 1845 during the James K. Polk administration. A dispute as to whether the southern boundary of Texas was the Nueces River or

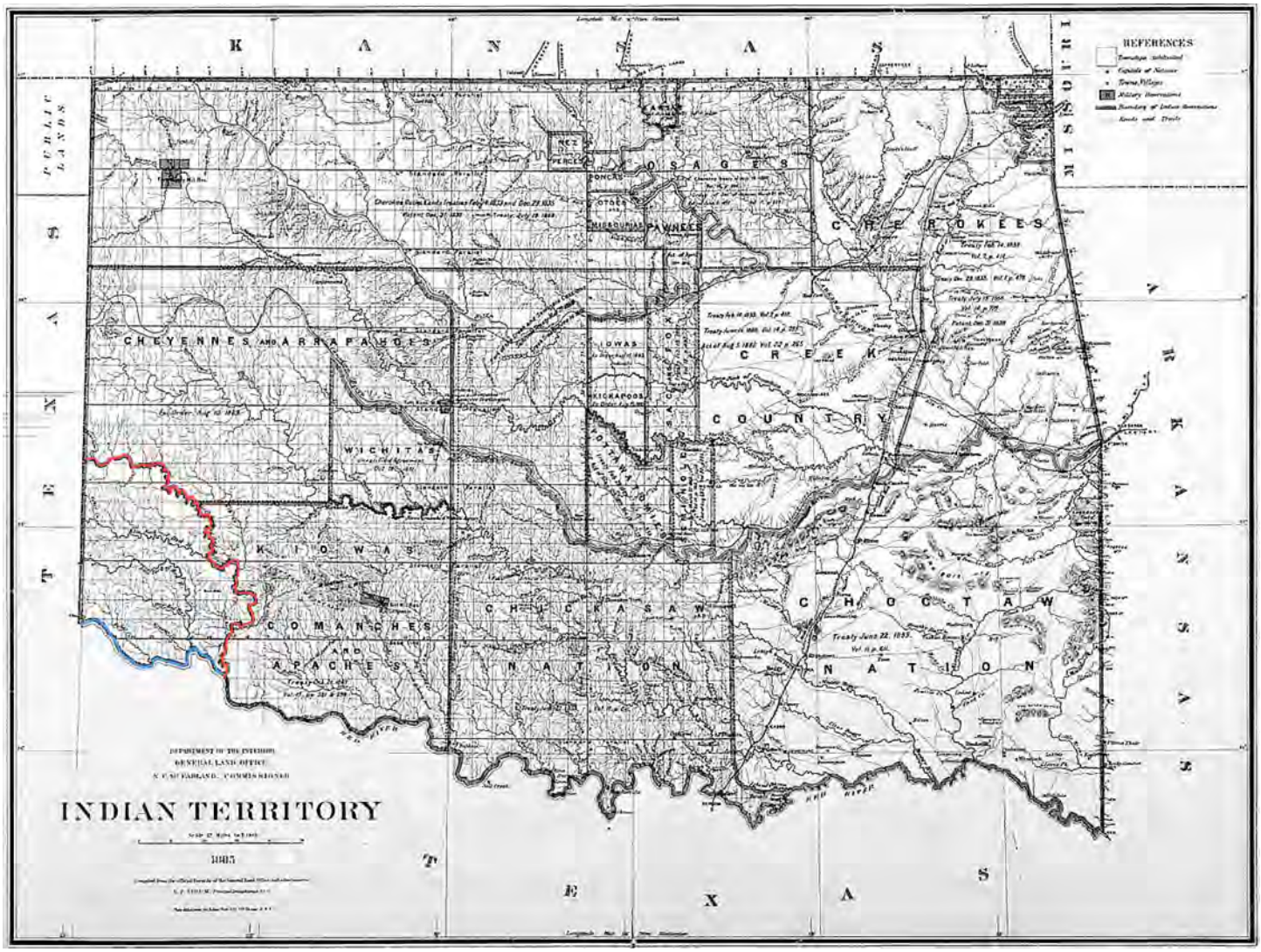
the Rio Grande precipitated a war between Mexico and the United States. After the U. S. victory, the Treaty of Guadalupe-Hidalgo settled the boundary with Mexico along the Rio Grande, and ceded California and other lands south of the Adams-Onis line to the U.S. In 1850, Congress passed an Act by which, among other provisions, Texas would agree the northern boundary of the Panhandle and the other western boundaries of Texas. It would appear that the boundaries of Texas were then settled. Or were they?

The Adams-Onis Treaty had made reference to the Melishe Map of 1818 to determine the point at which the Red River met the 100° meridian. Later surveys, however, determined that the map placed the meridian around ninety miles east of the astronomical location. Use of the Melishe meridian thus would have placed the border of the Texas Panhandle on a north-south line near Lawton Oklahoma and Wichita Falls, Texas, considerably reducing Oklahoma's land area. The Treaty, however, had a provision that later surveys would determine the true location of the meridian using the astronomical bearing.



Melishe Map of 1818

Randolph B. Marcy and Captain (later Civil War Union Major General) George B. McClellan first determined the Prairie Dog Town Fork to be the main fork of the Red River after exploring it in the summer of 1852. Nevertheless, on February 8, 1860, the Texas legislature passed an act providing for the formation of Greer County, with boundaries "beginning at the confluence of Red River and Prairie Dog Town River; then running up Red River, passing the mouth of the South Fork and following main or North Red River to its intersection with the twenty-third degree of west



Map of Greer County, Texas

longitude (the 100th meridian); thence due south across the Salt Fork to Prairie Dog River, and thence following that river to the place of beginning." This Act assumed that the North Fork was the Red River proper, and the Prairie Dog Town Fork was a tributary.

Though the Act was passed in 1860, the Civil War and Reconstruction delayed organization and development of Greer County until the 1880s. During that decade cattle companies acquired land by patents from the state. In July 1886, the settlers of the area bounded by the 100th meridian and the North and Prairie Dog Town forks organized Greer County under the authority of the Act. The county seat was named, post offices were established, a county jail built, and a school system was set up.

In 1890, Congress passed the Oklahoma Organic Act. This statute provided for a "temporary government for the Territory of Oklahoma . . . and for other purposes." The "other purposes" included authority to bring a suit in equity against the State of Texas to make a final determination for possession of the land between the North and South Forks and the 100th meridian against Texas' claims.

The first case, styled *United States v. Texas*, was filed in the Court in 1890 invoking the Supreme Court's original jurisdiction. Texas responded by filing a demurrer, challenging such jurisdiction. The demurrer was overruled, and the case proceeded on the merits.

After considerable briefing and argument, Justice John Marshall Harlan, writing for the Court, issued a ninety-one-page opinion and decree in favor of the United States.

The issues presented were two: (1) the true location of the 100th meridian, and once that issue was settled, (2) which of two forks of the Red River was the one referred to in the Treaty.

The first issue was disposed of by considering the language of the Adams-Onis Treaty. The Court said that, upon a reasonable interpretation of its provisions while it referred to the 100th meridian on the Melish map, it also left it open for the parties to engage commissioners and surveyors to ascertain the true location of the 100th meridian. The Court further observed that even if the Melish map were found to be the intent of the Treaty, the 1850 enactments by Texas and the United States, and their subsequent conduct embraced the correct meridian.

The real issue was whether the Treaty meant the Red River to be the Prairie Dog Town Fork, also known as the South Fork, or the North Fork to be the correct boundary between Texas and the territory that became Oklahoma. Both cross the meridian, but at locations about 50 miles from each other.

Justice Harlan considered in exhaustive detail the arguments presented by the parties. Among the issues that persuaded the Court to sustain the claim of the United States include the following.

The Compromise of 1850, enacted by Congress and accepted by Texas, together with the action of the state and federal governments, set the present borders of Texas. The intention of the two governments, as gathered from the words of the Adams-Onis Treaty, must control, and that the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. The south or Prairie Dog Town Fork most nearly answers to the description of the Red River as shown on the early maps, including that of Melish referred to in the treaty, instead of the North Fork, the course of which would make the line run to northwest from the confluence of the forks.

Texas argued that Greer County was named in an Act of 1879 constituting the northern judicial district in Texas and thus Congress conceded the County was part of Texas. The Court, however, held that the Act was not intended to express the purpose of the United States to surrender its jurisdiction, and does not admit the right of Texas to that territory. The same reasoning applied to the designation of a post office in "Greer County, Texas" by the U. S. Post Office.

The Court further opined that routes, trails, or roads, the character of which could not have been known around the time of the Treaty, does not suggest which Fork was primary. Travel by traders and trappers could have been only occasional and limited, and also would not so indicate.

Accordingly, the Court rendered the following decree.

> This cause having been submitted upon the pleadings, proofs and exhibits, and the court being fully advised, it is ordered, adjudged and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red River and of the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the 100th meridian of longitude – which territory is sometimes called Greer County — constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America.

This judgment appears to have ended the Texas border controversy. But, as it happened, not so.

Oklahoma was admitted to the Union as a state in 1907. A controversy subsequently arose where Texas contended that the boundary between the states was the middle of the main channel of the Red River while Oklahoma asserted that the south bank was the boundary. Oklahoma sued Texas in 1919 invoking the original jurisdiction of the Supreme Court. Oklahoma argued that the matter was settled by the Court's 1896 decree and the principles of *res judicata* should apply. Texas countered by arguing that the matter of the location, even though the Court's judgment stated the south bank was the boundary, was not actually litigated and those principles should not apply.

The Supreme Court overruled Texas' contentions and ruled that *res judicata* did apply and rendered judgment for Oklahoma. The Court later issued a further decree setting rules for implementing the judgment.

The Court rulings that the border was the south bank rather than the midstream as usual was significant in 1931when a spat occurred between the respective state governors concerning a bridge over the river east of the present-day Lake Texoma. That is worth another article.

Endnotes

1. The game was first held in 1900. It continued until 1922 and resumed in 1929 to play continuously until this day and played in the Dallas Cotton Bowl. The official name was changed in 2005 to"Red River Rivalry" and later "Red River Showdown" apparently because of squeamishness of corporate sponsors. Many still refer to it as the "Shootout."
2. https://www.loc.gov/collections/louisiana-european-explorations-and-the-louisiana-purchase/articles-and-essays/the-louisiana-purchase/
3. Adams-Onis Treaty Article Three.
4. Adams-Onis Treaty, Article Four.
5. This boundary is at latitude 36°30' that was the boundary between the permitted slave and free territories under the Missouri Compromise of 1820.

6. Texas ceded the lands to the west that were originally claimed to the United States in exchange for assumption of the state debt and payment of $10M. The Gadsden Purchase added the southern area of what is now Arizona and part of New Mexico, completing the present boundaries of the Continental U.S. lower 48 states.
7. "Melishe" was spelled in the Treaty. The "e" is omitted in some other sources.
8. *See* Note 4 and accompanying text. *See also* 8 Stat. 252 254, 256, *cited by United States v. Texas*, 162 U.S. at 28-29.
9. Ch. 90, Texas General Laws, 8th Leg. (1860). See W. L. Webb, "The Formation and Dispute of Greer County: A Historical Overview" *Texas State Historical Assn. Handbook, of Texas* (1952, updated 2015) https://www.tshaonline.org/handbook/entries/greer-county.
10. 26 Stat. 80 (Chapter 181) Pub.L. 51-181 (or 182).
11. *Ibid*. § 25.
12. U. S. Constitution, art. III.
13. *United States v. Texas*, 143 U.S. 621 (1892).
14. *United States v. Texas*, 162 U.S. 1 (1896).
15. *Ibid*., 42.
16. *Ibid*., 42-43.
17. *See* Note 9, and accompanying text above.
18. 162 U.S. at 81. The court further discounted the argument that the Prairie Dog Town Fork's water is unfit for drinking while the North Fork's is less so. See 162 U.S. at 88.
19. 162 U.S. at 90-91
20. *Oklahoma v. Texas*, 256 U.S. 70 (1921) (The Treaty did not explicitly say the south bank of the river was the boundary, but the 1896 decree may have been based on language in Article 3 describing the boundary as "… crossing the said Red-River, at the 100th meridian …").
21. 256 U. S. at 93.
22. 261 U. S. 340 (1923). (Decree declaring the general course of and rules for locating the boundary between Oklahoma and Texas on the south bank of Red River). Of some interest, Texas again sued Oklahoma in the 1980s to set the state's boundary near the Texoma Reservoir Dam on the Red River. At the request of both states, the Supreme Court entered a consent decree settling that issue. *Texas v. Oklahoma*, 457 U. S. 172 (1982).
23. For recent history, see Rusty Williams, *The Red River Bridge War*, Texas A&M Univ. Press (2016).

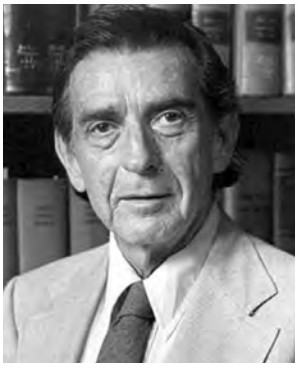
ROBERT J. REAGAN *is a partner in the Dallas firm of Reagan & Hatch. LLP. He focuses his practice on representing business and individuals in general civil litigation, creditors' rights, contested matters in bankruptcy cases, and probate and estate administration and litigation.*

Return to Journal Index

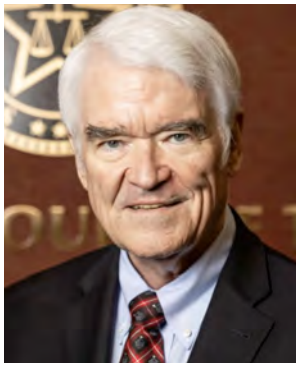
Forty-Five Years of First Amendment Law in Texas:
Reflections of an Accidental First Amendment Lawyer

By Thomas S. Leatherbury

Constitutional law, especially the First Amendment, fascinated me from an early age, but I never thought I would practice it, much less make a career out of it and go on to teach it. My father served on the Fort Worth ISD School Board from 1961 to 1973, so I heard about the Fifth Circuit at the dinner table when I was still in elementary school, as the District was ordered to implement remedies, including busing, under *Brown v. Board of Education II*. In law school, Texan Charles L. Black was my Constitutional Law I professor, and the most memorable day was when he came straight to class from a rehearsal for Julius Caesar at the Yale Repertory Theater—in toga and sandals. Then I took several elective Constitutional Law classes, writing my longer papers on single-member school board districts as a desegregation remedy and on prison mail policies, and working in a legal clinic that represented patients at one of Connecticut's three large mental hospitals in their civil commitment hearings.


Charles L. Black


Steve Philbin


Nathan Hecht


Orrin Harrison


J. Newton Rayzor

But in returning to Texas, I was set on practicing commercial litigation and joined Locke Purnell Boren Laney & Neely after my clerkship. I knew that Locke Purnell represented *The Dallas Morning News* and WFAA-TV, but other associates warned me not to expect any assignments for those clients and that Steve Philbin, the lead lawyer for those clients, was demanding and difficult to work with. So, I settled into a range of commercial cases, including an antitrust case in which new partners Nathan Hecht and Orrin Harrison had obtained a successful class plaintiffs' verdict a few months earlier, *Greenhaw v. Lubbock County Beverage Ass'n*.

About six weeks after starting with the firm, my career changed dramatically, and I became an accidental First Amendment lawyer. One Saturday morning, Steve Philbin barged into my office and slapped a file on my desk. *The Dallas Morning News* had been sued in Denton County for defamation by a North Texas State University trustee, J. Newton Rayzor, and

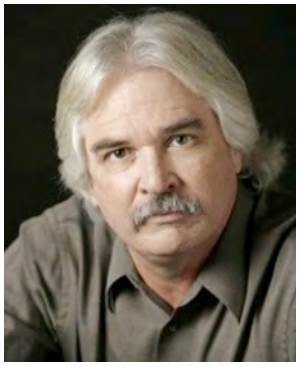
the trial court had denied *The News*'s plea of privilege (motion to change venue) the day before. *The News* planned to appeal that denial, and Steve needed an appellate brief written in short order. We worked closely on what was my first appellate brief, but lost the appeal. When the case went to trial, the jury awarded the plaintiff the then-astronomical sum of $2,000,000, and the briefing assignment landed on my desk once again. It was a steep learning curve, and Steve Philbin was indeed demanding to work with, but in the best, kindest, and most collaborative way imaginable.

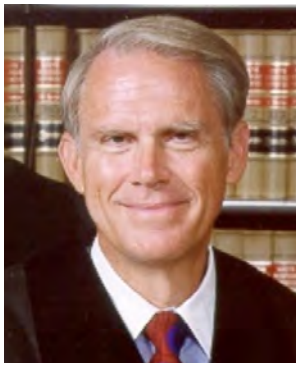

John McElhaney

During the briefing process, Steve suddenly fell ill and tragically passed away of leukemia. Literally, as our appellant's brief was ready to go to the printer, John McElhaney stepped in as the partner-in-charge, quickly becoming my mentor and teacher. We received the Fort Worth Court of Appeals' opinion reversing and rendering judgment for *The News* in November of 1982, the same day I attended my first Practicing Law Institute Communications Law seminar where I began to meet First Amendment advocates from across the country who would soon become my good friends and sometimes co-counsel or clients. The Fort Worth Court held squarely that statements of opinion and accurate characterizations could not serve as the basis for a defamation claim.

Because of Steve and John's initial sponsorship and mentorship, I have been fortunate to participate in and witness major changes in First Amendment law in Texas over the last forty-five years. Some of the positive changes are chronicled below.

Texas Rule of Civil Procedure 76a


Steve McGonigle


Judge John McClellan Marshall

In the 1980s, the newspaper war between *The Dallas Morning News* and *The Dallas Times Herald* was serious, and the initiative shown by individual-beat reporters made a difference. *The Dallas Morning News* had a tenacious and enterprising state-courthouse reporter, Steve McGonigle. In poking around the Dallas County District Clerk's Office, McGonigle discovered a roomful of closed and sealed files in the courthouse basement. He went to Administrative Judge John McClellan Marshall and convinced Judge Marshall to unseal all the files. *The News* published the results of McGonigle's review of those files in a series of articles in 1987 and 1988. McGonigle's painstaking research showed that whole case files were sealed without a motion to seal or sealing order, particular lawyers regularly got their clients' files sealed, and influential and wealthy individuals successfully had multiple cases sealed. *The Dallas Morning News* leadership wanted to challenge the lawless, willy-nilly sealing of files to compel greater judicial transparency, despite an administrative order Judge Marshall entered that made sealing court records more difficult. We were aware of some unsuccessful efforts to unseal court files, such as *Times Herald Printing Co. v. Jones*, in which the expiration of plenary power doomed unsealing efforts. We debated the proper vehicle extensively, and rightly or wrongly decided to file suit against Dallas County District Clerk Bill Long. Our case challenging Dallas Civil Court Rule 1.33 landed in Judge Marshall's court, so I was naively

optimistic about the outcome. While Judge Marshall granted *The News* partial relief, he denied *The News*'s request for public notice of sealing efforts and a "most compelling reasons" sealing standard, and *The News* appealed.


Judge Orlando Garcia

As the appeal was pending, concerns about the standardless sealing of judicial files had reached the 1989 Texas Legislature. Then-State Representative Orlando Garcia introduced a bill requiring the Texas Supreme Court to "establish guidelines for the courts of this state to use in determining whether in the interest of justice, the records in a civil case, including settlements, should be sealed." The bill passed and was codified as Section 22.010 of the Texas Government Code. The Texas Supreme Court referred the matter to its Rules Advisory Committee. On behalf of *The News*, John McElhaney and I attended the Committee meetings at which sealing rule proposals were debated.

Those Rules Advisory Committee debates were transcribed, and they make for a dry, but interesting, lesson in Texas history and bar politics. For the first time, I was meeting with senior lawyers from across the state who had far different law practices from mine, and with judges and justices who were deeply knowledgeable about, and invested in the rulemaking process. I learned how powerful the Family Law bar was when they secured a complete exemption for their cases from the proposed sealing rule. I learned about the incipient Intellectual Property bar, as they advocated for an exemption for trade secret cases. And, I learned about the clout of the Plaintiffs' bar, as they shared the media's interest in greater judicial transparency—particularly, in products liability, toxic tort, and catastrophic personal injury cases. When the Committee referred the proposed Rule 76a to the Court, I was on call to answer questions or to conduct follow-up research as the Committee or any justice of the Court might request. The Court passed Rule 76a by a 5-4 vote in 1990, with a public dissent from Justices Gonzalez and Hecht. With the new rule in hand, *The News* dismissed its appeal against District Clerk Long.


Justice Raul Gonzalez

While the contours of the rule were actively litigated in the 1990s, the rule seems to have fallen into disuse. Whether that is because the parties and the courts ignore it or wire around it, or because the lean financial condition of most publishers doesn't support the same type of investigative reporting now, I don't know. The adoption of Rule 76a proudly put Texas at the forefront of states with open access to court records, but I cannot say that as confidently now.

The Supreme Court Advisory Committee reconsidered Rule 76a at the Court's request several years ago. The Court took the Committee's work under advisement, but has not yet published any notice of rule changes. There is no doubt the rule, which was put in place before the widespread use of the Internet and the mandatory use of e-filing, needs updating. But my hope is that the core procedural requirements of a filed motion, notice to interested parties, public hearing, signed order, and right to appeal, as well as the substantive sealing standard, remain intact if and when the rule is changed.

Texas Civil Practice and Remedies Code Section 51.014(a)(6)


Vic Feazell

When I began practicing, it was difficult for a defamation defendant to obtain summary judgment in state court without a statute of limitations defense. There was no incentive for trial judges to grant a defense summary judgment on other issues such as truth, lack of actual malice, or fair comment. Then, McLennan County District Attorney Vic Feazell sued WFAA-TV for defamation over a multi-part investigative series that reported on allegations of corruption in his office. The case was put on hold while the federal criminal charges against Feazell were pending. After Feazell's acquittal in 1987, visiting Judge James Meyers denied WFAA's motion for summary judgment as to all of the broadcasts at issue, and the case went to trial in the spring of 1991. Gary Richardson of Tulsa represented Feazell, and John McElhaney and I tried the case for WFAA. The six-week trial was the subject of intense local interest and daily coverage in the *Waco Tribune-Herald*. After the jury returned a verdict of $58,000,000 for Feazell, the court denied WFAA's post-trial motions, entered judgment on the verdict, and the case resolved before an appeal was filed.


Judge James Meyers


John Hill


Gary Richardson


Bill Ogden

But this large verdict highlighted media defendants' inability to obtain summary judgment and sparked the effort to pass a new provision in the interlocutory appeal statute, Section 51.014(a)(6) of the Texas Civil Practice and Remedies Code. I was assigned to research other states' interlocutory appeals statutes and had the pleasure of working with Liddell Sapp partners John Hill and Bill Ogden on the project. Liddell Sapp took the lead in advocating for the new statute at the Texas Legislature, and their efforts proved successful. The right to appeal the denial of summary judgment in a defamation case proved game changing. In the first thirteen appeals under the statute, twelve resulted in reversal and rendition for the defamation defendants. Today, interlocutory review remains a powerful right in a defamation defendant's toolbox.


Laura Prather

Texas Civil Practice and Remedies Code Chapter 27, The Texas Citizens Participation Act

As big a change as the interlocutory appeal statute was, the passage of the Texas Citizens Participation Act in 2011 was even bigger. Laura Prather of Haynes & Boone deserves the credit for navigating the passage of this legislation so that Texas could join the other thirty-plus states that provide for an early dismissal procedure in cases involving the rights of speech, association, and petition, and for fee shifting when a motion to

dismiss is successful. The 2013 and 2019 amendments memorialized the right to interlocutory appeal of the denial of a motion to dismiss and narrowed the ability to file a motion to dismiss in some cases, but its applicability in core cases involving defamation is undiminished.


Rep. Morgan Meyer


Sen. Nathan Johnson

After retiring from Vinson & Elkins and going full-time at SMU Law School, I've had the experience of testifying at the Texas Legislature on TCPA-related proposals, specifically against efforts to eliminate or modify the automatic discovery stay and in favor of allowing pro bono attorneys to recover attorney's fees. Our students drafted the legislation that would amend the TCPA to allow pro bono attorneys to recover attorney's fees when their client's motion to dismiss is granted. Senator Nathan Johnson sponsored our bill in 2023, but it did not get any traction. In 2025, our proposal passed the House 142-0 after Representative Morgan Meyer and Senator Johnson introduced companion bills in both houses, but did not receive a committee hearing in the Senate. Stay tuned for 2027.

Confidential Source Statutes

After the United States Supreme Court decided *Branzburg v. Hayes*, Jim Goodale of Debevoise Plimpton and other media lawyers successfully argued that journalists had a qualified First Amendment privilege to refuse to identify confidential sources and to produce confidential documents. This qualified privilege generally requires the party seeking information to show the information's relevance and materiality, and the inability to obtain it from other sources. The Fifth Circuit recognized the qualified privilege in a defamation case, *Miller v. Transamerican Press, Inc.*, and in a civil rights case, *In re Selcraig*, which gave me my first Fifth Circuit argument, gladly split with Chip Babcock. But Texas courts did not recognize the qualified privilege until the San Antonio Court of Appeals decided *Dallas Morning News Co. v. Garcia*.


Jim Goodale


Rep. Sylvester Turner


Chip Babcock


Wayne Dolcefino

For years, Texas media opposed the concept of a reporter's shield law because of a lack of trust in the Texas Legislature. For years, I heard, "What the Legislature giveth, the Legislature can taketh away." But as the 1990s gave way to the 2000s, that opposition began to soften. Several unsuccessful high-profile challenges to subpoenas for confidential sources and materials— including one near the heart of Sylvester Turner's defamation lawsuit against Wayne Dolcefino and KTRK—made

broadcasters, then publishers sign on to support shield legislation. In 2009, Laura Prather captained the successful efforts at the Legislature that led to the passage of Texas Civil Practice & Remedies Code Sections 22.021–.027 and Texas Code of Criminal Procedure articles 38.11 and 38.111, shield laws in civil and in criminal cases. These statutes codify the qualified privilege to refuse to disclose sources and materials, subject to slightly different multi-part tests.

Since their passage, the irony is that the laws have not been used very much. Whether this desuetude results from litigants thinking they can't meet the burden of overcoming the statutory and constitutional qualified privilege, the use of modern technology and investigative methods that have made subpoenaing journalists unnecessary, or a combination of both is hard to discern.

Texas Civil Practice and Remedies Code Section 73.005(b)

Another case I argued unsuccessfully led to an important pro-speech amendment to the Civil Practice and Remedies Code chapter on defamation. In *Neely v. Wilson*, a veteran reporter at KEYE in Austin reported on a neurosurgeon who had been disciplined by the Texas Medical Board.

Justice Bob Pemberton

In addition to summarizing the Medical Board proceedings, the news story featured interviews with the neurosurgeon's patients who had sued him for malpractice and their family members. After full discovery, the Travis County trial court granted the defendants' motion for summary judgment, and the Austin Court of Appeals affirmed after an oral argument in which I was asked thirty-nine questions during my twenty minutes (mostly by Justice Pemberton). The Texas Supreme Court reversed and remanded the matter for further proceedings. One dispositive issue was whether the media defendants had to prove the truth of the patients' allegations republished by the defendants, or whether an earlier Texas Supreme Court decision had created a privilege to accurately report third-party allegations without having to prove their truth. The Texas Supreme Court decided there was no such privilege and that Texas would follow the common law and Restatement rule that "tale bearers are as bad as tale tellers." With the hard work of Laura Prather and others, the Texas Legislature passed Section 73.005(b) of the Texas Civil Practice and Remedies Code. The provision codified the third-party report privilege, deeming an accurate report of third-party allegations about a matter of public concern "true" and therefore not actionable.

Conclusion

Since joining the faculty of SMU as the Director of the First Amendment Clinic, my study and knowledge of the First Amendment have necessarily broadened and deepened, and I understand that First Amendment jurisprudence has become increasingly complex. In addition to encountering more free-speech bullies than I knew could exist, we have dealt with issues of government-compelled speech, for example, the State's anti-boycott laws relating to Israel and to fossil fuels and its anti-discrimination law relating to firearms manufacturers; we have filed briefs in book banning and in drag show cases and in criminal appeals involving Black Lives Matter protestors; we have sued the City of Dallas over its panhandling ordinance; we have considered state and federal Executive Orders that seem to discriminate based on viewpoint; we have watched the evolution of the public forum doctrine and time, place, and manner restrictions at institutions of

higher education; and we have navigated the judge-made morass that is qualified immunity in First Amendment retaliation cases. I have tried to give our students the same kind of mentorship I was fortunate enough to receive throughout law school and my legal career. Very few of our students think they will make a career out of constitutional litigation, but I can tell them that they, too, may become accidental First Amendment lawyers. And they'll be better prepared than I was.

Endnotes

1 349 U.S. 294 (1955).

2 721 F.2d 1019 (5th Cir. 1983).

3 The Texas Legislature revised the law governing venue appeals in 1983.

4 *A.H. Belo Corp. v. Rayzor*, 620 S.W.2d 756 (Tex. App.—Fort Worth 1981, writ dism'd).

5 The trust that Steve Philbin's family established in his memory through the Dallas Bar Foundation has provided significant financial support for SMU's First Amendment Clinic, including for two summer fellows each summer.

6 *A. H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

7 *See* Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, Dallas Morning News, Nov. 22, 1987, at 1A, 1987 WLNR 1954693; Steve McGonigle, *Judge Says Privacy Can Help Settle Suits*, Dallas Morning News, Nov. 22, 1987, at 24A, 1987 WLNR 1954665; Steve McGonigle, *Jurist Believes Sealing Records Is Undemocratic*, Dallas Morning News, Nov. 22, 1987, at 25A, 1987 WLNR 1954576; Steve McGonigle, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, Dallas Morning News, Nov. 23, 1987, at 1A, 1987 WLNR 1955656; Steve McGonigle, *Rules Set on Sealed Records*, Dallas Morning News, Dec. 31, 1987, at 25A, 1987 WLNR 1954777; Steve McGonigle, *Judge Orders Lawsuit Unsealed*, Dallas Morning News, Apr. 19, 1988, at 16A, 1988 WLNR 2270973.

8 717 S.W.2d 933 (Tex. App.—Dallas 1986, writ granted) (en banc), *judgment vacated and cause dismissed*, 730 S.W.2d 648 (Tex. 1987) (per curiam).

9 Rule 1.33 provided, in part: "Any party or his attorney may obtain an order for the suppression of any pleading filed in any action by filing a petition with the court in which the action is filed showing good cause for such suppression."

10 *The Dallas Morning News Co. v. Long*, No. 05-88-01131-CV (Tex. App.—Dallas 1988).

11 *See* Richard R. Orsinger, *Hist of Tex. R. Civ. P. 76a on Sealing Ct. Recs.*, 100 The Advoc. (Tex.) 22 (2022).

12 *See, e.g., In re The Dallas Morning News, Inc.*, 10 S.W.3d 298 (Tex. 1999) (per curiam) (holding, implicitly, that trial court had continuing jurisdiction over effective sealing orders—my first Texas Supreme Court argument, which took place in a classroom at SMU Law School in which I now teach); *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155 (Tex. 1993) (issuing conditional writ of mandamus halting disclosure of information made confidential by federal regulation).

13 *But see HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021) (harmonizing Rule 76a orders and the Texas Uniform Trade Secrets Act).

14 Tex. Civ. Prac. & Rem. Code Section 51.014(a) provides: "A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that: . . . (6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8 of the Texas Constitution, or Chapter 73 . . . ."

15 408 U.S. 665 (1972).

16 *See* James C. Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 Hastings L.J. 709 (1975).

17 621 F. 2d 721 (5th Cir. 1980).

18 705 F.2d 789 (5th Cir. 1983).

19 822 S.W.2d 675 (Tex. App.—San Antonio 1991, orig. proceeding).

20 *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (per curiam) (declining to issue mandamus against trial court that compelled reporter to answer questions about confidential source).

[21] *See* L. Prather and C. Robb, *Texas Reporter's Privilege Compendium*, Reporters Committee for Freedom of the Press, www.rcfp.org/privilege-compendium/texas/ (last updated July 2021).

[22] 418 S.W.3d 52 (Tex. 2013).

[23] *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990).

[24] *Netflix, Inc. v. Babin*, 88 F.4th 1080 (5th Cit. 2023) (affirming preliminary injunction against criminal prosecution of Netflix for distributing the movie *Cuties*); *Monacelli v. Bennett*, No. 12-22-00044-CV, 2022 WL 3754716 (Tex. App.—Tyler Aug. 30, 2022, pet. denied) (dismissing SLAPP suit on grounds of opinion and truth).

Thomas S. Leatherbury, *the Director of the First Amendment Clinic at SMU Dedman School of Law, is also is an appellate lawyer with over forty years of experience in state and federal appeals and trials.*

Return to Journal Index

Mapping Texas

By Frank Mace

Book Review

***Texas Takes Shape: A History in Maps from the General Land Office*, by Mark Lambert, Brian A. Stauffer, Patrick Walsh, and James Harkins (University of Texas Press, 2025), 360 pages.**

***Landmark Maps of Texas*, by Frank H. Holcomb (Texas A&M University Press, 2024), 256 pages**

Why do we love looking at maps? Even modern maps are engrossing because they organize and convey a huge amount of information in picture format, appeal to our spatial senses, and allow us to orient ourselves. Historic maps offer that and more: they visually put us in the milieu of the map's era, its knowns and unknowns, and the geopolitics of the time.

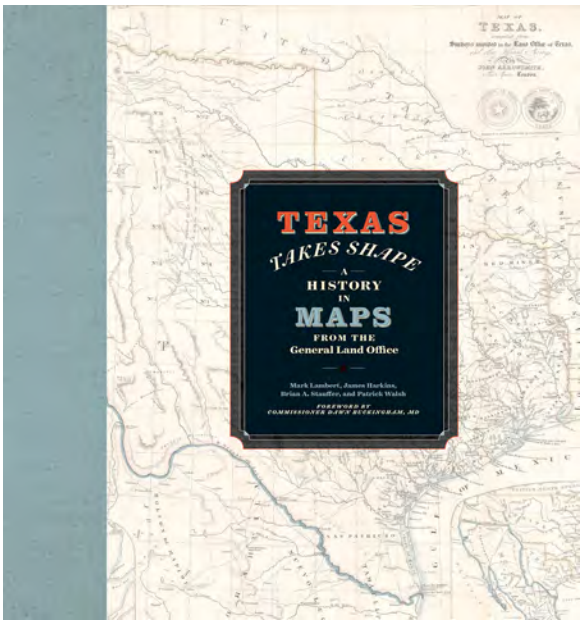
Two recent books chart the development of maps of Texas in particular, with each book contributing to Texas cartographic history in its own way. In *Texas Takes Shape: A History in Maps from the General Land Office*—a book financially supported by the Texas Supreme Court Historical Society, among others—four writers from the Texas General Land Office put forth a scholarly and thoroughly researched study of the GLO's map collection. In *Landmark Maps of Texas*, Houston lawyer Frank Holcomb shows what a world-class personal map collection looks like, showcasing his collection alongside short descriptions of each map. Both books display the gradual coalescing of geographic knowledge and shifting boundary lines across Texas, from the embryonic European maps of the 1500s, to Guillaume Delisle's 1718 map of *La Louisiane* (the first to use a term like "Teijas"), through the changes effected by war, treaty, and annexation in the 1700s and 1800s.

Texas Takes Shape

Texas Takes Shape is the product of more than a decade of work by GLO staff researching and studying the GLO collection. Some of these maps are naturally in the GLO's possession because the GLO created them, and others the GLO has acquired from the outside world to augment its collection. The book displays over 100 maps with an essay accompanying each.

A recurring contention in *Texas Takes Shape* is that "maps are both *products* and *agents* of history"—in other words, that maps played an active role in shaping, rather than just reflecting, history. The authors make this argument in various forms throughout the book. France, for instance, "used advanced cartography to support its territorial claims in North America against its Spanish and English rivals." Antonio García Cubas's atlases of Mexico contributed to an effort to "promote

a sense of shared national identity through historical, cultural, and cartographic undertakings" after Mexico lost so much of its expanse to Texas and the United States in the mid 1800s. Wartime maps during the Mexican-American and Civil Wars drew "attention to occupied territory or cities" and "sought to project a sense of optimism and, above all, achievement and progress." Then there's Irishman Nicholas Doran Maillard's 1841 map of the Republic of Texas, in which he placed "Territory of the Texan Indians" across most of central and north Texas "to support his thesis that the Texas government was illegitimate and controlled much less territory than it claimed." In all these examples, *Texas Takes Shape* suggests that maps were participants in the story and did not merely report the outcome.



Stories of cartographic drama and disputes also recur. The chapters on 1500s, 1600s, and 1700s maps are full of Dutch, French, German, Italian, and English maps of North America, but light on maps published by the Spanish—because the Spanish guarded theirs as state secrets. A personal squabble between mapmakers took place when Alexander von Humboldt, the eminent German scientist, lodged a complaint with President Jefferson about U.S. Army explorer Zebulon Pike's plagiarism of Humboldt's map of New Spain. "Despite these accusations," the authors write, "there is little resemblance regarding Texas between Pike's printed map and Humboldt's. For instance, Pike's depiction of the southeasterly courses of Texas rivers is superior to Humboldt's." And rudimentary mapping of the Red River in John Melish's 1818 map led to an 1896 U.S. Supreme Court showdown between Texas and the federal government, in which the Court forced Texas to hand over the former Greer County, Texas to the territory that would become Oklahoma.

Standout features in the book are its nine "Beyond the Neatline" essays (the *neatline* is the outermost printed line around a map) that cover discrete topics like Native American cartography, land grants awarded for military service, artistic embellishments on GLO maps made by mapmakers of old, and the hard lives of early surveyors. The topics are well chosen and enrich a book that otherwise proceeds map-by-map.

Overall, the authors write that *Texas Takes Shape* builds on the book they consider "the preeminent book on the subject to date," James C. Martin and Robert Sidney Martin's *Maps of Texas and the Southwest, 1513–1900* (1984). Adding to that forebearer, *Texas Takes Shape* contributes careful research amassed over a decade and "Beyond the Neatline" mini-studies, all laid out in good writing.

Landmark Maps of Texas

Frank Holcomb's *Landmark Maps of Texas* shares his museum-worthy collection of Texas maps and shows what a dedicated private collector can assemble. Holcomb presents maps ranging from 1513 to 1904 with short, digestible text providing the map's background and pointing out

features of interest. Whereas *Texas Takes Shape* is a detailed reference work, Holcomb's book is easy to relax and leaf through.

I had a chance to tour Holcomb's map collection at his Houston law office and home before he unfortunately passed away unexpectedly last year, before his book was published. Historic maps lined the walls of his office and, at his home, with all wall space exhausted, Holcomb had sliding map racks that one could pull out across the room, with each rack holding several maps. In the foreward to *Landmark Maps of Texas*, James Harkins (one of the authors of *Texas Takes Shape*) recalls visiting Holcomb's home and seeing the 1718 Delisle map hanging over a cat's litter box. "Well, you have to put it somewhere," Holcomb chimed in, "and there wasn't room at the office, and the cat likes it."

Though Holcomb calls his book a "collector's presentation of printed maps of Texas, not a scholarly history of mapping Texas," the book's factual background could use some cleanup in the second edition. The book repeatedly states that the Mexican Law of April 6, 1830, which banned further American immigration into the state of Coahuila y Texas, "cancelled" and "nullified" empresario contracts except Stephen F. Austin's and Green DeWitt's. But that law only "suspended" empresario contracts and, according to a recent analysis, the law's "practical result . . . was the interruption of empresario efforts that relied on American immigrants to complete their contracts, exception made of Austin's and DeWitt's. Contracts that could be filled with Mexican or non-American settlers continued in effect under their original terms and conditions."[1] Other mistakes are more black and white: The book says that the coastal zone in which Mexican law prohibited settlement (absent special permission) was ten "miles" from the coast, when it was ten leagues (about twenty-six miles); it says that Texas lands extend "three nautical miles (more than ten conventional miles) offshore," when it is three marine leagues (a marine league is 3 nautical miles), which does work out to about ten conventional miles; and it says a *labor* of land was 166 acres, when it was 177.1 acres. Since Holcomb passed away before the book was published, he presumably would have corrected these errors, had he had the chance. Despite its slips, *Landmark Maps of Texas* joins *Texas Takes Shape* in taking us on a colorful visual journey through Texas history.

---

[1] Galen D. Greaser, *That They May Possess the Land: The Spanish and Mexican Land Commissioners of Texas (1720-1836)* 174 n.402 (2023).

Frank Mace *is a senior associate at Baker Botts representing clients in a variety of complex litigation matters at both the trial and appellate levels. His practice focuses on commercial disputes and securities and shareholder litigation. Prior to joining Baker Botts, Frank clerked for Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas, Houston Division.*

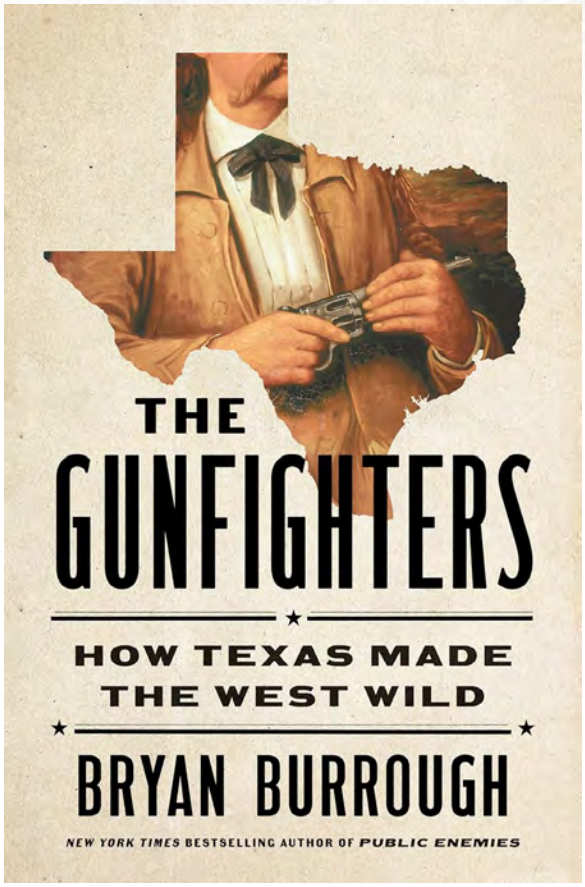
Return to Journal Index

• Book Review •

The Gunfighters: How Texas Made the West Wild

By Hon. John G. Browning

Bryan Burrough, *The Gunfighters: How Texas Made the West Wild,* Penguin Press (New York 2025), 430 pages.



As a student and fan of Texas history, I was unsure what to expect from Bryan Burrough's latest work, *The Gunfighters: How Texas Made the West Wild.* Would I enjoy it as much as I devoured Burrough's earlier *The Big Rich* (a compelling history of the Texas oil industry and the larger-than-life characters who made it), or would I have the mixed emotions that I experienced reading the Burrough co-authored *Forget the Alamo: The Rise and Fall of an American Myth*? I'm happy to report that *The Gunfighters* belongs firmly in the former category.

Burrough manages to bring not just the "Wild West" itself to life with both flair and painstakingly researched historical depth, he puts flesh on the bones of individual legends like Wild Bill Hickock, Billy the Kid, Wyatt Earp, and Doc Holliday. All too frequently, popular history gives us one dimensional portrayal of gunfighters like these, lending too much credence to the sensationalistic journalism of the time. Burrough is unflinching and unforgiving as he writes about these men, who were numbed to violence by their experience in the Civil War and in the violent reality of life in Texas and the West generally. He also de-glamorizes the gunplay and violence of the day, with gunfights occurring often in closer quarters than Hollywood would later portray in the TV and movie Westerns that elevated such gunfighters from brutal to heroic status.

According to Burrough, Texas was the "Ground Zero" of gun violence in the 19th century, boasting the highest murder rate per capita in U.S. history. Part of this he chalks up to a "perfect storm" of having hostile borders with Comanche territory and with Mexico, a Civil War confluence of both Confederates and Union loyalists, and the booming cattle business that attracted unsavory

characters like rustlers, vigilantes, and gamblers. Added to this "kaleidoscope of personal violence" (as Burrough describes it) was the Southern dueling code that ran rampant in antebellum Texas as a "clear product of the South's obsession with honor" (see my article "Dueling in Texas – A Curious History" in the Spring 2024 issue of the Journal for more on that topic). Burrough acknowledges that dueling formalities melted away against the backdrop of the frontier's violent confrontations, leaving behind the notion "that extrajudicial violence was a permissible, even acceptable, way to resolve disputes." What emerged, Burrough tells us, was "a highly martial culture, its people deeply attuned to violence and expert at it."

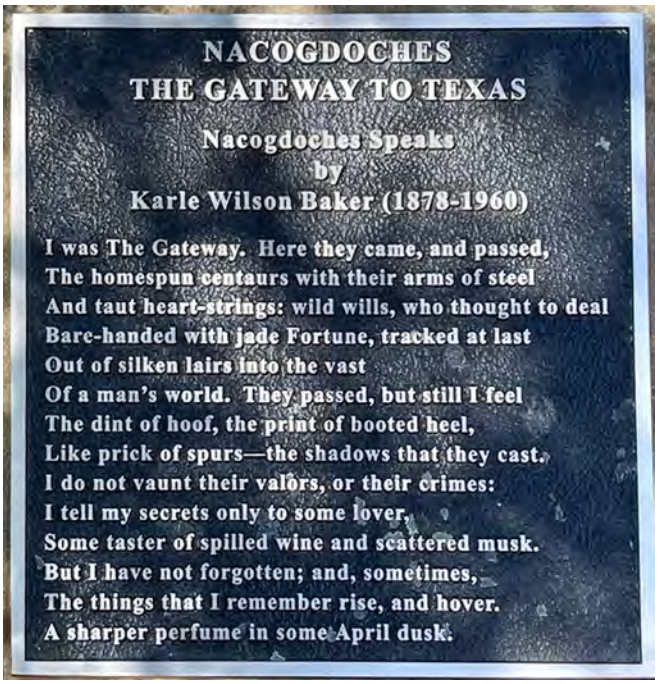
Burrough masterfully sorts the truth from fiction, pointing out how the tabloid journalism of the day inflated the already astonishing reality into mystic status. His book is a "must read," whether you are an armchair historian or simply love tales of the Old West. Burrough breathes life into the mundane violence of the West and adds nuance to episodes like the shootout at the O.K. Corral or Butch and Sundance's ending blaze of glory in South America.

In the end, however, perhaps what distinguishes *The Gunfighters* from the works of other Western historians is its unabashed focus on Texas and its outsized importance in the mythos of the American West. Burrough reminds us "Take away Texans—Texas cowboys, Texas outlaws, and Texas lawmen—and the American Gunfighter Era shrinks to insignificance." Citing Texas historian Bill O'Neal, he points out that "more gunfighters were born in Texas than in any other state or territory and more died in Texas than in any other state…10 of the deadliest 15 spent most of their careers in Texas." Burrough addresses the question of whether Texas' reputation for the violence of the West is deserved, and he concludes "you bet your ass Texans were different."

Return to Journal Index

Spring 2025 Meeting:
Nacogdoches, History, and Judge Tom Reavley

Text and photos by David A. Furlow



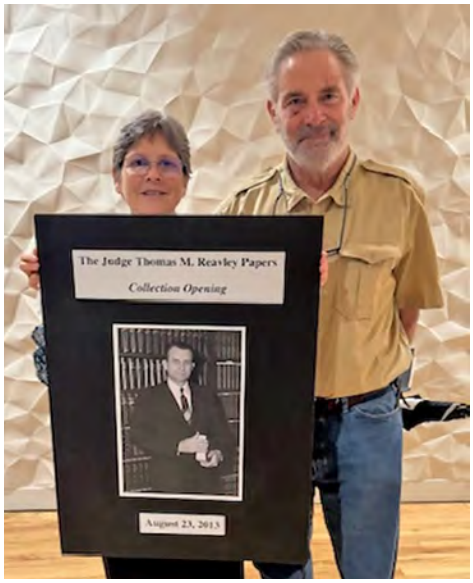
Statue of Karle Wilson Baker and a plaque featuring her poem.

The Society conducted its Spring 2025 Members and Board Meeting in Nacogdoches this May. Officers reviewed archival records that illuminated the life of Texas Supreme Court Justice and 41-year Fifth Circuit Judge Thomas M. Reavley. The Society's members elected officers and trustee, then toured historic sites that revealed new insights about Judge Reavley.

The Society's President, Lisa B. Hobbs, chose her hometown, Nacogdoches, as an appropriate location for the Spring Meeting. It is an historic place; one the Society had not visited before. It was the Gateway to Texas, something Pulitzer Prize winning poet Karle Wilson Baker memorialized in her poem "Nacogdoches speaks." A bronze statue on the campus of Stephen F. Austin State University memorializes the poet and her work.

With this rich history at hand, it made sense to find a native guide to Nacogdoches. We turned to *Visit Nacogdoches*, a local bureau, to find the right historian for the job. *Visit Nacogdoches* Group Sales & Services Coordinator Lauryn Pennington came to the Society's assistance. She did everything anyone could to welcome us to the city. Her greatest service was in introducing us to Jeff Abt, a local historian and horticulturalist, to share his vast knowledge of the city's history with Society members who attended the Spring 2025 meeting live or via Zoom. Mr. Abt told us how Nacogdoches, the capital of Nacogdoches County, had come to have such a rich history. Archeologists have dated the Caddo Indian mounds—and the human bones

and pottery within them—to approximately A.D. 1250. One of those mounds plays a role in this story. The ill-fated French explorer René Robert Cavelier, Sieur de La Salle, traveled to the area in 1687 on his journey to a mutiny and an unmarked grave.



Left: *Visit Nacogdoches* Group Sales & Services Coordinator Lauryn Pennington. Right: Society Administrative Coordinator Mary Sue Miller displays a poster alongside local historian Jeff Abt.

A later French governor of Louisiana, Sieur Antoine de la Mothe Cadillac, sent explorer Louis Juchereau de St. Denis through the area in 1714 to organize a trade route through Texas to the Spanish settlements along the Rio Grande. Spanish authorities in Mexico City responded by appointing Domingo Ramón, the son of Captain Diego Ramón of San Juan Bautista Presidio, to command a military expedition to secure Spanish Texas from unauthorized French incursions in 1715. A Franciscan missionary, Antonio Margil de Jesús, came with Commander Ramón to found a mission church, Nuestra Señora de Guadalupe de los Nacogdoches, and five other missions amidst the piney woods of East Texas.

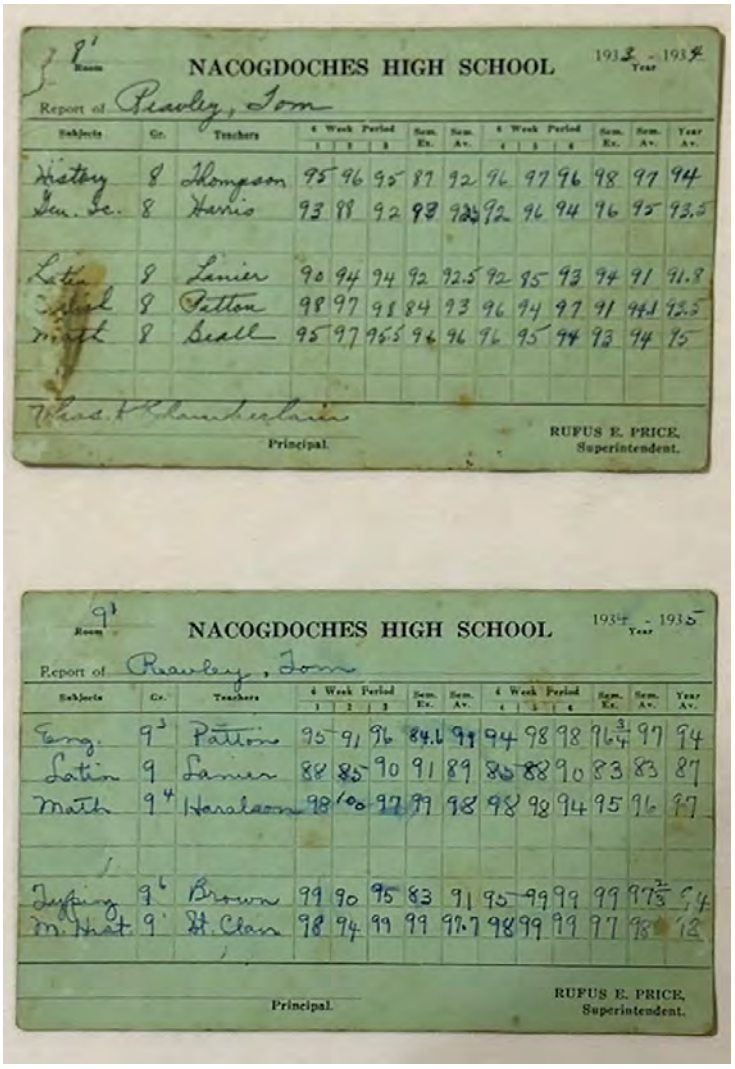
Mr. Abt brought along a friend and archivist, Kyle Ainsworth, Special Collections Librarian at the East Texas Research Center on the Stephen F. Austin State University Campus. In addition, Mr. Ainsworth serves as a Project Manager for the Texas Runaway Slave Project. While Jeff Abt told the Society about the important history of Nacogdoches, Kyle Ainsworth brought a collection of photos and archival records that shed fresh light on the career of Texas Supreme Court Justice and 41-year Fifth Circuit Judge Thomas. Justice Reavley served nine years on the Texas Supreme Court before President Carter

Left: Executive Director Sharon Sandle and President Lisa B. Hobbs listen as historian Jeff Abt shared stories about how Nacogdoches became the oldest town in Texas. Center: President-Elect Jasmine S. Wynton. Right-foreground: Jeff Abt. Background: Archivist and Special Collections Librarian Kyle Ainsworth.

LBJ supporter Judge Thomas M. Reavley, left, and President Lyndon B. Johnson, right. Photo courtesy of archivist Kyle Ainsworth.

appointed him to the U.S. Court of Appeals for the Fifth Circuit, an event that resulted in his long career on the Fifth Circuit. Judge Reavley was ninety-nine years old when he died in Houston in December 2020.

Archivist Kyle Ainsworth provided the Society's members with rare access to an important judge's accomplishments and challenges. His rich trove of archival records included Judge Reavley's Nacogdoches High School report cards, his transcript from Harvard Law School, and articles reflecting his service as the Summer Editor of Stephen F. Austin State University's *Pine Log* college newspaper. We shared images



NACOGDOCHES HIGH SCHOOL

Report of Reavley, Tom

Subjects	Gr.	Teachers	4 Week Period 1	2	3	Sem. Ex.	Sem. Av.	4 Week Period 4	5	6	Sem. Ex.	Sem. Av.	Year Av.
History	8	Thompson	95	96	95	87	92	96	97	96	98	97	94
Gen. Sc.	8	Harris	93	88	92	98	92	92	96	94	96	95	93.5
Latin	8	Lanier	90	94	94	92	92.5	92	85	93	94	91	91.8
[illegible]	8	Patton	98	97	98	84	93	96	94	97	91	94	93.5
Math	8	Beall	95	97	95.5	96	96	96	95	94	93	94	95

Thos. F. Chamberlain
Principal.

RUFUS E. PRICE
Superintendent.

NACOGDOCHES HIGH SCHOOL

Report of Reavley, Tom

Subjects	Gr.	Teachers	4 Week Period 1	2	3	Sem. Ex.	Sem. Av.	4 Week Period 4	5	6	Sem. Ex.	Sem. Av.	Year Av.
Eng.	9	Patton	95	91	96	84.6	91	94	98	98	96 3/4	97	94
Latin	9	Lanier	88	85	90	91	89	86	88	90	83	83	87
Math	9	Haralson	98	100	97	99	98	98	98	94	95	96	97
Typing	9	Brown	99	90	95	83	91	95	99	99	99	97 2/3	94
M. Hist.	9	St. Clair	98	94	99	99	97.7	98	99	99	97	98	12

Principal.

RUFUS E. PRICE
Superintendent.

URDAY, MAY 6, 1939

Run-off Election Offices Will Be

Reavley Is Summer Editor of Pine Log

Tom Reavley, Sophomore student from Nacogdoches, was elected to serve as editor of the Pine Log during the 1939 summer session at a meeting of the Publications committee Tuesday morning. Scheduled selection of editors for the 1939-40 Stone Fort annual and Pine Log was postponed until Thursday, and lack of a quorum at Thursday's meeting caused another postponement, the next session being slated for Tuesday morning, May 9, at 10 o'clock in Main 116.

NEW EDITOR

TOM REAVLEY

Reavley was appointed associate Log editor at the beginning of this long term and has served in that capacity throughout the year, as well as writing his column, "Sez Me." He was also a news reporter and columnist during his Freshman year.

The incoming summer editor is president of the Sophomore class, the Austinites, and the local Wesley Students Association, and is a member of Pi Kappa Delta, national forensic society. He is active in dramatics, being in the cast of three dramas produced by B. E. Howard this year.

Stone Fort Annual Dance Postponed

The Stone Fort yearbook dance, at which the annual favorites and

Archivist Kyle Ainsworth showed Society members a rich collection of materials that memorialized every aspect of Judge Reavley's life.

of those documents via cell phone cameras and Zoom so every trustee could share in the Society's mission of gathering and preserving the history and work of the Texas Supreme Court and the state's appellate courts.

After the meeting ended, Jeff Abt led a guided tour of Washington Square, the plaza of Old Nacogdoches University in the 1840s. In 1904 it came to serve as an office building of the Nacogdoches Independent School District.

Nacogdoches historian Jeff Abt, foreground, led President Lisa B. Hobbs, left, President-Elect Jasmine S. Wynton, center, Executive Director Sharon Sandle and others on a guided tour of Old Nacogdoches University.

Mr. Abt then led us across the street to the boyhood home of Judge Reavley. As we crossed the street, we noticed a green, well-manicured hillock in the front yard of Judge Reavley's bright yellow house. That hillock was the last surviving Caddo Indian mound inside Nacogdoches' city limits. It was the kind of thing calculated to turn a young man's attention to the past. It explains why he chose to take Latin classes at Nacogdoches High School, something that gave him a special appreciation of the distant past, including the history of law and jurisprudence from the Roman Republic through the Reformation to the American Revolution. Judge Reavley served on the adjunct faculty of the University of Texas School of Law and lectured frequently at Baylor, Pepperdine and Texas Tech law schools. He and another eleven judges, along with *Black's Law Dictionary* Editor Bryan Garner, put Judge Reavley's familiarity with Latin to good use when they coauthored *The Law of Judicial Precedent* in 2016.

An ancient Indian mound and a Texas Historical Commission signboard mark the presence of a Caddo Indian Mound in the front yard of Judge Reavley's boyhood home in Nacogdoches (pictured below).

The day ended with everyone's gratitude to *Visit Nacogdoches* Group Sales & Services Coordinator Lauryn Pennington for helping our Society find local historian Jeff Abt and archivist Kyle Ainsworth, whose efforts brought Texas's legal history to life. We all agreed to meet again at the Society's Chief Justice John Hemphill Dinner this September 5 at the Four Seasons Hotel in Austin.

Return to Journal Index

THE TEXAS SUPREME COURT HISTORICAL SOCIETY

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.

Return to Journal Index

2025-26 Membership Upgrades

The following Society members have moved to a higher Membership category since June 1, 2025.

TRUSTEE

Hon. Lawrence Doss

Return to Journal Index

2025-26 New Member List

The Society has added 24 new members since June 1, 2025.
Among them are 21 Law Clerks for the Court (*) who will receive
a complimentary one-year membership during their clerkship.

TRUSTEE

David J. Campbell
Alison Battiste Clement
Audrey Vicknair

REGULAR

Eric Ables*
Brandon Charnow*
Meagan Corser*
Alesondra Cruz*
Emmalyn Decker*
Wes Dodson*
Temi Fayiga*
Brendan Fugere*
Hunter Heck*
Ashley Little*
Eliza Martin*
Jackson Nichols*
Ben Prengler*
Abigail Schultz*
Christian Shaffer*
Kavid Singh
Max Varela*
Martha Vazques*
Kali Venable*
Kirk Vonkreiser*
Alison Welch*
Hannah Young*

Return to Journal Index

Membership Benefits & Application

Hemphill Fellow $5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating & Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow $2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of All Society Publications
- Preferred Individual Seating and Recognition in Program at Annual 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
- All Benefits of Patron Membership

Patron Membership $500

- Discount on Society Books and Publications
- All Benefits of Contributing 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*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs

eJnl appl 9/25

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/.

Name _____

Firm/Court _____

Building _____

Address _____ Suite_____

City _____ State_____Zip _____

Phone (_____)_____

Email (required for eJournal delivery) _____

Please select an annual membership level:

- ☐ Trustee $1,000
- ☐ Patron $500
- ☐ Contributing $100
- ☐ Regular $50
- ☐ Hemphill Fellow $5,000
- ☐ Greenhill Fellow $2,500

Payment options:

- ☐ Check enclosed, payable to **Texas Supreme Court Historical Society**
- ☐ Credit card (see below)
- ☐ Bill me

Amount: $_____

Credit Card Type: ☐ Visa ☐ MasterCard ☐ American Express ☐ Discover

Credit Card No._____Expiration Date _____CSV code_____

Cardholder Signature _____

Please return this form with your check or credit card information to:

Texas Supreme Court Historical Society
P. O. Box 12673
Austin, Tx 78711-2673

eJnl appl 9/25